

SPECIAL POINTS OF IN- TEREST:

- IEP Teams must consider both the IDEA and ADA requirements for ensuring effective communication for children with disabilities
- Under the ADA, the student's preferred method of communication must be primarily considered
- Written documentation is required to excuse an IEP Team member in whole or in part from a meeting.
- Outside hospitalizations are red flags for child find.

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ADA's Effective Communication Requirement

The IDEA and the ADA both require public schools to address the communication needs of children with disabilities. Under the IDEA, schools are required to provide communication services, including assistive technology, as part of a child's IEP that are designed to meet the unique needs of the child and are designed

to allow the child to make meaningful educational progress.

To meet the communication needs of a student with a hearing, vision or speech disability, Title II of the ADA requires districts to take appropriate steps to ensure that communication with students with disabilities is as effective as communication with students

without disabilities. Districts are required to provide appropriate auxiliary aids and services so that students with disabilities have an equal opportunity to participate in and enjoy the benefits of the district's services, programs, and activities.

A recent 3rd Circuit case highlights the differences in these standards.

[Read More about the ADA's Effective Communication Requirement on p. 3](#)

Excusing IEP Members

The IDEA identifies required members of the IEP team who must be present at IEP meetings. The IEP Team for a each child with a disability includes: the parents of the child; not less than one regular education teacher of the child; not less than one special education teacher of the child, or where appropriate, one special education provider of the child; the LEA representative; an individual who can interpret evaluation results; at the discretion of parents or LEA, others who have knowledge or expertise about the child; and when appropriate, the child.

[Review the requirements for excusing IEP members on page 4](#)

CASE LAW UPDATE

E.L., a Student In The Garnet Valley S.D. Hearing Officer Decision

Issue: Whether the District failed in its Child Find Obligation to evaluate a student with mental health needs for special education services and whether the District was responsible for payment for the student's residential placements.

Facts: E.L. was a high school student who was doing well until the 2021-2022 school year. That year, student met with the guidance counselor for anxiety and depression. By March, E.L. was seeing the guidance counselor frequently and began to experience difficulty attending afternoon classes. Also at that time, S.L. began experiencing suicidal ideations. The district conducted a risk assessment and S.L. was taken to the hospital.

A few days later, E.L.'s therapist provided information requesting and suggesting various accommodations. The District implemented a 504 plan that incorporated the therapist's recommended accommodations. However, student continued to have suicidal ideations and reported self-harm. E.L. was evaluated by a psychiatrist and a residential mental health hospitalization was obtained through the remainder of the school year.

E.L. began the 2022-2023 school year positively. However, by the fall, E.L. was hospitalized again at a behavioral health hospital for 10 days. The district issued a Permission to Evaluate after E.L. returned to school. E.L.'s suicidal ideations continued through January when parents arranged for E.L. to begin a partial hospitalization program.

The district issued the ER in February, concluding that E.L. was eligible for special education based on an Emotional Disturbance and recommended emotional support services. An IEP was developed. E.L. returned to school in May and his IEP was not revised again until November of the following year.

Parents' First Claim: Parents claim that the District should have evaluated E.L. in March, 2022 when the student's meetings with the counselor increased and attendance in class dropped and the first suicidal ideation occurred.

Ruling: The Hearing Officer found that the District had no prior knowledge of mental health issues. Moreover, it was reasonable for the District to rely on E.L.'s own psychologist who recommended accommodations. Therefore, she concluded that the development of a 504 Plan rather than evaluating for an IEP was appropriate.

She further found that the District did timely issue a Permission to Evaluate once the student returned the following year and was again hospitalized in the fall.



Parents' Second Claim: Parents claim that once E.L. returned to school in May, the District failed to provide an appropriate educational program.

Ruling: The Hearing Officer agreed and found that once the student returned, the District should have reconvened the IEP Team to examine E.L.'s current needs. She also found that the IEP Team should have revisited ESY given E.L.'s regression. She awarded compensatory education for May and the summer.

Parents' Third Claim: Parents claim that E.L.'s outside placements were the direct result of the District failing to provide appropriate service and to meaningfully address E.L.'s anxiety and depression. They sought reimbursement for the costs of those programs.

Ruling: The Hearing Officer disagreed. She found that the placements were not necessary for educational purposes. The student needed the medical and emotional components of the hospital placements. The placements did not provide special education services but rather focused on mental health and therapy. The District was not responsible for payment of those services.

ADA's Effective Communication Requirement

(Continued from page 1)

The Third Circuit Court of Appeals recently analyzed whether a School District could provide FAPE to a student with communication needs under the IDEA and at the same time, violate the ADA's Effective Communication Requirement. The Court held that it is possible given the differences in scope and intent of these laws.

In *LePape v. Lower Merion School District*, Alexander was a non-verbal student whose parents sought to implement "Spelling to Communicate" (S2C), a technique involving a letter board to facilitate communication, as his communication method in school. The District declined to include this methodology in his IEP and the parents filed for due process. The case was appealed up to the 3rd Circuit.

The Court provided several key clarifications:

- ◆ **Distinct Legal Standards:** The court emphasized that claims under the ADA are legally distinct from those under the IDEA. The IDEA focuses on providing FAPE through individualized instruction and services, while the ADA addresses the broader issue of discrimination and equal access to educational programs. The Court noted that compliance with the IDEA does not automatically equate to compliance with the ADA.
- ◆ **ADA's Primary Consideration Standard:** Unlike the IDEA that requires IEP Teams to determine appropriate programs and services for students with disabilities, Title II of the ADA requires schools to give primary consideration to the auxiliary aide or services requested by the student when determining what is effective communication for the student. The IDEA does not require parental or student preferences to be taken into consideration as long as the IEP is reasonably calculated to provide educational benefit to the child.

- ◆ **Alternative Effective Means of Communication:** Under the ADA, schools are not required to acquiesce to the student's preferred method of communication if they can provide an alternative, effective means of communication. In the *LePape* case, there remained a dispute about the efficacy of the student's preferred method of communication—the letter board, compared to other forms of communication offered by the District.

- ◆ **Fundamental Alteration in Services:** Although not specifically addressed in the *LePape* case, under the ADA, schools have defenses that are not available through the IDEA. Under the ADA, a school is not required to provide an accommodation if it can demonstrate that doing so would result in a fundamental alteration in the nature or a service, program or activity or would result in an undue financial or administrative burden. In particular, schools are not required under the ADA to provide new programs or new curricula. No such language exists under the IDEA and Court have long required schools to provide necessary special education services regardless of cost or burden.

It is essential that IEP Teams review communication through the lens of both the IDEA and the ADA when determining what services will be provided to a student with hearing, vision or speech disabilities. Engaging in the interactive process with and closely collaborating with the student and parents is essential to meeting the requirements of both statutes. Equally important is documenting that the student's preference was primarily considered by the school. If the District is declining to provide that preferred method, document that what is being provided is an effective method of communication and why.

Excusing IEP Team members

(Continued from p. 1)

Under the IDEA, a required member of the IEP may be excused for several reasons:

Member's Curriculum Area Will Not Be Modified or Discussed

A member of the IEP Team is not required to attend an IEP meeting, in whole or in part, if the parent and the public agency agree, *in writing*, that the attendance of the member is not necessary because the member's area of the curriculum or related service is not being modified or discussed at the meeting.

Members' Curriculum Area Will Be Modified or Discussed

Additional rules must be followed if a team member will be excused in whole or in part from the IEP Team meeting if their area of curriculum or related service is being modified or discussed.

- ◆ The parent must consent *in writing* to the excusal; AND
- ◆ The team member must submit, in writing to the parent and the IEP Team input into the development of the IEP prior to the meeting

Note the difference in language between the two situations. If the curriculum is not being discussed, only a written agreement is necessary. If the curriculum is being discussed, written consent, is required. Both must be in writing, but consent requires the district to fully explain and inform the parents, in their native language, all information relevant to the excusal of a team member and must ensure the parents' understanding that consent is voluntary and can be revoked.

OSERS has advised that Districts are not required to obtain parental consent to excuse multiple regular education teachers if at least one general education teacher will be in attendance.

Providing Notice of Excused Team Members

The IDEA is silent as to how far in advance of an IEP Team meeting a parent must be notified of the District's request to excuse a required member of the IEP Team. The US Department of Education has indicated that districts should provide "as much notice as possible." Avoid telling parents at the last minute if possible, as the Department of Education has also advised that parents have the right not to agree to an excusal, especially if notice is provided late.

DOCUMENT!

Note the language of the IDEA requires the parents' agreement or consent to be in writing. Further the language requires agreement or consent if a team member is being excused even in part from the meeting. With short staff, Districts often ask the parents if the regular education teacher can be excused to return to class. Typically the parents verbally agree and the teacher leaves. Districts should be careful to document the agreement or consent to excuse a team member—even if it is for only a part of the meeting. Courts have found IDEA violations where Districts have failed to obtain written consent.

Failure to properly excuse an IEP team member is typically considered to be a procedural violation of the law and may not result in a denial of FAPE if there is no substantive harm to the student and parents were able to participate in the meeting. This question can be avoided by documenting written agreement or consent of the parents.

Excusal of the LEA Representative

Be cautious about excusing the LEA Representative even if parents agree. Typically that individual is needed to ensure that the team makes appropriate decisions and is able to commit district resources to implement the IEP. OSEP has advised that if the LEA Rep is excused, the district remains responsible for implementing the IEP and cannot use the excusal as a reason to not implement what was agreed upon.

IDEA V. ADA

What Are The Differences

IDEA

- Requires schools to provide FAPE—related aids and services to allow the child to make meaningful educational progress.
- Services are individually designed and do not require maximizing potential. Schools do not have to compare effectiveness of communication for children with disability with effective communication for children without disabilities.
- Services do not have to be the same as or equal to services provided to children without disabilities.
- In determining what accommodations must be provided, the IEP Team must consider what communication aids and services a child *needs* in order to receive FAPE.
- Parents are one member of the IEP Team and although their requests must be considered, they do not have the authority to demand a particular aid or service.
- If a child needs a particular aid or service to receive FAPE, the school must provide it regardless of cost or burden.

ADA

- For students who are deaf, blind or have a speech disability, auxiliary aids and services must be provided to ensure effective communication
- Effective communication ensures that communications with children with disabilities is as effective as communication with others.
- Auxiliary aids and services afford a child with a disability an equal opportunity to participate in and enjoy the benefits of the district's services, programs or activities.
- School must provide effective communications where necessary for a child who is deaf, blind or has a speech disability.
- In determining how to meet a child's needs, the school must give primary consideration to the requests of the student with the disability or to his/her parents.
- Parent/student request need not be honored if school can demonstrate it would result in a fundamental alteration to the nature of a service, program or activity or would result in an undue financial and administrative burden.



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If you have a special education issue you would like to see addressed in subsequent issues of this newsletter, please write to or e-mail Trish Andrews at the above address.

Andrews & Price, LLP is the pre-eminent law firm in Western Pennsylvania in the practice of Public Sector Law. Our attorneys have more than 60 years of combined experience servicing School Districts. We provide a full range of legal services to our clients, including serving as Solicitor for various school districts, serving as special counsel for special education due process hearings, presenting seminars relating to the Reauthorization of IDEA and representing our clients in all types of litigation, including defense of numerous civil rights suits in federal and state Court.



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Consult Your Solicitor!

The legal issues discussed herein are for the purpose of providing general knowledge and guidance in the area of special education. This newsletter should not be construed as legal advice and does not replace the need for legal counsel with respect to particular problems which arise in each district. As each child is unique, each legal problem is unique. Accordingly, when districts are faced with a particular legal problem, they should consult their solicitor or with special education counsel to work through the issues on a case by case basis.