ANDREWS & PRICE

SPECIAL EDUCATION ALERT

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SPECIAL POINTS OF INTEREST:

- **Districts can provide appropriate transition services to 18-21 year old students without sending students to college based programs.**
- **A transition program located on a college campus is not a less restrictive environment simply because the student would be with same age peers.**
- **Districts should however, plan for transition activities outside of the school system such as community based instruction, travel training and community based vocational experiences.**

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Hearing Officer Finds School Not Required to Send Student To College Program For Transition

The IDEA requires that students who are transition-age must be provided with appropriate measurable postsecondary goals, which are based upon age appropriate transition assessments related to training, education, employment, and independent living skills where appropriate, as well as the transition services and courses of study needed to assist the child in reaching those goals.

A transition plan is “a coordinated set of activities” that :

(A) is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(B) is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and

(C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

Learn Your Legal Requirements on pages 3-4

WHAT SERVICES SHOULD BE IN AN IEP

Do you have students in your District that have a disability and qualify for services under the IDEA but are also gifted? What about students that have a medical condition requiring 504 services and are also gifted? Do you have students who have a “speech only” IEP but have other needs, but do not qualify as having a disability in any other category? Read this article to learn what documents should be issued and how the student’s needs should be addressed.

See page 5 for more information

CASE LAW UPDATE

U.S. Supreme Court
Endrew F. v. Douglas County School District

For the first time since the Supreme Court decided Rowley v. the Hendrick Hudson School District in 1982, this month, the Court will consider the issue of what level of special education services is a school district required to provide to a disabled child in order to provide FAPE?

FACTS

Endrew (Drew) has autism and ADHD. He received special education services through the Douglas County School District through 4th grade. Drew's education went well through 2nd grade and he made educational progress. However, in 2nd grade, behavioral problems began increasing, leading to the development of a Positive Behavior Support Plan (PBSP).

In 3rd grade, Drew began needing significant support through the special education classroom. He also needed paraprofessional support, mental health services and speech and language. Although he made progress on some goals, his behavior interfered with education. In 4th grade his PBSP was revised.

The Team met again to develop a new IEP for 5th grade, which called for additional time in the special education classroom and with his paraprofessional. The Team scheduled another meeting in order to include an autism specialist. However, parents did not attend that meeting and instead enrolled Drew in a private school for autistic children where the tuition was approximately $70,000 per year.

Procedural History

Parents filed for due process seeking tuition and placement, claiming that Drew had stopped making educational progress and that the District's 5th grade IEP was not substantively different than prior IEPs that failed to provide him with FAPE.

The Hearing Officer found that the IEP was reasonably calculated to provide Drew with an educational benefit. The District Court upheld the Hearing Officer's decision and the 10th Circuit affirmed. The Court relied on Rowley and held that the District's IEP conferred "some educational benefit," meaning that it was reasonably calculated to offer "more than trivial educational benefit." The Court further noted that the determination of "appropriate" must be made at the time the IEP was offered, rather than "Monday Morning Quarterbacking" the decision at a later date.

The United States Supreme Court will now decide whether the Rowley standard of "some educational benefit" continues to apply or whether Schools are required to provide some higher level of educational benefit to a disabled student. While the majority of Circuit Courts have subscribed to this level of service, the 3rd Circuit has heightened that standard to a "meaningful educational benefit" standard.

Drew's family has gone a step further and are arguing that the IDEA provides a child with a disability with opportunities that are substantially equal to the opportunities provided to nondisabled children. This argument was rejected by the Rowley Court.

The U.S. Government, who filed a brief in this case, argued that appropriate means that the IEP must provide the child with an opportunity to make *significant* progress in light of the child's capabilities. This definition would expand schools requirements considerably—even in the most liberal Third Circuit.

A decision upholding the 10th Circuit's opinion would be favorable to PA schools, where our Courts have held schools to a much higher standard than "some educational benefit."

Transition

(Continued from page 1)

The IDEA further provides that students with disabilities may remain in school and receive a free, appropriate public education, including transition services, until *the child turns 21. Although Pennsylvania allows* all students to attend public schools through the age of 21, the reality is that most regular education students graduate after 12th grade at the age of 18.

Has your district faced requests from parents to provide and pay for transition services to a post 12th grade student outside of the school environment—perhaps at a program located on a college campus? Have those parents argued that their child needs to receive their education with college age students because all of their child's "peers" have graduated and are no longer in the school? Have they argued that their child does not want to return to the high school because their friends are no longer there? Have they argued that their child will be in a less restrictive environment on a college campus because they will be with college age non-disabled peers?

A Pennsylvania Hearing Officer rejected parents' request for a school district to pay for their child to attend a transition program for 18-21 year olds on a college campus, finding that the transition plan offered by the District was appropriate.

What Should Be Included In a Plan?

In this case the District did offer the student with a transition plan that was responsive to and met her needs and thus was reasonably calculated to provide the student with educational benefit. The District's proposed program provided opportunities to explore options for post-secondary education, vocation and independent living and then practice those skills in vocational experiences with regular monitoring and constructive feedback through paraprofessionals and job coaches.

The District's program included academic and vocational instruction within the classroom, community based field trips to practice functional reading and math skills, jobs within the school building, community based vocational experiences and travel instruction. Additionally, the student had the opportunity to take elective courses with nondisabled peers.

Student's Interests

Parents argued that the vocational experiences were not based on student's interests. Testimony contradicted this argument. Nevertheless, the hearing officer stated that although "the law requires that students be provided with a variety of transition activities based on the student's strengths, needs and interests," LEAs are not required to "restrict all services to those in which a student has shown a desire to participate." This is especially true in earlier stages of transition where the student is still exploring interests or where the goal is for the student to learn job-readiness and/or soft skills within a work environment.

LRE

The Hearing Officer also rejected the parents' argument that a college program was less restrictive than the District's high school because the student would have the opportunity to engage with same age peers.

The Hearing Officer found that the Student was provided with opportunities to be included with typical peers, as well as adults, during vocational experiences in and out of school, in elective classes and during clubs and other extra-curricular activities. Further, the students within the life skills class were all within the required 4 year age range span required by state regulations; although they were all younger than the student.

The Hearing Officer recognized that there will be a discrepancy in age for students who stay in school beyond 12th grade because most children of that age

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Transition

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have graduated. Nevertheless, the hearing officer found this to be an "unavoidable consequence" of the IDEA's goal to provide children with disabilities access to education beyond what nondisabled students typically receive. Furthermore, the Hearing Officer found no law that requires schools to educate students with peers that are the exact same age.

FAPE

What is clear from this hearing officer's decision is that schools are required to provide an appropriate transition plan to a child in the least restrictive environment. Schools are not required to provide the best or an ideal transition plan, transition services that are only reflective of the student's interests, are what the parents want or are with college age students.

College Program

Because the hearing officer found that the school district offered an appropriate program, she did not analyze whether or not the program operated on the college campus was appropriate. To be clear, she did not rule the outside placement to be inappropriate and in fact pointed to many positive aspects of educating an older student in such a program. Often these programs are relatively cheap and therefore, some District's opt to send students to fulfill post high school transition needs.

Be aware, however, that there were some areas pointed out by the hearing officer for District's to be aware of when considering such programs.

1. Although the student was provided with a document called an IEP, it was actually a very generic document that essentially outlined different tasks that all children in the program perform. It was not individualized towards this particular student's needs. Remember that even if the IEP Team decides to send a student to an outside placement, the LEA is always responsible for ensuring that the child receives FAPE. You must make sure that the program addresses the child's needs.

2. At least in this program, vocational experiences are assigned based on what is available rather than based on the student's interests. While this may not always be an issue, especially for students newer to transition or those still exploring options or learning soft skills, as the child gets older and is aging out of services, the Team may want to focus employment opportunities toward the student's interests.

3. Again, at least in this program, students were accompanied to their work sites by college age work-study students who had limited experience in job coaching or mentoring. Many students of transition age need coaching on the job to learn the skills that are necessary to gain employment. Consider whether the student needs these types of vocational services and discuss the level of support available through the program before determining the child's placement.

4. Consider how much interaction the child will truly have with college age students. Transition services still have to be provided in the least restrictive environment. Is the program located on a college campus but the student has very little if any interaction with nondisabled peers? Do the disabled students participate in the program as a group or is the student participating in college classes in a more integrated fashion? Simply being on a college campus with college age students does not make the program less restrictive.

5. Consider how much progress monitoring the program does. Progress monitoring is essential in determining whether a program is meeting a child's needs and whether it is appropriate. This is impossible to do if the program is providing infrequent or no progress monitoring.

IEP Services

(Continued from page 1)

Speech "only" IEP: There is a misconception that a child who has only a speech disability is somehow different than children who qualify for special education services under other disability categories. That is not accurate. A speech and language impairment is a disability category under the IDEA. Therefore, a child who qualifies for services under speech has the same protections as any other IDEA eligible child.

What does that mean? Under the IDEA, when evaluating a child with a disability, the evaluation must be sufficiently comprehensive to identify ***all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.*** Therefore, regardless of what the child's disability may be, ALL of the child's needs must be evaluated.

Once a child is eligible for special education, all of the child's needs must then be addressed in the IEP. Although the language of the statute states that the IEP's goals must meet the child's needs ***that result from the child's disability***, hearing officer's have consistently held that the IEP must address **all** of the child's identified needs, whether they are related to the disability or not.

Therefore, an evaluation must identify all of a child's needs, even for those children who are eligible for services under the IDEA with a speech and language disorder. That child may be struggling academically in reading or in math. Those needs must be identified through the evaluation process, even if the child would not otherwise qualify for special education services with a learning disability in either of those areas.

Once the child qualifies for services under the IDEA, regardless of the disability category, those needs must be addressed through the IEP. Thus, the speech student who is struggling in math can receive supports through his or her IEP. Those supports could range from special education supports, modifications

and accommodations in a regular education class to learning support services through a special education teacher. The Team must determine what is necessary to meet that child's needs and ALL of those needs should be addressed in one document: **THE IEP.**

504 and the IDEA: Other children qualify under the IDEA but also need accommodations for other disabilities that would typically be covered under Section 504. For example, a child who qualifies for learning support services due to a learning disability may also have a peanut allergy. A child with a learning disability would receive an IEP, whereas a child with a peanut allergy would typically receive a 504 Service Agreement.

In this case, however, state regulations provide that children who qualify under both 504 and the IDEA, continue to be governed under the IDEA. This means that all of the child's needs, including goals and objections and SDI to address the learning disability AND all of the accommodations to address the food allergy would be addressed through one document: **THE IEP**.

The IDEA and Gifted: Some children with disabilities also qualify for gifted services. Chapter 16 of the state regulations specifically address this issue. They provide that if a student is determined to be both gifted and eligible for special education, Chapter 14, which are the regulations governing the IDEA, take precedence. Schools are not required to conduct separate screenings or evaluations or use separate procedural safeguard processes to provide for the student's needs.

Further, a single IEP shall be developed and implemented, revised and modified that addresses both the student's special education and gifted needs. Therefore, again, all special education and gifted goals, SDI, accommodations, and enrichment should be included in one document: **THE IEP.**

RESTRAINTS

Office For Civil Rights Issues Dear Colleague Letter on Use Of Restraints

The Office For Civil Rights (OCR) issued a Dear Colleague Letter on December 28, 2016 providing guidance on when the use of restraints and seclusion may result in discrimination against students with disabilities in violation of Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA).

General Definitions

Restraint: restricting the student's ability to move his or her torso, arms, legs or head freely. This includes both mechanical restraints and physical restraints. It does not include a physical escort.

Seclusion: confining a student alone in a room or area that he or she is physically prevented from leaving. It does not include a time out, provided the student is monitored in an unlocked setting and is implemented for the purpose of calming the student.

State Law

Pennsylvania permits the use of restraints to control acute or episodic aggressive or self-injurious behavior only when the student is acting in a manner as to be a clear and present danger to himself, to other students or to employees and only after less restrictive measures and techniques have proven to be or are less effective. If a restraint is used, the parents must be notified and an IEP Team must be convened, unless waived by the parents. The IEP Team must consider whether the child needs an FBA, reevaluation, a new or revised PBSP or a change of placement.

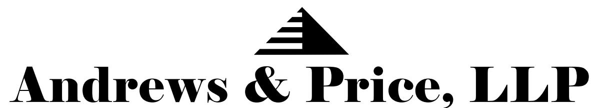
Children Not Identified

OCR advises Districts to strongly consider conducting evaluations for regular education students that are exhibiting behaviors that have lead to restraint or seclusion in the school. These behavior challenges could be a sign that the student has a disability and needs special education services. As OCR states, a child with behavioral issues can be eligible for special education services, even if those behavior challenges do not result in academic issues. A child can be doing well academically and still need services for social and emotional issues.

Children with Disabilities

OCR further cautions that for children already identified, the use of restraint or seclusion could be evidence that the student's current program is not addressing his/her needs. In that case, the District is obligated to consider different or additional services for the child and whether a reevaluation, including an FBA is necessary. In OCR's view, the continual need for restraints or seclusion are persuasive indicators that the child's needs are not being met.

To be clear, restraints and seclusion are not prohibited under Section 504. OCR opines that it would likely find a restrain or seclusion to be a justified response for a student where the behavior imposes imminent danger of serious physical harm to self or others. However, OCR would likely not find the repeated use of restraints or seclusion to be a justified response where nothing else—an evaluation, a reevaluation, an FBA, new behavior management– was considered or employed.



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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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TRI-STATE AREA SCHOOL STUDY COUNCIL

Tri-State Area School Study Council of the Administrative and Policy Studies Department of the School of Education of the University of Pittsburgh seeks ways to increase organizational capacity in schools through problem solving, technical service, and staff development so all students will be better prepared to make contributions to both our democratic society and the world community.

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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.