

**SPECIAL POINTS OF INTEREST:**

- The U.S. Department of Justice and the Pennsylvania Department of Education reached an agreement following a complaint filed by the Education Law Center.
- In the agreement, the Pennsylvania Department of Education agreed to take steps to remedy the issues found by the Department of Justice.
- Districts should consider its process for referring students to AEDY programs in light of the agreement.

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## Overhauling Alternative Education for Disruptive Youth Programs

The U.S. Department of Justice (DOJ) reached a comprehensive agreement with the Pennsylvania Department of Education (PDE) regarding a federal civil rights investigation relative to special education students assigned to AEDY programs.

Six years ago, the Education Law Center filed a complaint challenging discriminatory practices in Pennsylvania’s Alternative Education Disruptive Youth

(AEDY) programs. The complaint highlighted the high percentages of students with disabilities, among other minority groups, in AEDY programs across the state. In 82 Pennsylvania school districts, more than half the students sent to AEDY programs. Nationally, 16 percent of special education students participate in AEDY programs.

The agreement between the DOJ and PDE details protections

against inappropriate placement for students with disabilities and sets clear time limits for how long students with disabilities can remain in AEDY programs. The agreement also requires transition plans for returning to the general education program and prohibits the placement of students with disabilities in “unapproved disciplinary programs.”

Schools should consider its referrals to AEDY programs.

**See page 3 for more information.**

## What Do Courts Say About FAPE Post Endrew F.?

In 2017, The United States Supreme Court reviewed the standard of FAPE in Endrew F. and held that an IEP must be reasonably calculated to enable the child to receive meaningful educational benefit in light of the student’s intellectual potential and ability. Pennsylvania Courts have also held School District’s to a similar standard when assessing whether FAPE was provided. Recent cases have been instructive on whether or not FAPE has been provided to children with disabilities in light of Endrew F.

**See page 2 for more information.**

## CASE LAW UPDATE—Child Find & FAPE

### **S. v. West Chester Area Sch. Dist. Eastern District of Pennsylvania**

#### **FACTS**

S, a minor child with epilepsy, and his parents filed a Motion for Judgment on the Administrative Record requesting that the Eastern District of Pennsylvania to reverse a Hearing Officer's decision not to award compensatory education for the period before December 2015.

S was diagnosed with epilepsy in the beginning of his third-grade year. In November 2014 of S's fourth-grade year, the parents submitted a written request for the school district to evaluate S for IDEA eligibility. The district completed an Evaluation Report in February 2015 and found that while the student was demonstrating moderately limited alertness in the classroom, which qualifies as Other Health Impairment under the IDEA, he did not qualify as a child with a disability under the IDEA because he did not need specially designed instruction. The school district developed a 504 plan, including several accommodations to address the February 2015 Evaluation Report.

S progressed to fifth-grade, where teachers noticed that S was struggling academically, socially, and emotionally. His teachers referred him for a second evaluation, which was completed in November 2015. This evaluation included information obtained during fifth grade and indicated S needed an IEP. The initial IEP was modified with additional supports during S's sixth grade year. S's parents believed that the program and placement was inappropriate and unilaterally transferred him to a private school.

In April 2017, S, through his parents, filed a due process complaint with the Office of Dispute Resolution. The complaint alleged that the school district: (1) failed to satisfy the IDEA's child-find requirement and (2) provided inappropriate programming and placement from January 2013 to Spring 2016 under the IDEA and Section 504.

#### **HEARING OFFICER DECISION**

Although the hearing officer limited the claims to those arising on or after April 3, 2015, the hearing officer heard evidence and ruled in the alternative on claims related to the February 2015 Evaluation Report and the March 2015 Section 504 Agreement. The Hearing Officer found that the February 2015 Evaluation Report and the subsequent 504 agreement was timely and satisfied the school district's child-find obligation. The 504 plan adequately addressed the problems identified in the evaluation report, and the hearing officer concluded that S was not entitled to relief because the school district provided a FAPE to S. However, the hearing officer found that the December 2015 IEP was inappropriate because it lacked a required goal and specially designed instruction in reading comprehension and a required goal in written expression. As a result, the district was ordered to provide compensatory education for 45 minutes per day for every day that the district was in session from December 22, 2015 to March 31, 2016.



#### **DISTRICT COURT DECISION**

With regard to the claim that the February 2015 Evaluation Report failed to comply with the IDEA's child find obligation, the court held that the school district satisfied its obligations under the IDEA. The student argued that the Evaluation Report and its conclusion were inappropriate based on the subsequent evaluation indicating that S was eligible for an IEP and SDI.

However, the Court pointed out that case law in the Third Circuit establishes that a subsequent evaluation yielding a different result does not make the earlier testing inadequate. In this case, the District monitored the student's progress after the initial evaluation and took new information into account in its subsequent Evaluation Report. After considering the new information, the District determined that the student was eligible for SDI and an IEP, and therefore, the Evaluation report complied with the IDEA.

Based on the established case law and the facts at hand, the Eastern District of Pennsylvania denied S's Motion for Judgment on the Administrative Record.

## Alternative Education for Disruptive Youth

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Six years ago, ELC filed a complaint alleging discriminatory practices in the state's AEDY programs. When the complaint was filed, Pennsylvania had more than 700 state-approved AEDY programs, with more than 14,000 students assigned to the programs. The complaint sparked an investigation conducted by the Justice Department which revealed that students with disabilities are disproportionately sent to these programs and do not provide required services to English learners.

The complaint was based on information obtained through Right-to-Know requests issued by ELC. The information established that students with disabilities and students of color were disproportionately placed in alternative disciplinary programs. With respect to students with disabilities, 15 percent of students in the state have disabilities and IEPs. In 2011-12, nearly 44 percent of students in AEDY had IEPs, and two years later, the percentage only fell to 38 percent. In 2013-14, about 15 percent of students in Pennsylvania schools were black, however, 34 percent of black students were in AEDY schools. ELC data also showed that less than one third of the students who are assigned to AEDY return to regular schools.

Although a major focus of the complaint was racial disparities, the finding issued by the DOJ failed to address the issue. The data submitted by ELC established that there were 35 districts, including Philadelphia, where there was a disparate portion of African American students in AEDYS and exceeded their district-wide share by 25 percentage points or more.

The DOJ stands by its investigation, and a spokesperson issued a statement that the settlement agreement reflects the issues discovered based on the investigation. It found violations of the Americans with Disabilities Act and the 1974 Equal Educational Opportunities Act, which prohibits discrimination based on national origin and requires states to actively assist students in overcoming language barriers. The DOJ also noted that the AEDY programs are separate from students' typical general education programs and

usually do not offer the same access to instructional programs or activities.

The settlement agreement has resulted in the PDE's implementation of major changes and has appointed a statewide AEDY team that includes two administrators in Harrisburg and regional coordinators. The goal of these changes is to provide general oversight of AEDY programs, which PDE believes will advance the goal of providing a nondiscriminatory environment for all students.

In addition, PDE has also agreed to update program guidelines, develop an electronic system to monitor the AEDYs, implement a complaint system, and improve communication with families and students to better understand their rights. The agreement requires that PDE complete individual assessments of students with disabilities to determine whether they are being placed in alternative education programs because of their disability and to monitor whether the programs timely transfer students back to their home schools.

Another remedy requires PDE to guarantee that local educational agencies attempt appropriate interventions before referring students with disabilities in order to prevent students' placement in these programs because of their disability. PDE will ensure that qualified and credentialed teachers can provide education to English learners, and it will provide professional development to teachers and others involved in referring students to disciplinary schools. PDE will revise its non-discrimination policies and data monitoring.

In light of this settlement agreement, school districts should consider the process for referring students to AEDY programs to ensure nondiscrimination.

## TEST YOUR KNOWLEDGE

George is an 8-year-old boy with a speech-language impairment. The third-grader enjoys playing the piano and drums in music class with peers and outside of school with his family but can be reluctant to participate in classroom activities that involve speaking in front of peers.

George understands who, what, why, where, why, and how questions and can answer in sentences containing five or more words three out of five times with 75 percent accuracy while receiving speech-language services during the school year. However, after winter and spring break last year, he regressed to only speaking two-word sentences and it took several weeks for him to regain his skills.

The IEP Team discusses George's present levels of academic achievement and functional performance, including the regression of his speech-language skills and progress after winter and spring break. In considering all of the data, the Team determines that extended school year services for five weeks during the summer will help improve George's speech-language skills.

The IEP Team crafted an ESY goal for George's speech-language challenges: "By the end of the summer, George will speak in more complex sentences. Rafael's teacher will use data tracking sheets to record his growth and share his progress with his parents at the end of each week.

### **Is this goal sufficient?**

A school district must provide ESY services when a child's IEP team determines on an individual basis that the services are necessary for the child to receive FAPE. Once a school district makes this determination, the district must hold an IEP meeting and develop an IEP to reflect the student's needs. The IDEA requires that the IEP must include a statement of measurable annual goals designed to meet the child's disability-related needs.

The goal above is not specific and fails to include how often and how accurately George will use complex sentences and what number of words will make up those sentences. The goal is immeasurable.

Here is a better goal: "By the end of the summer, George will demonstrate the ability to speak in sentences made up of five or more words four out of five times with 80 percent accuracy. The teacher will use data tracking sheets will be used to record his growth and will share George's progress with his parents at the end of each week.

# FAPE

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Most recently, the Third Circuit reviewed the appeal of a Hearing Officer's decision regarding FAPE in Colonial School District v. G.K. In this case the District Court held that a Pennsylvania Hearing Officer applied an erroneous standard in determining whether FAPE was provided and overturned his decision. The Third Circuit Court of Appeals agreed with the District Court.

Parents of a student with autism and learning disabilities initially filed a Complaint for a due process hearing alleging that their son was denied FAPE under the IDEA. The student's needs were identified as reading comprehension, written expression, math problem solving and social language/social skills. Goals were developed for each of these areas of need. However, parents obtained an Independent Evaluation that showed continued deficits, particularly in reading comprehension and oral expression. Parents reiterated at the hearing that although the District provided reports indicating progress, that the student remained behind on standardized tests.

The Hearing Officer awarded 300 hours of compensatory education and ordered a comprehensive reading evaluation to be paid for by the District. The Hearing Officer, rather than determining whether the student's IEP itself was appropriate, based his decision largely on whether or not the student made sufficient progress during the school year. The Court rejected this standard of determining FAPE, stating that "it cannot be determined whether an IEP was appropriate solely by evaluating a child's progress or lack of progress under that IEP."

Rather, the Supreme Court held that an IEP must be "reasonably calculated to enable the child to receive educational benefits" but does not "guarantee any particular level of education." The Endrew F. Court stated "no law could do that—for any child." Further, Courts should not Monday Morning Quarterback the IEP Team's decision.

The Third Circuit applied similar language in S.C. v. Oxford School District in holding that as long as the program is reasonably calculated to enable the student to make progress in light of the child's circumstances,

the School District will not be liable even if the child did not make as much progress as expected or as much progress as their peers.

In that case, the Court found that the District began providing the child services from a young age. The IEP in question addressed the student's identified needs. It targeted the student's behaviors and lack of focus and was revised to address anxiety once that was a known need. Further, the child was able to advance from grade to grade. The Court again found that an IEP need not be perfect and does not guarantee a particular level of progress or success.

These decisions do NOT mean that analyzing progress is no longer required. Progress reporting continues to be important and valuable information to use to determine what changes need to be made to an IEP. Recent Court decisions have held that linking annual measurable goals to a student's strengths and needs assists in demonstrating that an IEP is appropriate based on the IDEA requirement that an IEP be reasonably calculated to allow a student to progress in light of his individual circumstances. Progress reporting is essential to determining what continues to be a child's areas of need.

Progress reporting also provides invaluable information to the team to determine the changes that need to be made on an annual basis or more frequently when necessary. Teams should not only maintain progress data but use it to analyze what is working and what is not. If a child isn't making progress, the Team must use that information to revise the IEP moving forward. Courts will find a denial of FAPE where a school continues to provide the same goals, the same SDI and the same program to a student who is not making progress.

Progress reporting can also enlighten the team to new information and needs that were not identified previously. For example, progress reports that show that a child with a learning disability is not making progress due to behavior or lack of focus may need to look at new areas of need that should be addressed in a revised or new IEP.



## **TIPS FOR DEVELOPING APPROPRIATE IEPs**

- \* Are the Present Education Levels (PELs) of the IEP sufficiently detailed?
- \* Do the PELs describe and outline the child's circumstances and potential that may be interfering with progress?
- \* Have all of the child's needs (academically, behaviorally, socially, emotionally) been appropriately identified?
- \* Are all of the child's needs addressed within the IEP—either in goals, objectives, SDI or through related services?
- \* Are there any problems from the prior IEP and are they addressed and documented through changes to the child's IEP?
- \* If the child did not receive meaningful educational benefit or significant learning, what changes to the educational program are documented in the IEP?
- \* Are there new or different areas of concern that must now be addressed in the IEP?
- \* Is it evident through the wording of the IEP that the goals are at a higher level or are more challenging than the year before?
- \* Have we documented and are we able to articulate the rationale behind the decisions that were made by the IEP Team in developing the child's educational program?
- Does the Team feel that the IEP is reasonably calculated to allow the student to receive meaningful educational benefit?



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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.*