



Education Law Center's Testimony Regarding Pennsylvania's Application to the United States Department of Education Under Part B of the Individuals with Disabilities Education Act Presented March 14, 2011

Thank you for this opportunity to present testimony regarding Pennsylvania's grant application to the United States Department of Education (US DOE) under Part B of the Individuals with Disabilities Education Act (IDEA). While many aspects of Pennsylvania's special education program are of high quality (for example, much progress has been made in providing quality early intervention services to young children with disabilities), the bottom line in this testimony is that the Education Law Center (ELC) does not believe that the Pennsylvania Department of Education (PDE or the Department) can make the required assurances to the US DOE unless the problems discussed below are addressed. These problems affect some of Pennsylvania's most vulnerable children – children in the child welfare system, children placed in residential settings, and children assigned to special programs for “disruptive students.” We also want to express our support for the testimony of other disability advocacy groups, in particular the Disability Rights Network (DRN). DRN is raising concerns relating to the IDEA procedural safeguard system that are of the highest importance for children with disabilities.

For 35 years, ELC has been working to improve educational opportunities and outcomes for at-risk public school students in Pennsylvania. Children with disabilities who need special education have been a major focus of our work. We have spoken with, trained, and advocated for many thousands of students with disabilities, their families, and child-serving professionals from before there was an IDEA until the present. Since in this forum we can only introduce these issues

briefly, we would welcome the opportunity to meet with PDE staff to provide detail and discuss remedy.

### **I. Children with Disabilities in Residential Placements**

*Pennsylvania is not ensuring that “[a]ll children with disabilities residing in the State, including children with disabilities who are homeless or who are **wards of the State** ..., and who are in need of special education and related services, are identified, located, and evaluated,” that they receive “a free appropriate public education [FAPE],” and that “[to]the maximum extent appropriate, children with disabilities, **including children in public or private institutions or other care facilities**, are educated with children who are not disabled....” [Assurances 1, 2, and 3]*

***The Problems: In this testimony we focus on two problems that impede these children’s access to FAPE in the Least Restrictive Environment (LRE): 1) the extent to which these children continue to be educated on-site, often in educationally inferior programs, even though they could be successfully educated in the public school districts where they are living; and 2) the frequent failure to appoint surrogate parents for these children when needed.***

#### ***FAPE in the LRE:***

Every year, thousands of Pennsylvania children are placed in residential settings such as group homes, residential treatment facilities, and day mental health treatment programs. In fact, in 2007, Pennsylvania placed more children in residential treatment facilities than did any other state in the country.<sup>1</sup> A high percentage of these youth are involved in the juvenile justice system, the child welfare system, or both. Many have disabilities that qualify them for special education services and either are not identified or if identified do not receive FAPE in the LRE.

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<sup>1</sup> The National Association of Psychiatric Health Systems reports that 70.7% of the children in RTFs nationally are “publicly placed.” *Survey on Educational Services Within Residential Placement* (2007) at 4. [http://www.naphs.org/documents/SurveyEducSvsinResidPlacemts.FINAL.41207\\_001.pdf](http://www.naphs.org/documents/SurveyEducSvsinResidPlacemts.FINAL.41207_001.pdf)

In 2009, Arley Styer, a Stoneleigh Foundation Fellow assigned to ELC, conducted a study of the education available to children in care in residential placements in Pennsylvania. In collaboration with other advocacy groups (in particular the Disability Rights Network), the Department of Public Welfare, the Pennsylvania Council of Children, Youth and Family Services, and the Children’s Hospital of Philadelphia, Ms. Styer collected 394 surveys,<sup>2</sup> completed four focus groups,<sup>3</sup> and conducted over twenty-five interviews.<sup>4</sup> During the course of this process she determined that children in these facilities are most often educated on the facilities’ grounds, even though they could be attending regular schools.

Key findings of the study were:

- 71% of youth surveyed reported that they attended on-site schools;
- 56% of providers reported that “none” or “less than 10%” of children in their care attended public school;
- Over 62% of child welfare professionals stated that clients were “refused” enrollment by public schools while 30% of providers reported this conduct;
- 52% of caseworkers reported that the curriculum at on-site schools was not grade-level appropriate. Qualitative data indicates that the education provided by on-site schools is often limited in instructional hours, relies heavily on worksheets, is far below grade level, fails to advance basic skills, and is not geared towards keeping students on track to graduate.

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<sup>2</sup> Surveys were conducted of 261 caseworkers from residential facilities, in juvenile probation and in education-related professions. A separate survey included 67 residential treatment facilities statewide. A third included 66 youth in foster care who were currently or formerly in residential placement.

<sup>3</sup> Focus group participants included caseworkers from public and private child welfare agencies, statewide administrators and professionals working in private residential settings, and youth currently residing in residential placement.

<sup>4</sup> Interviews were with state, county and local level government representatives; state policy makers at the Departments of Public Welfare and Education; representatives from welfare offices in three counties; child advocate attorneys from two Counties; representatives from school districts, Family Courts, residential providers and attorneys; and parents and youth who had been in residential care.

- Approximately 50% of youth surveyed reported that they were taught in a classroom with children of varying ages/abilities;
- 37% reported that they were taught in a classroom with students “around” their own age; and 12% reported that school consisted “solely” of independent worksheets.

***Solutions: Over the last few years, PDE has taken substantial steps to correct some of these abuses. It has stepped up monitoring of these facilities; has issued a major Basic Education Circular<sup>5</sup> (BEC) that sets out the applicable rules with emphasis on these children’s right to be educated in the LRE whenever possible; and the Division of Compliance has in several instances forcefully implemented this BEC. However, more needs to be done.***

- We need to monitor what is happening in these facilities consistently and over time. To this end, the Departments of Education and Public Welfare should collect and report annual data on the number of school-aged children placed by non-education agencies in day or residential settings (such as residential treatment centers, group homes, and partial hospitalization programs) and the number of such children attending school on-site or in regular public schools.
- PDE should step up its monitoring of these facilities and host school districts to determine whether the BEC is being followed uniformly throughout the state.

***Surrogate Parents:***

Under the IDEA, a child is a “ward of the state” if the child is in the custody of a child welfare agency and does not have a foster parent who can serve as a “parent” as defined by the IDEA (IDEA parent). 34 C.F.R. §§300.30(a), 300.45. That children in the foster care system are disproportionately children with disabilities is well known, as is the fact that many of these children experience poor educational outcomes. Children in the child welfare system often do not

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<sup>5</sup> *Educational Programs for Students in "Non-Educational" Placements* (May 2010), [http://www.portal.state.pa.us/portal/server.pt/community/pa\\_codes/7501/educational\\_portions\\_of\\_non-educational\\_placements/507372](http://www.portal.state.pa.us/portal/server.pt/community/pa_codes/7501/educational_portions_of_non-educational_placements/507372).

have parents who are willing and able to represent them in the special education process – either to ensure that they are identified as in need of special education services or to ensure that identified children receive FAPE in the least restrictive environment (LRE).

The 2004 IDEA amendments addressed this problem by clarifying that, unless inconsistent with state law, foster parents can qualify as IDEA parents if there is no birth, adoptive, or court appointed special education decision maker willing and able to perform this role. But that left at special risk are children in care who live in residential placements if they have neither a parent nor a foster parent to act on their behalf. Unless surrogate parents are promptly appointed for such children when there is no other IDEA parent in the picture, it is unlikely that children with disabilities will be promptly identified or adequately served.

The Stoneleigh Fellow’s study had some critical findings on this point also:

- While a majority of children in residential placements have IEPs, they often do not have parents or other legally authorized persons who participate in decisions about where the child should be educated or the content of their program.
- Approximately 45% of caseworkers reported acting as the decision maker even though federal law bars caseworkers from serving as surrogate parents.

***Solutions: ELC (and other disability advocates such as the Disability Rights Network) have argued that Pennsylvania should follow the lead of other innovative states, in particular Vermont, and establish a state level “surrogate parent” program at least for children in residential placements. For more information on what other states have done, here is the link to a fact sheet from the American Bar Association’s Center for Children and the Law that describes some state efforts on this front.***

[http://www.americanbar.org/content/dam/aba/migrated/child/education/publications/ga\\_surrogate\\_parent\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/child/education/publications/ga_surrogate_parent_final.authcheckdam.pdf).

ELC, Juvenile Law Center, and the Disability Rights Network contacted PDE as early as 2008 to present this problem and propose this solution (a copy of our letter is attached), but we never achieved traction and the problem continues for many children in care in residential placements. Until this problem is addressed, we cannot agree that PDE has successfully met the “child find” or FAPE requirements for children with disabilities who are “wards of the state.”

## II. Children in Alternative Education for Disruptive Youth (AEDY) Programs

*Given the poor quality of educational services in many AEDY programs and PDE’s (and in particular the Bureau of Special Education’s) failure to monitor such programs for students eligible for special education, PDE is not ensuring that “FAPE is available to all children with disabilities residing in the State between the ages of 3 and 21 ...” [Assurance 1]*

*PDE is violating its Child Find obligation with respect to children in AEDY programs by not ensuring that “[a]ll children with disabilities residing in the State ... are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services in accordance with 20 U.S.C. 1412 (a)(3); 34 CFR §300.111. [Assurance 3]*

*PDE is not ensuring that local educational agencies conduct legally compliant manifestation determination reviews (MDRs) before transferring students to AEDY programs. Thus, PDE is not ensuring that “children with disabilities and their parents are afforded the procedural safeguards required by 34 CFR §§300.500 through 300.536 and in accordance with 20 USC 1412(a)(6); 34 CFR §300.121. [Assurance 6]*

***The Problems: IDEA-eligible children are disproportionately being assigned to AEDY programs in violation of the IDEA’s rules (in particular the mandate that Local Educational Agency (LEAs) conduct MDRs that meet certain standards). Furthermore, children in such programs are not uniformly receiving FAPE as defined in 34 C.F. R. §300.530 (d) (for children attending alternate settings). In***

***addition, given the large percentage of students found eligible for special education while attending AEDY programs, it appears that PDE is violating its Child Find obligations with respect to these students while they are still in regular school programs.***

To receive funds under IDEA Part B, Pennsylvania must submit a Part B Annual Performance Report to the Department of Education, Office of Special Education Programs. This report includes data regarding any disproportionality of students with disabilities subject to school discipline. Based on this information, we believe that districts in the Commonwealth are placing students with disabilities into AEDY programs in violation of the IDEA.

First, too many students with disabilities are being placed into AEDY programs. Students with disabilities comprise only 15% of our general public school population, but nearly 40% of the over 30,000 students placed in AEDY programs in Pennsylvania are IDEA-eligible.<sup>6</sup> There are two possible explanations for this disproportion:

- Districts are not conducting compliant MDRs. When a student's misbehavior is a manifestation of his disability, the IDEA, prohibits the transfer of a student eligible for special education to an AEDY program unless the student's misconduct involves illegal drugs, weapons, or the student has inflicted serious bodily harm on another person at school or a school-related event. 34 C.F.R.§300.530(g). Therefore, students with disabilities should not be any more likely to be transferred as a disruptive student than their non-disabled peers. The data raises serious questions as to whether school districts that are transferring especially large numbers of students with disabilities to AEDY programs are following the IDEA rules concerning MDRs and other procedural protections.
- School districts are failing to comply with their Child Find obligations and are transferring students who should have been identified as students with disabilities. During the three years that the data has been publicly available, almost 3,000 students each year, over 9% of all AEDY students, have been

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<sup>6</sup> See PDE's Annual Reports on Alternative Education for Disruptive Youth, available at [http://www.portal.state.pa.us/portal/server.pt/community/aedy\\_annual\\_reports/7320](http://www.portal.state.pa.us/portal/server.pt/community/aedy_annual_reports/7320).

identified as students eligible for special education services *after* their transfers to AEDY programs. This implies that had the school districts conducted adequate Child Find while these children were in regular school programs, many of these students would have been identified and received necessary services at an earlier point. This would, perhaps, have prevented their disruptive behavior and have entitled them to the IDEA's procedural protections, including MDRs.

Then there is the issue of the quality of the services – including the special education services – available to children who are attending AEDY programs. From talking to families and other stakeholders statewide, we have learned that there is wide variation in the quality of AEDY programs. Anecdotally and through various reports and studies, we know that many programs are educationally inferior to regular schools, use harsh disciplinary techniques, and are not providing the necessary supports to help children reintegrate successfully into their regular schools and communities.<sup>7</sup> Another problem is the excessive length of stay at some of these facilities. In short, rather than providing FAPE to IDEA-eligible students, many of these programs are propelling students into the School-to-Prison Pipeline.

Indeed, state law explicitly allows AEDY programs to provide less education to students attending these programs, including students with disabilities. Under PDE guidelines, AEDY programs can provide fewer hours of instruction (20 hours per week, plus 2 ½ hours of counseling per week) than are provided in the regular high school environment (27.5 hours per week). Thus many students in AEDY programs, including students with disabilities, only receive 73% of the academic instruction accorded their school peers attending regular school programs. Many AEDY programs provide a narrower academic curriculum than students receive in a regular school environment, frequently cutting out such courses as art, music,

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<sup>7</sup> See “Improving Alternative Education for Disruptive Youth in Pennsylvania”, Education Law Center 2010, available at [http://www.elc-pa.org/pubs/downloads2010/ELC\\_AltEdPA\\_FullReport.pdf](http://www.elc-pa.org/pubs/downloads2010/ELC_AltEdPA_FullReport.pdf); see also *Pennsylvania Alternative Education for Disruptive Youth Evaluation Report*, by Christina Ager, Arcadia University, et al., prepared for the Pennsylvania Department of Education, dated September 2006.



physical education, and foreign language.<sup>8</sup> Current state law allows privately operated AEDY programs to staff their schools with uncertified content teachers.

The IDEA is clear that children who are removed to an alternate educational placement are still entitled to FAPE, although it is defined somewhat differently. Specifically, these students “(i) continue to receive educational services, as provided in §300.101(a) [FAPE], so as to enable the child to continue to participate in the general educational curriculum ... and to progress toward meeting the goals set out in the child’s IEP; and (ii) receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur. 34 C.F.R. §300.530(d).

Given these grave concerns about the quality of education provided to all students at AEDY programs, including students with disabilities, and the high number of students with disabilities attending AEDY programs, PDE has a duty to ensure that these individualized determinations are being made for every IDEA-eligible child who is transferred to an AEDY program or who is identified as eligible while attending such a program to ensure that the child is receiving FAPE. Thanks to clarifying language in the BEC on AEDY programs, districts should be aware of the requirements regarding students with disabilities in or at risk of AEDY placement.<sup>9</sup> But we do not believe districts are following the law as described in that BEC.

**Solutions:** We urge the Department to increase its oversight of alternative education programs and to hold districts accountable for the AEDY programs to which they send students with disabilities. PDE has assigned only limited staff to

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<sup>8</sup> See “Improving Alternative Education for Disruptive Youth in Pennsylvania,” pages 24-26; see also the most recent AEDY Annual Report from PDE, page 27 (finding that most privately provided AEDY programs only provide instruction in the “core subjects”) (available at [http://www.portal.state.pa.us/portal/server.pt/community/aedy\\_annual\\_reports/7320](http://www.portal.state.pa.us/portal/server.pt/community/aedy_annual_reports/7320)).

<sup>9</sup> Pennsylvania Department of Education, Basic Education Circular: *Alternative Education for Disruptive Youth* (July 9, 2009). [http://www.portal.state.pa.us/portal/server.pt/community/purdon%27s\\_statutes/7503/alternative\\_education\\_for\\_disruptive\\_youth/507342](http://www.portal.state.pa.us/portal/server.pt/community/purdon%27s_statutes/7503/alternative_education_for_disruptive_youth/507342)

oversee over 600 AEDY programs, and the Bureau of Special Education is currently not involved in such oversight. Specifically, PDE should do the following:

- Identify AEDY programs with especially high disproportions of children with disabilities and conduct on-site visits to determine whether the sending school districts are meeting their Child Find obligations and whether they properly conduct MDRs.
- Direct the Bureau of Special Education to closely monitor all AEDY programs that serve children with disabilities as part of its cyclical monitoring to determine whether the schools and the sending school districts are fully complying with the IDEA's procedural and substantive requirements. To the extent that deficiencies are found, PDE should require prompt correction.
- Encourage school districts to use only AEDY programs that offer positive behavioral modification programs that address students' disruptive behavior. Many school districts have found success in regular schools with the use of Positive Behavioral Interventions and Supports for students with and without disabilities. AEDY programs could benefit from such initiatives as well.
- Collect data on the numbers of students with disabilities served, the types of disabilities represented, the nature of the therapeutic and special education programming provided, the availability of related services, and the like.
- Alternatively, if PDE is unable to conduct such intensive monitoring and oversight to ensure FAPE, procedural compliance, and data collection it should **prohibit the placement of students with disabilities in AEDY programs.**
- Send a Penn Link or other reminder to all school districts reminding them of their obligations under the IDEA regarding transferring students with disabilities to AEDY programs. The Department already has a revised Basic Education Circular on AEDY outlining the Districts' general obligations to all students, including those with disabilities. Remind districts of these guidelines and obligations.

We are very grateful for this opportunity to raise concerns that affect especially vulnerable children. Again, we would welcome the opportunity to discuss these concerns in greater detail with relevant Department staff.

Thank you,

Jennifer Lowman, Esq.  
Education Law Center  
1315 Walnut Street, #400  
Philadelphia, PA 19107  
215-238-6970, ex. 312  
[jlowman@elc-pa.org](mailto:jlowman@elc-pa.org)  
[www.elc-pa.org](http://www.elc-pa.org)