

Exceptional Teachers Teaching Exceptional Children

NASET SPECIAL EDUCATOR E-JOURNAL

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Special Education Legal Alert

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This month's update identifies court decisions that address current issues for students with disabilities, including not only eligibility, but also free appropriate public education (FAPE) under *Endrew F.* in the context of the high-stakes remedy of tuition reimbursement. For various related articles, special supplements, and earlier monthly updates, see perryzirkel.com.

In Rocklin Unified School District v. J.H., an unofficially published decision on February 15, 2022, a federal district court in California addressed the tuition reimbursement claim for a fifth grader with diagnoses of anxiety and ADHD. During third grade, the district responded to his diagnoses with a 504 plan, and he succeeded academically, socially, and behaviorally. During grade 4, he continued to meet academic standards with his 504 plan, but his teacher noted some behavioral issues and bullying by his peers, culminating in an altercation that resulted in his suspension. In grade 5, the district continued the 504 plan accommodations and provided a school-wide positive behavior intervention system, but his parent requested a special education evaluation upon reporting continued bullying. The evaluation concluded that he was eligible under § 504 but not the IDEA and recommended adding accommodations for his social and emotional challenges. Instead, the parent unilaterally placed him for sixth grade in a private school that provided small classes, school-wide supports, and § 504 accommodations, although no special education services. After exacerbated anxiety based on the school's challenging curriculum and an independent educational evaluation at the end of the school year, the district reevaluated him upon the parent's request and found him eligible under the IDEA classification of other health impairment (OHI). The district proposed an inclusionary placement, which included special education services, and the parent

<p>disagreed, keeping him at the private school. The parent filed for a hearing, which awarded reimbursement for grade 6 because the district should have found him eligible as OHI at the end of grade 5. However, the reimbursement did not extend to grade 7 because the proposed IEP was appropriate. The district appealed to federal court.</p>	
<p>The district contended that even if his diagnoses met the criteria for OHI, he did not need special education due to his continuing academic success.</p>	<p>The court reasoned that the need for special education is not limited to academic considerations, here extending to the need to provide mental health services to address his continued and escalating interpersonal behavioral problems.</p>
<p>The district alternatively argued that even if there were a denial of FAPE, the unilateral placement was not appropriate due to its lack of special education services.</p>	<p>Citing precedents, the court concluded that the standard for a unilateral placement is limited to whether it was reasonably calculated to enable the child to make progress appropriate under his circumstances. Applying this standard, based on what the parent reasonably knew at the time, the placement passed muster.</p>
<p>This decision reinforces two points evident in the previous monthly updates. First, the boundaries between general education, including but not at all limited to 504 plans and tiered interventions, and special education are blurry. Second, although <i>Andrew F.</i> is not a lofty substantive standard, it effectively is the controlling criterion for unilateral placements in tuition reimbursement cases. Once again, the final determinations vary from case to case depending on the circumstances.</p>	

On February 7, 2022 in *G.D. v. Swampscott Public Schools*, the First Circuit Court of Appeals addressed the tuition reimbursement claim for an elementary school student with “severe dyslexia.” During first grade, while the student was in a local private school, the school district conducted an eligibility evaluation of the child upon the request and with the consent of the parents. The evaluation team concluded that the child qualified for special education under the classification of specific learning disabilities (SLD). The parents enrolled the child in the district for second grade. Although they sought a “substantially-separate school” for students with language-based disabilities, the IEP team decided on largely mainstreamed placement, which included some specially designed instruction in a “language-based classroom.” The IEP also provided ESY reading instruction services for the summer before grade 2 and an extended evaluation for the first 8 weeks of grade 2. The parents arranged for a private evaluator to test the child at the end of ESY and again after the 8-week period. He found improvement that he concluded was not statistically significant and recommended the parents’ requested placement. Instead, the November IEP meeting resulted in an amendment that reversed the time allocation between the regular and specialized, separate classrooms and included another extended evaluation. After this second evaluation period, the district reported progress based on its assessments. At the next IEP meeting, the district proposed continuing the amended IEP for grade 3. Dissatisfied with their child’s purported progress, the parents provided timely notification of unilateral placement for grade 3 in a private school exclusively focused on SLD and sought reimbursement via a due process hearing. After a prolonged hearing, the decision was in favor of the district, and the parents’ appeal to federal district court was also unsuccessful. Undaunted, they filed an appeal with the First Circuit, which covers Massachusetts and 3 other states in New England.

The parents contended that neither the hearing officer nor the district court showed that the child’s “slow gains” were appropriate “in light of the child’s [individual]

The First Circuit rejected this claim, finding that the determination at both adjudicative levels took into consideration the child’s individual circumstances, which included that

circumstances,” per <i>Endrew F.</i>	her disability was severe and she entered the district as a non-reader.
The parents alternatively argued that the state’s proficiency exams rather than the district’s qualitative and informal measures are the test for appropriate progress.	The First Circuit disagreed, pointing out that neither <i>Endrew F.</i> or its lower court progeny dictates reliance on standardized testing, much less any specified level of improvement via such testing.
Finally, the parents took issue with the exclusion of evidence of the child’s significant quantifiable progress at the private school.	The First Circuit distinguished the excluded evidence as post-hearing, contrary to the IDEA’s presumption for the least restrictive environment, and conflicting with the “snapshot” approach for determining FAPE.
This recent officially published decision illustrates, once again, the need to avoid stilted interpretations of <i>Endrew F.</i> , here in the dyslexia context. The proper place for higher expectations is in the best-practice orientation that parents and districts potentially share for collaborative problem solving that is distinguishable from the foundational standards of legal requirements.	

Buzz from the Hub

All articles below can be accessed through the following links:

<https://www.parentcenterhub.org/buzz-march2022-issue1/>

<https://www.parentcenterhub.org/buzz-feb2022-issue2/>

<https://www.parentcenterhub.org/buzz-feb2022-issue1/>

<https://www.parentcenterhub.org/buzz-jan2022-issue2/>

Education Data 101

(Also available in Spanish: ***Datos educacionales: Nociones básicas***)

This FAQ on data shares resources you need to understand why education data is a critical tool for supporting individuals, families, educators, and communities. From the Data Quality Campaign.

Parents Are Getting Access to Student Data, But How Can We Support Them to Use It?

With the right supports, parents can be savvy data consumers who actively engage with their students' data. In many places around the country, school leaders are already taking creative measures to bridge this gap between simple communication and engagement. This article highlights examples.

Sharing Info about State Assessments with Families of Children with Disabilities

(Also available in Spanish)

In February, CPIR teamed with NCEO to spotlight NCEO's amazing new resource, the *Participation Communications Toolkit*. The highly customizable toolkit is designed for stakeholders to use in discussing and making decisions about how children with disabilities will participate in state assessments.

Q&A on Serving Children with Disabilities Placed by Their Parents in Private Schools

(Also available in Spanish)

This OSEP webinar for Parent Centers answers questions about states' obligations to provide equitable services (versus FAPE) to children with disabilities who are placed in private schools by their parents. Simultaneous Spanish interpretation was also provided. Find the 2 YouTube videos, a PDF of the presentation slides, the guidance document, and more at the link above.

The Importance of Community in Indigenous Peoples' Healing

In this March 2022 blog post, the National Alliance for Mental Illness (NAMI) reflects on the power of community in Native American life, saying "Being an active part of a community that allows us to feel seen is truly an invaluable feeling. When we feel seen and connected as humans, our healing expands."

The Incredible Power of Purpose

*(Also available in Spanish: **Cómo ayudar a un niño a encontrar su propósito**)*

Having a clear sense of purpose in life has unlimited benefits for a child. This Great Schools resource includes a worksheet/activity designed to help teens explore and define their unique purpose in life.

Mental Wellness in the Black Community

From the National Alliance on Mental Illness (NAMI), Sharing Hope is a 3-part video series that explores the journey of mental wellness in Black communities through dialogue, storytelling, and guided discussions.

Compartiendo Esperanza: Mental Wellness in the Latinx Community

Also from NAMI comes *Compartiendo Esperanza*. It, too, is a 3-part video series, this one focusing on mental wellness in Hispanic/Latino communities, through dialogue, storytelling, and guided discussions

Native Hope: Reflecting on Our Foundations

Understanding Native American culture is critical when conducting outreach to tribes, communities, and Native families with children who have disabilities. **Native Hope** is a resource that helps Native communities meet their needs. It also offers candid and poignant articles on its website that can enrich Parent Center understanding of Native American history, culture, and values, both historically and in the present.

Sharing Info about State Assessments with Families

(Also available in Spanish) Riches, indeed, are shared in this February 11th CPIR webinar, which focuses on NCEO's new (and quite amazing!) resource, the *Participation Communications Toolkit*. You'll love the toolkit; it's designed for stakeholders of all stripes to use in discussing and making decisions about how children with disabilities will participate in state assessments. The webinar highlights the role that Parent Centers in particular can play in supporting the family's role as one of the primary decision makers about their child's participation.

Return to School | Child Find and Early Intervention Services

(Also available in Spanish) This February 2nd webinar features presenters from OSEP as they elaborate on two of OSEP's recent *Return to School Roadmaps*, both focused on Part C: (1) Child Find, Referral, and Eligibility; and (2) Provision of Early Intervention Services. Both roadmaps are also available in Spanish, as is this webinar.

Introduction to the Vocational Rehabilitation Program

(Also available in Spanish) Want to learn more about the services available from the vocational rehabilitation system for people with disabilities? Check out this January 24th webinar from the RAISE Center. It covers eligibility, developing the Individualized Plan for Employment, available services, and financial factors to consider. Links to the captioned English and Spanish versions are given at the bottom of the page linked above.

Honoring Black History Month: Unsung Heroes of the Disability Rights Movement

The month of February is dedicated to honoring the long history of Black Americans and their many contributions to society. In this article, NCLD (National Center for Learning Disabilities)

highlights the stories of Black heroes whose vision, commitment, and activism helped advance progress for people with disabilities.

Plain Language Made It Easy

(Also available in Spanish) | The RAISE Center and PEATC (Virginia's PTI) collaborated to develop this resource guide and video in English and Spanish to assist people in making their documents accessible to everyone.

Federal Funding Support Specifics

In March 2021, the American Rescue Plan (ARP) Act was signed into law. It included \$122 billion for states and school districts to help safely reopen and operate schools and address the impact of the pandemic on students. Want to know more about ARP funding for your state? How about what your state proposed to do with those funds? Find out at the link above, posted by the Office of Elementary and Secondary Education at the U.S. Department of Education.

The Department's January 2022 press release on the approval of all state plans and the distribution of funds to states highlights what SEAs and school districts are doing to address the urgent needs of their schools with ventilation improvements, staff hiring and retention, mental health services, high-dosage tutoring programs, after-school and summer learning partnerships, and more.

Support for COVID-19 Screening Testing in Schools

Heard of the ELC at the CDC? In April 2021, it awarded \$10 billion from the ARP on behalf of CDC to 62 recipients to support COVID-19 screening testing and other mitigation activities in K–12 schools for teachers, staff, and students. Use the USA map to find out about the screening programs and plans in your state. Funding is available through July 31, 2022.

Competitive Integrated Employment (CIE) Toolkit

This toolkit is a resource for educational and vocational rehabilitation agencies in improving post-school employment outcomes for students with disabilities. It's meant to facilitate the collaboration necessary to implement secondary transition services across agencies at the state, community, and student levels and increase the use of evidence-based practices (EBPs). From NTACT, the National Technical Assistance Center on Transition.

Pros and Cons of Disclosing a Disability to Employers

*(Also available in Spanish: **Ventajas y desventajas de revelar a los empleadores que tiene una discapacidad**)*

Starting a new job can make teens and young adults feel excited, independent, and maybe nervous. They're expected to learn new skills and routines, interact with new people, and make decisions. One of the biggest decisions is whether to tell their employer about any learning and thinking differences.

Questions Often Asked by Parents about Special Education Services

When children are struggling in school, it's important to find out why. It may be that a disability is affecting your child's educational performance. If so, your child may be eligible for special education and related services that can help. To learn more about special education, keep reading. This publication will help you learn how you and the school can work together to help your child.

As a first step, the school may need to try sufficient interventions in the regular education classroom and modify instructional practices before referring your child for special education evaluation.

Read This Publication If You Want to Know...

- How to have your child evaluated (at no cost to you) to see why he or she is having difficulty in school
- What the evaluation process involves and how you can contribute to it
- How special education can support your child's learning, if he or she is found eligible for services
- How your child's eligibility is determined and your right to participate in making that decision
- What happens next, if your child is found eligible
- *Hint:* It involves writing an individualized education program, or IEP, for your child...

Read the article here:

<https://www.parentcenterhub.org/lg1/>

Understanding Evaluation Results and Next Steps

Need a refresher on evaluation basics? Or maybe you're still deciding whether your child needs an evaluation or you haven't yet requested one. If so, go back to a previous step in our evaluation journey:

Learning about evaluations

Deciding on an evaluation

Requesting an evaluation

Preparing for an evaluation

Your child has had an evaluation, and you've gotten the results. Now what? Evaluation results will lead to some sort of action. The school will decide whether or not your child is eligible for special education supports and services.

Having results can also help you take action. When you fully understand where your child is struggling, you can pursue the right help and support. You might advocate at school for certain interventions, for instance. You might also look into **types of tutoring** that will address your child's needs.

This guide can help you make sense of evaluation results so you can make informed decisions based on what they show. Read the article here:

<https://www.understood.org/articles/en/understanding-evaluation-results-and-next-steps>

Information for Limited English Proficient (LEP) Parents and Guardians and for Schools and School Districts that Communicate with Them

Schools must communicate information to limited English proficient parents in a language they can understand about any program, service, or activity that is called to the attention of parents who are proficient in English. This fact sheet answers common questions about the rights of parents and guardians who do not speak, listen, read, or write English proficiently because it is not their primary language. Read the fact sheet here:

<https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-lep-parents-201501.pdf>

Protecting Youth Mental Health: The U.S. Surgeon General's Advisory

Mental health affects every aspect of our lives: how we feel about ourselves and the world; solve problems, cope with stress, and overcome challenges; build relationships and connect with others; and perform in school, at work, and throughout life. Mental health encompasses our emotional, psychological, and social wellbeing, and is an essential component of overall health.¹

As described in the 1999 Surgeon General's Report on Mental Health, it is the "springboard of thinking and communication skills, learning, emotional growth, resilience and self-esteem."² Mental health challenges can be difficult to define, diagnose, and address, partly because it isn't always clear when an issue is serious enough to warrant intervention.² All of us, at all ages, occasionally experience fear, worry, sadness, or distress. In most cases, these symptoms are short-lived and don't affect our ability to function. But, at other times, symptoms can cause serious difficulties with daily functioning and affect our relationships with others, as in the case of conditions such as anxiety disorders, major depressive disorder, schizophrenia, bipolar disorder, and eating disorders, among others.

In December 2021 the U.S. Surgeon General released *Protecting Youth Mental Health*, a 53-page advisory targeted at the children's mental health crisis—which has been made worse by the pandemic. The advisory provides a comprehensive list of suggestions and resources for specific audiences, including young people, families and caregivers, educators and school systems, community organizations, local governments, and more. Read the advisory report here:

<https://www.hhs.gov/sites/default/files/surgeon-general-youth-mental-health-advisory.pdf>

Education Department Launches Historic Real Pay for Real Jobs Initiative for People with Disabilities

The U.S. Department of Education's Rehabilitation Services Administration (RSA) released the notice inviting applications for the Subminimum Wage to Competitive Integrated Employment (SWTCIE) demonstration project, aimed at increasing access for people with disabilities to jobs that pay good wages.

The SWTCIE project is the largest discretionary grant administered by RSA, with \$167 million available to State Vocational Rehabilitation agencies and their partners.

"Economic security should be available to all Americans," said U.S. Secretary of Education Miguel Cardona. "Providing individuals with disabilities with a high-quality education and the services that they need to thrive will result in real pay for real jobs, empowering them and leading to greater social and economic inclusion."

SWTCIE is a step toward ending practices that have allowed some employers to pay less than the federal minimum wage to people with disabilities. The new grant program will sponsor innovative approaches that allow people with disabilities to successfully secure jobs working alongside their non-disabled peers while earning the same pay.

"More than 30 years after the passage of the Americans with Disabilities Act, far too many people with disabilities continue to be denied equal opportunity," said U.S. Rep. Robert C. "Bobby" Scott of Virginia, chairman of the House Committee on Education and Labor. "The subminimum wage for workers with disabilities is a relic of a time when people with disabilities were viewed as unable to work and lacked federal protections. It is long past time that we help phase out the subminimum wage for people with disabilities and expand access to fulfilling employment and economic self-sufficiency. We must continue working to ensure every American can succeed and earn a fair wage."

To help eliminate subminimum wage employment, this competition will award grants to as many as 18 State Vocational Rehabilitation agencies and their partners that will create employment

opportunities for individuals with disabilities. The jobs will be in critical need areas, including home and community-based services, the arts, or transportation and related industries. In addition, applicants may submit proposals in other areas that will transition individuals from subminimum wage employment to competitive integrated employment.

“Some workers with disabilities spend decades earning a subminimum wage without the opportunity to gain new skills or move to a job that pays a higher wage. Today, the Department of Education took an important step to end this discriminatory practice,” said U.S. Sen. Bob Casey of Pennsylvania. “I applaud Secretary Cardona for his leadership and I will keep fighting to ensure all workers with disabilities are paid at least minimum wage and have the opportunity to succeed in the workplace.”

The SWTCIE project advances a key Biden-Harris Administration goal – strengthening the economic security of Americans with disabilities. This funding opportunity aligns existing and emerging employment opportunities with the needs of employers and the public infrastructure. Most notably, activities will ensure people with disabilities are earning real pay for real jobs.

The Department's Rehabilitation Services Administration web page provides additional information about vocational rehabilitation opportunities for people with disabilities.

Statement by U.S. Secretary of Education Miguel Cardona on CDC Guidance and Keeping Schools Safely Open

U.S. Secretary of Education Miguel Cardona issued the following statement on the release of new CDC guidance:

"Ninety-nine percent of schools are safely open for in-person learning and that is a testament to the hard work and partnership of school communities – particularly parents, educators, district leaders and school staff. With today's announcement of updated CDC guidance, we can continue to keep schools safely open while allowing for educators and parents to get back to focusing on what is most important: our students' futures. Moving forward, districts should continue to work with local health experts, parents, and educators to identify what works best for their communities and consider the appropriate mitigation strategies needed to keep students and staff safe. This work – in addition to the critical work of helping students catch up academically and providing emotional and mental health supports– can and should be done using American Rescue Plan funds. As we move forward into a new phase of recovery, the Department remains committed to our school communities and providing the guidance and resources they need to be successful."

Information on the new CDC guidance can be found at

<https://www.cdc.gov/coronavirus/2019-ncov/science/community-levels.html>

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- National Institute of Health
- National Organization on Disability
- Substance Abuse and Mental Health Services Administration
- U.S. Department of Education
- U.S. Department of Education-The Achiever
- U.S. Department of Education-The Education Innovator
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