IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA SCHOOL BOARDS ASSOCIATION, INC., SCHOOL DISTRICT OF PITTSBURGH, CENTRAL BUCKS SCHOOL DISTRICT, and UPPER DARBY SCHOOL DISTRICT, Petitioners, v. DR. KHALID N. MUMIN, SECRETARY OF EDUCATION OF THE PENNSYLVANIA DEPARTMENT OF EDUCATION, and the PENNSYLVANIA DEPARTMENT OF EDUCATION, Respondents.	:	No.: 409 M.D. 2023

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF THEIR APPLICATION FOR SUMMARY RELIEF

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I. STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 42 Pa. C.S. § 761(a)(1) .

II. STATEMENT OF QUESTIONS INVOLVED

A. Does the Department of Education or the Secretary of Education have the authority to change the Age-Out Rule when the New Age-Out Rule establishes a binding norm that is inconsistent with Section 1301 of the School Code, 24 P.S. § 13-1301 and Section 11.12 of the regulations of the State Board of Education, 22 Pa. Code § 11.12?

Suggested Answer: No.

B. Is the New Age-Out Rule in the nature of a mandatory rule or standard of behavior requiring compliance with the rulemaking procedures and process contained in the Regulatory Review Act and the Commonwealth Documents Law?

Suggested Answer: Yes.

C. Can the Department of Education or the Secretary of Education mandate that School Districts act in violation of law based on its interpretation of the Individuals with Disabilities Education Act, an interpretation which is flawed?

Suggested Answer: No.

III. STATEMENT OF THE CASE

A. Procedural History.

On September 11, 2023, the Petitioners, the Pennsylvania School Boards Association ("PSBA"), the School District of Pittsburgh ("Pittsburgh"), the Central Bucks School District ("Central Bucks") and the Upper Darby School District

("Upper Darby") (together referred to as "the School Districts") filed a Petition for Review.

On September 29, 2023, the Respondents filed Preliminary Objections. The School Districts filed an Answer to the Preliminary Objections on October 31, 2023. The Respondents withdrew their Preliminary Objections on November 17, 2023. At the time that this Memorandum of Law was prepared, the Respondents had not filed an Answer to the Petition for Review.

On October 4, 2023, the School Districts filed an Application for Special Relief seeking a Preliminary Injunction. The Respondents filed an Answer to the Application for Special Relief on November 1, 2023. A hearing was conducted, and the Application for Special Relief was amicably resolved.

On November 14, 2023, the Court entered a scheduling Order, which was amended by Order dated November 20, 2023.

In accordance with the scheduling orders, the Petitioners and the Respondents filed their respective Applications for Summary Relief on November 28, 2023.

This Memorandum of Law is being submitted in accordance with the scheduling Orders and in support of the Petitioners' Application for Summary Relief.

B. Factual Background

In 2002, the Pennsylvania General Assembly revised the age limits applicable to eligibility for public education by extending the upper end of those limits from

age 21, which had been the limits since 1949, to the conclusion of the school term during which the child attained age 21. *See* Act of Mar. 10, 1949, P.L. 30, No.14, art. XIII, § 1301, amended by Act of June 29, 2002, P.L.524, No. 88, § 10, 24 P.S. § 13-1301 ("Section 1301"). Among other things, this revision to the School Code ended the chaos of terminating a child's right to education in the midst of a school term. At all times prior to August 30, 2023, the law, practices, and policies in Pennsylvania were that students with disabilities "aged out" of their right to a free appropriate public education ("FAPE") in Pennsylvania in a manner consistent with legislative rule. *See* 24 P.S. § 13-1301; 22 Pa. Code § 11.12; *see also Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972) ("the PARC Consent Decree").[1] That changed on August 30, 2023, when the Pennsylvania Department of Education ("PDE") entered into a legally binding Settlement

[1] There are certain situations when age does not cause a student to lose his/her right to services. First, the General Assembly enacted two statutes in the wake of the COVID pandemic that extended the right to FAPE for an additional year if certain conditions were met. *See* 24 P.S. § 15-1501.10. Those Acts, having served their defined and temporary purpose, are no longer effective. Second, if violations of the FAPE mandate embodied in federal law entitle a student to "compensatory education," such "make whole" compensation can extend beyond the student's twenty-first birthday. *See Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1991). There is also an issue regarding whether extended school year services may apply to the summer after the school term in which the student turns 21. These issues are not part of this case.

Agreement[2] changing the age-out rule to allow students with disabilities to continue their enrollment in school districts and receive FAPE until their 22nd birthday ("the New Age-Out Rule"). The School Districts seek to have the Respondents' action voided and to enjoin the Respondents from taking action to enforce the New Age-Out Rule.

Factually, the following is pertinent: On July 11, 2023, a class action complaint ("the Complaint") was filed against PDE. *See* Exhibit P-1.[3] No responsive pleading was filed. *See* Exhibits P-2; P-63, Stip. ¶ 45.[4] Seven (7) weeks and one (1) day after the filing of the Complaint, PDE entered into a settlement agreement ("the Settlement"). *See* Exhibits P-3; P-63, Stip. ¶ 47. The Settlement changed the then existing age-out rule as expressed in Section 1301, the State Board regulations at 22

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[2] Although the Settlement Agreement resolved an action filed before the United States District Court for the Eastern District of Pennsylvania, *A.P. v. Pennsylvania Department of Education*, Civil No. 2:23-cv-02644 (E.D. Pa. Jul. 11, 2023), it preceded the filing of any responsive pleading in the matter, and it was not subject to review or approval of the Court.

[3] Pa. R.C.P. 1035.1 provides that the record upon which summary judgment may be based includes pleadings, admissions, affidavits, and expert reports. The Petitioners filed Exhibits enumerated in paragraph 7 of their Application for Summary. References in this Memorandum of Law to Exhibits are to the Exhibits filed with said Application.

[4] The Parties entered into Stipulations in accordance with the Court's Order dated October 11, 2023, ¶ 5. Those Stipulations were marked as Exhibit P-63 for purposes of the Petitioners' Application for Summary Relief.

Pa. Code § 11.12, and the federally approved State Plan (Exhibit P-63, Stip. ¶ 40; Exhibit P-56) to the New Age-Out Rule of 22 (*See* Exhibit P-3) Under the Settlement, the New Age-Out Rule of 22 was to become effective no later than September 5, 2023 and applied to a class of children who turned 21 during or after the 2022-2023 school year and had aged out of public education in accordance with the then existing rule. PDE announced to school districts the following:

> Effective no later than September 5, 2023, all students entitled to FAPE and all of the rights and procedural safeguards under the Individuals with Disabilities Education Act (IDEA) and Chapter 14 of Title 22 of the Pennsylvania Code may remain enrolled in public school until they turn 22 years of age.

Exhibit P-26; *see also* Exhibit P-63, Stip. ¶ 50.

Thereafter, the Respondents conducted and/or sponsored training sessions directing attendees that school districts, Intermediate Units, and vocational-technical schools must continue to provide education to a certain class of students until age 22. (Exhibit P-63, Stip. ¶ 54; Exhibit P-6). In training provided by PDE to public school leaders, PDE said:

> No later than September 5, 2023, all students entitled to FAPE and all the rights and procedural safeguards under the Individuals with Disabilities Education Act (IDEA) and Chapter 14 of Title 22 of the Pennsylvania Code may remain enrolled in public school until they turn 22 years of age.

Exhibit P-6, p. 3; *see also* Exhibit P-27.

Attendees to PDE's training verified that PDE said that the New Age-Out Rule was mandatory. Alyssa Marton ("Marton"), Director of Pupil Services for Central Bucks, attended the PDE training on August 31, 2023. In her affidavit, Marton said: "I attended a PDE virtual training on August 31, 2023, during which the Director of PDE'S Bureau of Special Education, Carole Clancy, Ed.D., unequivocally stated that the policy change was mandatory." Exhibit P-60, ¶ 5. Patti Camper, Assistant Superintendent for Special Education for Pittsburgh, stated in her Declaration, "I attended a virtual training on August 31, 2023, and PDE (Carole Clancey) clearly communicated that this policy change was mandatory." Exhibit P-62, ¶ 5.

Despite creating a new rule, the Respondents did nothing to comply with any of the procedures or processes for valid rulemaking.

IV. SUMMARY OF THE ARGUMENT

The Respondents have changed the Age-Out Rule without legal authority and without complying with the rulemaking requirements of the Commonwealth Documents Law, 45 P.S. §§ 1102 *et seq*. ("the CDL"), or the Regulatory Review Act, 71 P.S. §§ 745.1 *et seq*. ("the RRA").

The Respondents' argument that the New Age-Out Rule is not a regulation requiring compliance with the rulemaking processes of the CDL and RRA is without merit. The Settlement Agreement that creates the New Age-Out Rule is legally binding and, by its terms, is subject to specific performance. The Settlement

Agreement requires PDE both to implement and to enforce the New Age-Out Rule. The Settlement Agreement prohibits PDE from enforcing the "Current Age-Out Rule." The Settlement Agreement requires both the State Plan and the Model Policy for School Districts to be changed to include the New Age-Out Rule. Both the State Plan and the Model Policy are legally enforceable.

Contrary to the argument PDE has posited to date, the New Age-Out Rule is not required by the Individuals with Disabilities Education Act ("IDEA"). The IDEA specifically defers to state law the rules applicable to students aged 18-21.

V. STANDARD FOR SUMMARY JUDGMENT

A motion for summary judgment may be granted only where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Flood v. Silfies*, 933 A.2d 1072, 1074 (Pa. Commw. Ct. 2007). A fact is material if it directly affects the disposition or the outcome of a case. *Department of Environmental Protection v. Delta Chemicals, Inc*., 721 A.2d 411, 416 (Pa. Commw. Ct. 1998). The right to judgment must be clear and free from doubt.

VI. ARGUMENT

A. Neither the Department of Education Nor the Secretary of Education has the Authority to Change the Age-Out Rule where the New Age-Out Rule Violates Section 1301 of the School Code and 22 Pa. Code §11.12.

Section 1301 establishes the Age-Out Rule in Pennsylvania. Section 1301 provides in relevant part that:

> Notwithstanding any other provision of law to the contrary, a child who attains the age of twenty-one (21) years during the school term and who has not graduated from high school may continue to attend the public schools in his district free of charge until the end of the school term.

24 P.S. § 13-1301.

Similarly, regulations of the State Board of Education provide:

> School age is the period of a child's life from the earliest admission age to a school district's kindergarten program until graduation from high school or the end of the school term in which a student reaches the age of 21 years, whichever occurs first.

22 Pa. Code § 11.12.

Notwithstanding these legal precepts, PDE agreed in the Settlement Agreement to a New Age-Out Rule that allows certain children with disabilities to remain in school until their 22nd birthday. *See* Exhibit P-3. However, the Respondents are without the power and authority to change a rule established by law.

Your Honorable Court noted that:

> The authority of a public administrative agency ordinarily includes the power to make or adopt rules and regulations with respect to matters within the province of such agency, ***provided such rules and regulations are not inconsistent with law.***

Pennsylvania Ass'n. of Life Underwriters v. Commonwealth, Dep't of Ins., 29 Pa. Commw. 459, 461, 371 A.2d 564 (Pa. Commw. Ct. 1976) (emphasis added).

This same concept was also expressed by your Honorable Court as follows:

> When an agency adopts regulations at variance with the statute, the regulations, and not the statute, fall by the wayside.

Xerox Corporation v. City of Pittsburgh, 15 Pa. Commw. 411, 327 A.2d 206 (Pa. Commw. Ct. 1974); *George A. Fuller Co. v. City of Pittsburgh*, 15 Pa. Commw. 403, 327 A.2d 191 (Pa. Commw. Ct. 1974).

At bar, the New Age-Out Rule is in direct and clear violation of Section 1301 and 22 Pa. Code § 11.12. As a result, it must be declared invalid.

B. The New Age-Out Rule Is In The Nature of a Mandatory Rule or Standard of Behavior Requiring Compliance With The Rulemaking Procedures And Processes Contained in the Regulatory Review Act and the Commonwealth Documents Law.

It is undisputed that on August 30, 2023, PDE entered into a settlement of a federal case, without Court sanction, changing the Age-Out Rule for children with disabilities. PDE's action imposed on school districts a new obligation to provide FAPE to a class of children who had aged out of their right to attend school under existing law and practice. It is undisputed that this New Age-Out Rule was adopted by PDE without going through any of the applicable rulemaking procedures or processes. As a result, PSBA and the School Districts filed this action asserting that PDE's actions were taken in violation of the RRA and the CDL.

PDE makes two fundamental assertions in defense of the case. First, PDE asserts that the New Age-Out Rule is not a mandatory rule but is optional. Second, PDE asserts that it is not doing anything to create any new rule or requirement. Instead, PDE asserts that it is merely interpreting requirements of IDEA. Both assertions are erroneous.

(1) The Settlement and its Related Documents are Intended to have the Force of Law.

When promulgating a regulation, an agency must comply with the requirements set forth in the CDL, the Commonwealth Attorneys Act ("the CAA"), and the RRA. *Germantown Cab Co. v. Phila. Parking Auth*., 993 A.2d 933, 937 (Pa. Commw. Ct. 2010); *Borough of Bedford v. Department of Environmental Protection*, 972 A.2d 53 (Pa. Commw. Ct. 2009). A regulation not promulgated in accordance with statutory requirements will be declared a nullity. *Borough of Bedford*, 972 A.2d at 62.

The CDL defines the term "regulation" as follows:

> (12) "REGULATION" means any rule or regulation, or order in the nature of a rule or regulation, promulgated by an agency under statutory authority in the administration of any statute administered by or relating to the agency, or prescribing the practice or procedure before such agency.

45 P.S. § 1102.

In determining whether a statement of policy is a regulation with the force and effect of law, the Pennsylvania Supreme Court has held that a properly adopted substantive rule establishes a standard of conduct which has the force of law, whereas a general statement of policy does not establish a binding norm but merely serves as an announcement to the public of a policy that the agency hopes to implement in future rulemaking or adjudications. *See Pennsylvania Human Relations Commission v. Norristown Area School District*, 473 Pa. 334, 374 A.2d

671 (1977). To ascertain whether a binding norm is established, the reviewing tribunal must consider the provision's plain language, the manner in which it has been implemented by the agency, and whether the section restricts the agency's discretion. *See id.; Millcreek Manor v. Dep't of Pub. Welfare*, 796 A.2d 1020, 1026 (Pa. Commw. Ct. 2002); *R.M. v. Pennsylvania Housing Finance Agency of the Commonwealth*, 740 A.2d 302 (Pa. Commw. Ct. 1999), *petition for allowance of appeal denied*, 563 Pa. 669, 759 A.2d 390 (2000).

In *Giant Food Stores v. Department of Health,* 713 A.2d 177 (Pa. Commw. Ct. 1998), your Honorable Court said:

> The distinction between regulations and statements of policy is that regulations establish binding norms having the force of law. Pennsylvania *Human Relations Commission v. Norristown Area School District*, 473 Pa. 334, 374 A.2d 671 (1977). In contrast, statements of policy are announcements to the public of general policies that the agency may implement in the future, and when a policy is applied by an agency in a particular situation, it must be prepared to support the policy just as if the statement was never issued. Id. Further,
>
> > 'binding norm' means that the agency is bound by the statement until the agency repeals it, and if the statement is binding on the agency, it is a regulation. Additionally, in determining whether an agency action is a regulation or a statement of policy, one must look to the extent to which the challenged pronouncement leaves the agency free to exercise discretion to follow or not to follow the announced policy in an individual case.
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> *Department of Environmental Resources v. Rushton Mining Co*., 139 Pa. Commw. 648, 591 A.2d 1168, 1173 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 529 Pa. 626, 600 A.2d 541 (1991).

Giant Food Stores v. Department of Health, 713 A.2d at 180.

PDE argues that the RRA and the CDL do not apply because the Settlement and related documents are not intended to have the force of law.[5] For the reasons that follow, PDE's assertions are erroneous and seriously flawed.

(2) The New Age-Out Rule is Mandatory.

PDE entered into a "Mutual Settlement Agreement and Release" agreement ("the Settlement Agreement") on August 30, 2023, establishing the New Age-Out Rule. *See* Exhibit P-3. Intending to be "legally bound" (Exhibit P-3, p. 2), PDE agreed that it "will rescind and cease implementing and enforcing the Current Age-Out Policy as it exists in Section 300.101 of ***its*** IDEA Policies and Procedures."[6] Exhibit P-3, ¶ I.1[7] (emphasis added). PDE's Policies and Procedures are the "State

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[5] In Paragraph 18 of its Application for Summary Relief, PDE asserts that:

> Because neither the Model Policy, nor the challenged communications regarding Model Policy, are *orders, directives, requirements, or mandates*, but are instead "advice...[and] not an order, directive, requirement, or mandate requiring the School District...to implement...mandates within their schools" there exists no actual case or controversy regarding PDE's challenged actions. *R.M. v. Ortega*, 2022 WL 17347632, *12 (Pa. Cmwlth. 2022).

Respondents' Application for Summary Relief, ¶ 18 (emphasis in original).

[6] The Current Age-Out Rule as it appears in Section 300.101 of its Policies and Procedures is consistent with Section 1301.

[7] The State Plan contains Current Age-Out Rule as follows:

Plan." Exhibit P-56. PDE agreed to amend "***its*** IDEA Policies and Procedures" to reflect the New Age-Out Rule. Exhibit P-3, ¶ 1.2 (emphasis added). In paragraph I.3 of the Settlement Agreement, PDE agreed to "implement" and to "enforce" the New Age-Out Rule. The clear and unmistakable language of the Settlement Agreement establishes that PDE has bound itself to enforce the New Age-Out Rule.

In addition to adopting the New Age-Out Rule in Section I of the Settlement Agreement, PDE agreed to take additional steps to implement the New Age-Out Rule. First, it agreed to send notices to parents and students of "their right to re-enroll." Exhibit P-3, Section II. In paragraph VI of the Settlement Agreement, PDE agreed that breaches of the Settlement Agreement shall be remedied by "specific

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> The Commonwealth of Pennsylvania (PA) ensures that all children with disabilities aged 3 years to 21 years of age residing in PA have the right to a free appropriate public education (FAPE), including children with disabilities who have been suspended or expelled from school. There is an age-related exception under the provision of 34 CFR § 300.102(b). Under the School Code (24 P.S. § 13-1301)… Every child, being a resident of any school district, between the ages of six and twenty-one (21) years, may attend the public schools in his district, subject to the provisions of this act. Notwithstanding any other provision of law to the contrary, a child who attains the age of twenty-one (21) years during the school term and who has not graduated from high school may continue to attend the public schools in his district free of charge until the end of the school term. Therefore, PA is required to make FAPE available to a child with a disability to the end of the school term in which the student reaches his/her 21st birthday.

Exhibit P-56, § 300.101, p. 2 (ellipses in original).

performance and injunctive or other equitable relief." Exhibit P-3, ¶ VI, p.4. In paragraph X of the Settlement Agreement, PDE agreed that the Settlement Agreement was a "binding legal document." Exhibit P-3, ¶ X, p. 4.

In *Giant Food Stores,* your Honorable Court found that the rule under consideration was a regulation that needed to go through required rulemaking processes because the agency in that case "viewed the terms of the Handbook as binding norms and [a] Hearing Examiner ministerially applied those notes to resolve" a dispute. *Giant Food Stores*, 713 A.2d at 180. The clear and unmistakable terms and conditions of the Settlement Agreement bind PDE to the New Age-Out Rule and commit PDE to enforce it. Under these facts, it is clear that the New Age-Out Rule is a regulation that should have gone through rulemaking.

Even if the Settlement Agreement did not bind it to implementation of the New Age-Out Policy, PDE must enforce its reading of the IDEA as a condition of its receipt of funding under that statute. The IDEA requires every state to have in effect a process for receipt, independent review, and final determination of written complaints filed by any "organization of individual" alleging violations of any procedural or substantive failure of a local educational agency to comply with the IDEA. *See* 34 C.F.R. §§ 300.151 – 300.153. The state educational agency—in this case, PDE—must issue final findings of fact and conclusions of law in response to any such complaint within sixty days, *see id*. at § 300.152(a), and impose "corrective

action" against the non-compliant local educational agency, including "compensatory services and monetary reimbursement," *id.* at § 300.151(b). Having notified the parents of every student who aged out of eligibility for IDEA-mandated services during the 2022-2023 school term or during the summer of 2023 that they now may seek services through their child's twenty-second birthday, PDE would now have this Court believe that if it receives a compliance complaint from one of those parents—or from an organization representing one or more of them—that it issue a final ruling advising the complainant that compliance with the new, allegedly IDEA-mandated Age-Out rule is entirely within the discretion of the local agency.

That the new rule is not an enforceable mandate is also belied by expert opinion evidence presented in this case. Mr. Andrew Faust, an attorney who has had a storied career in the field of special education, signed an affidavit in this case. Exhibit P-61. Mr. Faust explained the practical binding effect of the Settlement Agreement beginning on page 26 of his Affidavit. Mr. Faust summarized the complaint process overseen by PDE and the special education due process procedures. Mr. Faust explained that PDE's compliance staff and special education hearing officers will enforce the new Age-Out Rule. *See* Exhibit P-61, ¶ 83.

Another expert whose affidavit was submitted by the Petitioners is Andrew Klein—an educational consultant who has approximately 50 years of experience in

the field of special education.[8] *See* Exhibits P-33, P-30. Included in his experience is his work as a special education hearing officer for approximately 17 years and a program auditor for approximately 16 years. Exhibit P-33. Like Mr. Faust, Mr. Klein explained how the Settlement Agreement carries the weight of law. *See* Exhibit P-33, ¶ 19. Mr. Klien explains how special education hearing officers will give legal effect to the New Age-Out Rule. Exhibit P-33, ¶ 20. He also discussed the compliance processes of PDE and rendered the opinion that PDE "employees will treat the Settlement Agreement and related documents as legally binding." Exhibit P-33, ¶¶ 21, 22.

The explanations of both Mr. Faust and Mr. Klein are truisms based on the clear and unmistakable language of the Settlement Agreement, as well as applicable law that will be discussed hereinafter. Just as the Court noted in *Giant Food Services* that a Hearing Officer's application of a rule in a handbook lead to the conclusion that the rule had the force of law, the undisputed opinions by Mr. Faust and Mr. Klein lead to the same conclusion that special education hearing officers will enforce the New Age-Out Rule.

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[8] Mr. Klein's expert opinion was recently cited approvingly by your honorable court in *Smith v. Warwick Sch. Dist.*, 2023 Pa. Commw. Unpub. LEXIS 676, *1 (Pa. Commw. Ct. Dec. 20, 2023).

In addition to the clear and unmistakable language of the Settlement Agreement and the explanation by Mr. Faust and Mr. Klein, the language in other PDE documents make it clear that the New Age-Out Rule is mandatory. PDE's Penn*Link announcement to public school entities stated that "[e]ffective no later than September 5, 2023, all students entitled to FAPE . . . may remain enrolled in public school until they turn 22 years of age." Exhibit P-26. That is a mandatory statement establishing PDE's intention that the rule is mandatory. In the training PowerPoint by PDE, this same statement was repeated, again evidencing the mandatory nature of the New Age-Out Rule. *See* Exhibit P-6, slide 6. PDE's training expressly stated to school entities that:

> **The following students may re-enroll for the 2023-23 school year**:
>
> - A student with a disability who turned 21 and exited during or after the 2022-2023 school term.
> - A student with a disability who turned 21 and a parent/guardian/student signed a Notice of Recommended Education Placement/Prior Written Notice (NOREP/PWN) related to graduation but now wants to re-enroll.

Exhibit P-6, slide 8 (bold in original).

In the letter that PDE sent to parents, guardians, and students, which is mentioned above, the following statement was made:

> Under the new policy, students who are eligible under federal IDEA may access a Free and Appropriate Public Education until their 22nd birthday. This means if a student would have traditionally exited from

> high school during or after the school term in which they turned 21 years of age, ***they now may remain in school until their 22nd birthday.***[9]

Exhibit P-25 (emphasis added).

Nothing in the PowerPoint suggested that the New Age-Out Rule was only optional. Nothing in the notice to parents, guardians, and students suggested that students could remain in school only if the school district agreed.

Building on the mandatory and legally binding and enforceable language of the Settlement Agreement, these PDE documents make it clear that PDE intended the New Age-Out Rule to be mandatory and not just a legal interpretation. In no manner did PDE qualify its notices and training to say that the New Age-Out Rule was optional.

(a) *PDE's Assertions About the "Model Policy" Are Misplaced.*

In paragraphs 1, 2, 3, 6, 9, 14, 15, 16, 17, 18 and 31 – 34 of their Application for Summary Relief filed on November 28, 2023, the Respondents build a spurious

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[9] Perhaps PDE would have the Court believe that its use of the word "may" in the Agreement, the Penn*Link, and the parent letter, was intended to suggest that a school district has discretion to allow a student to participate through his or her twenty-second birthday (as in, "your school district has our permission to allow your child to participate through his or her twenty-second birthday"), as opposed to suggesting that it is the parents and students who have discretion to return to eligibility (as in, "you and your child may elect to return"). The context, however, makes clear that the "may" used in these documents was not intended to grant discretion to school districts.

defense upon the foundation of the so-called "Model Policy," ignoring the State Plan and the language of the Settlement Agreement. In paragraph 6 of the Respondents' Application for Summary Relief, Respondents mistakenly assert that the Petitioners "seek to enjoin PDE from 'enforcing' or further disseminating its guidance regarding the Model Policy." In paragraph 9, the Respondents refer to "[t]he Model Policy at issue." In paragraph 16, the Respondents assert that "LEA's may, but are not required to, implement the Model Policy" and in paragraph 18, the Respondents assert that "[b]ecause neither the Model Policy, nor the challenged communications regarding Model Policy, are *orders, directives, requirements or mandates,* but are instead 'advice,'" PDE has not adopted a regulation. With all due respect to the Respondents, the Petitioners have not taken aim solely (or even primarily) at the Model Policy. It is curious at best as to why the Respondents devote so much ink to the Model Policy alone, ignoring the State Plan, the plain language of the Settlement Agreement, and the applicable provisions of the IDEA regarding the State Plan and the Model Policy.

The "State Plan" and the "Model Policy" are distinct and separate documents. *Compare* Exhibit P-56 (the "State Plan") and Exhibit P-23 (the "Model Policy"). The Settlement Agreement required PDE to change both the "State Plan," and the "Model Policy." The State Plan was attached to the Settlement Agreement as Exhibit A of the Settlement Agreement. The footer on each page of that Exhibit A is "State

Plan 2018—July 1, 2018."[10] *See also* Exhibit P-56. The third recital in the Settlement Agreement expressly referenced the State Plan and attached the State Plan as Exhibit A of the Settlement Agreement. Section I.1. of the Settlement Agreement expressly required PDE to "rescind and cease implementing and enforcing the Current Age-Out Policy as it exists in Section 300.101 of **its** IDEA Policies and Procedures," *i.e.*, the State Plan. Exhibit P-3 (emphasis added). The next section of the Settlement Agreement, *i.e.*, section I.2., requires the Model Policy to be amended regarding the Age-Out Rule. For reasons unknown, PDE focuses on the Model Policy, ignoring the State Plan.

Perhaps PDE's focus on the Model Policy, ignoring the State Plan, grows from the two facts—(1) the "look and feel" of the two documents are the same; and (2) the Model Policy and not the State Plan was attached to the federal complaint filed against PDE on July 11, 2023. *See* "Exhibit 1" of Exhibit P-1. They are both called "Policies and Procedures under 34 C.F.R. §§ 300.101 – 300.176." They were both dated July 1, 2018. However, the State Plan and the Model Policy are distinct governing documents falling into different and distinct places of the legal fabric.

[10] This should be compared to the footer of the Model Policy, which provides, "LEA Policies and Procedures—July 2018." Exhibit P-23.

The State Plan, as its name implies, represents the Commonwealth's plan to ensure compliance with the IDEA. The State Plan is prepared and submitted to the federal government for approval in accordance with the following regulation:

> A State is eligible for assistance under Part B of the Act for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets the conditions in §§ 300.101 through 300.176.

34 C.F.R. §300.100; *see also* 20 U.S.C.S. § 1413(a)(1).

The State Plan represents the Commonwealth's promises and representations to the federal government that it will enforce the provisions in its State Plan to ensure compliance with the IDEA. The state standards that are set forth in the State Plan are enforceable through the IDEA. *See CJN v. Minneapolis Pub. Sch*., 323 F.3d 630, 639 (8th Cir. 2003); *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist*., 198 F.3d 648, 658 (8th Cir. 1999). In *Michael C. ex rel. Stephen C. v. Radnor Twp. Sch. Dist*., 202 F.3d 642 (3d Cir. 2000), the Court said:

> Entitlement to a [free appropriate public education, or] FAPE, by its terms, encompasses an appropriate educational program that is individually-designed for each student in accordance with the requirements of Part B [of IDEA] and ***the educational standards of the State*** in which the student's parents reside. In addition, under 34 C.F.R. § 300.600, each State must exercise a general supervision over all programs in the State that provide educational services to disabled students, and ***must ensure that all such programs meet State education standards*** and Part B requirements.

Id. at 648 (emphasis added).

Under the IDEA, the duty to provide FAPE to students is shared by both the state and local educational agencies. One court described this shared responsibility as follows:

> "The IDEA divides responsibilities for ensuring access to FAPE between State Educational Agencies ("SEAs") and Local Educational Agencies ("LEAs")." *Lejeune v. Khepera Charter Sch.*, 327 F. Supp. 3d 785, 789 (E.D. Pa. 2018) (citing 20 U.S.C. § 1413). To receive federal funding under the IDEA, a state must submit a plan to the Secretary of Education with policies and procedures that ensure that the state is complying with the IDEA and providing students with a FAPE. 20 U.S.C. § 1412. In turn, ***the SEA makes funding available to LEAs that comply with the SEA's plan under the IDEA***. 20 U.S.C. § 1413. "The SEA is responsible for general supervision of the implementation of the IDEA in the state, while the LEA is responsible for directly providing educational programming." *Lejeune*, 327 F. Supp. 3d at 789 (citation omitted).

Ida D. v. Rivera, 2018 U.S. Dist. LEXIS 196572, *4 (E.D. Pa. 2018) (emphasis added).

The IDEA specifically requires school districts to have a plan that is consistent with the State Plan. The IDEA provides:

> (a) In general. A local educational agency is eligible for assistance under this part [20 USCS §§ 1411 et seq.] for a fiscal year if such agency submits a plan that provides assurances to the State educational agency that the local educational agency meets each of the following conditions:
>
> (1) Consistency with State policies. The local educational agency, in providing for the education of children with disabilities within its jurisdiction, has in effect policies, procedures, and programs that are consistent with the State policies and procedures established under section 612 [20 USCS § 1412].

20 U.S.C.S. § 1413(a)(1).

Not only does the IDEA require the local plans adopted by school districts to be consistent with the State Plan, but also, the regulations of the Pennsylvania State Board of Education require the local plans to be consistent with the requirements of such plans as established by PDE. The applicable regulations provide that: "The Secretary will prescribe the format, ***content*** and time for submission of the special education plan." 22 Pa. Code §14.104(a) (emphasis added). The State Board regulations further provide that school district plans are to be submitted to PDE for approval and that PDE will approve the plan if "[t]he plan meets the specifications defined in this chapter and the ***format, content and time for submission of the agency plans prescribed by the Secretary***." 22 Pa. Code § 14.104(f)(4) (emphasis added). In light of these provisions, PDE's assertion that LEA's may, but are not required to, implement the Model Policy" (*see* ¶ 16 of PDE's Application for Summary Relief) is simply not correct as a matter of law. School district plans must contain the "content" of the Model Policy in order to obtain approval from PDE. 22 Pa. Code §§ 14.104(a); 14.104(f)(4).

In light of the foregoing, by agreeing in the Settlement Agreement to change both the State Plan and the Model Policy, PDE has created a mandatory rule requiring compliance with the CDL and RRA.

(3) The IDEA Does Not Compel the New Age-Out Rule

In its Application for Summary Relief, PDE asserts that the New Age-Out Rule "is both compelled by Federal Law and [] sets forth PDE's understanding of IDEA requirements . . .."[11] Respondents' Application for Summary Relief, ¶ 17. These assertions are in error and exemplify a fundamental misunderstanding of the IDEA by PDE.

For ages above 18, the IDEA leaves it up to the states to determine whether FAPE will be provided. *See N.D. v. Reykdal*, 2023 U.S. Dist. LEXIS 175828, 2023 WL 6366045 (W.D. Wash 2023). As an exception to the rule that FAPE extends to age 22, the IDEA expressly leaves it to state law, practices in the state, and applicable court orders to define the ages during which children with disabilities are entitled to FAPE. The IDEA articulates the exception as follows:

> (B) Limitation. The obligation to make a free appropriate public education available to all children with disabilities ***does not apply with respect to children***—
> (i) ***aged*** 3 through 5 and ***18 through 21*** in a State to the extent that **[1]** ***its application*** to those children would be ***inconsistent with*** **[2]** ***State***

[11] Many paragraphs of the Respondents' Application for Summary Relief are awkward because they are based on the fundamental flaw of being couched in terms of the Model Policy, as if that was the only thing about which the Petitioners complain. Instead, the Petitioners complain about the New Age-Out Rule agreed upon in the Settlement Agreement, PDE's commitment to implement and enforce the New Age-Out Rule, and PDE's September 5, 2023, change to both the State Plan and to the Model Policy, both of which are legally enforceable.

> ***law or*** **[3]** ***practice, or*** **[4]** ***the order of any court***,[12] respecting the provision of public education to children in those age ranges . . ..

20 U.S.C. § 1412(a)(1)(B) (emphasis and bracket numbers added).

The "application" of FAPE[13] to a student's 22nd birthday is inconsistent with state law, practice, and Court Order in Pennsylvania. *See N.D.*, 2023 U.S. Dist. LEXIS 175828.

(a) State Law.

Regarding state law, as discussed previously herein, the School Code and the regulations of the State Board of Education set forth the age-out rules. Section 1301 provides:

> Every child, being a resident of any school district, between the ages of six (6) and twenty-one (21) years, may attend the public schools in his

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[12] This language was in the original Public Law 94-142 enacted in 1975. It makes perfect sense that Congress was deferential to state practices and Court Orders that states may have entered into in light of the fact that Pub. L. 94-142 was based in large part upon two landmark cases that were decided earlier in the decade--*Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Ass'n for Retarded Children*, 343 F. Supp. 279. Both of these cases expected FAPE to be provided until a child reached age 21.

[13] 20 U.S.C. §1412(a)(1)(B) uses the phrase "its application," clearly referring to the obligation to provide FAPE. It is a fundamental canon of statutory construction that courts must give effect to all words of the statute. *In re WR Grace & Co*., 729 F.3d 332, 341 (3d Cir. 2013); *United States v. Grasha*, 2020 U.S. Dist. LEXIS 142401 (W.D. Pa. 2020). In short, the application of the obligation to provide FAPE is not required when it would be "inconsistent with State law or practice, or the order of any court. PDE's New Age-Out Rule to provide FAPE until a student's 22nd birthday is inconsistent with law, with the practices of the state, and with a court order.

> district, subject to the provisions of this act. Notwithstanding any other provision of law to the contrary, a child who attains the age of twenty-one (21) years during the school term and who has not graduated from high school may continue to attend the public schools in his district free of charge until the end of the school term.

24 P.S. § 13-1301.[14]

> Similarly, the regulations of the State Board of Education provide:
>
> School age is the period of a child's life from the earliest admission age to a school district's kindergarten program until graduation from high school or the end of the school term in which a student reaches the age of 21 years, whichever occurs first.

22 Pa. Code § 11.12.[15]

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[14] The current version of Section 1301 was enacted in 2002, by adding the following sentence: "Notwithstanding any other provision of law to the contrary, a child who attains the age of twenty-one (21) years during the school term and who has not graduated from high school may continue to attend the public schools in his district free of charge until the end of the school term." That sentence did not appear in the School Code until 2002. *See* Act 88 of 2002, P.L. 524, § 10 (2002). The effect of this sentence was to allow students who turned 21 during a school term to stay in school until the end of the term. Until this was added to the School Code, students would leave school upon reaching their 21st birthday.

[15] This regulation was last amended on October 23, 2004 to bring this provision into compliance with the 2002 amendment to Section 1301. Explaining its rationale for this regulatory change in 2004, the State Board of Education said, "The Board has revised § 11.12 to reflect section 10 of the act of June 28, 2002 (P. L. 524, No. 88) (Act 88), which amended section 1301 of the code (24 P. S. § 13-1301)." 34 Pa. Bull. 5798, 5799.

(b) Court Order.

There is only one Order about which we are aware that addresses the Age-Out Rules in Pennsylvania—the PARC Consent Decree. The PARC Consent Decree provides, in relevant part, the following:

> Defendants are bound by Section 1301 of the School Code of 1949, 24 Purd. Stat. Sec. 13-1301, to provide free public education to all children six to twenty-one years of age.

Pennsylvania Ass'n for Retarded Children, 343 F. Supp.at 309, ¶ 16.[16]

The New Age-Out Rule that PDE and the Secretary have agreed upon is in violation of the PARC Consent Decree.

(c) Practices in Pennsylvania.

Except for changes made due to COVID in 2021 and 2022,[17] the practices of school districts and of PDE have consistently been that students age out of the right to FAPE no later than the end of the school terms during which they turn 21 years of

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[16] The PARC Consent Decree protects a class of "mentally retarded persons" between the ages of 6 and 21. There was a defendant class that included all school districts. Hearings were conducted by the Court on a Consent Agreement. Notice was provided to interested parties, and objections were filed and considered by the Court. After considering the evidence presented and the arguments made, the court approved the PARC Consent Decree. It remains valid and in force to this day, except PDE has now changed the rule by its agreement to the Settlement Agreement.

[17] *See* Act 66 of 2021 and Act 55 of 2022.

age. The School Districts have presented evidence of the following practices by both PDE and school districts across the Commonwealth.

- *The State Plan.* For decades, PDE has consistently and repeatedly advised the United States Department of Education ("USDE") that children with disabilities age out no later than the end of the school term during which they turn 21. The current State Plan promulgated and implemented by the Commonwealth in accordance with the IDEA contains the Age-Out Rule as set forth in Section 1301. Exhibit P-56, p. 2 ("PA is required to make FAPE available to a child with a disability to the end of the school term in which the student reaches his/her 21st birthday."). The State Plan, including the Current Age-Out Rule, has been approved repeatedly by the USDE. Exhibit P-61, ¶¶ 36 *et seq.*

- *Interpretative Documents.* For decades, PDE has consistently and repeatedly prepared, published, and transmitted guidance and/or interpretative documents that children with disabilities age out no later than the end of the school term during which they turn 21. Exhibit P-5 has been issued by PDE interpreting the rules governing enrollment. ("Students who turn 21 during the school terms are entitled to [fi]nish that school term.")

- *Internal Communications from PDE.* Reacting to an article that the right to FAPE lasts until a student's 22nd birthday, a PDE official said in July 2023, "[t]he

article is inaccurate when it says entitled until age 22 (as we all know under 300.101).” Exhibit P-7.

- *USDE Approval.* The USDE, knowing of Pennsylvania’s age-out rule that children with disabilities age out no later than the end of the school term during which they turn 21, has never advised PDE or any school district in Pennsylvania that the rule was in violation of the IDEA and has consistently and repeatedly since the IDEA and its predecessor law was first enacted in 1975 approved Pennsylvania’s plan, including the enrollment ages in the plan. Exhibit P-61, ¶ 39.

- *PDE Enforcement.* PDE is required to enforce the IDEA in Pennsylvania and ensure that school districts are complying with the IDEA. An example of a compliance assurance document is marked as Exhibit P-4. (“The Pennsylvania Department of Education (PDE) is responsible for developing and maintaining a system that ensures that each child with a disability receives a free appropriate public education (FAPE) and that each family has access to a system of procedural safeguards.”). Until now, PDE has never required school districts to provide FAPE to children with disabilities until their 22nd birthdays.

- *The Model Policy for LEAs.* For years, the Model Policy prepared by PDE for school districts to adopt provided that that children with disabilities age out no later than the end of the school term during which they turn 21. *See* Exhibit P-23. The current Model Policy provides:

> Notwithstanding any other provision of law to the contrary, a child who attains the age of twenty-one (21) years during the school term and who has not graduated from high school may continue to attend the public schools in his district free of charge until the end of the school term. Therefore, PA is required to make FAPE available to a child with a disability to the end of the school term in which the student reaches his/her 21st birthday.

Exhibit P-23, p. 3.

- *Special Education Due Process Proceedings.* Children with disabilities who claim that they are entitled to services that are not being provided by a school district have the right to file an administrative complaint seeking a due process hearing before a special education hearing officer. Because of the knowledge throughout Pennsylvania about the age-out rule, no claims have been made before a special education hearing officer that the age-out rule lasts until a student's 22nd birthday. Exhibits P-42, P-33; *see also* Exhibit P-61, ¶¶ 40, 41; Exhibit P-33, ¶ 13.

- *School District Policies.* School districts across the Commonwealth adopt policies governing their affairs, including policies governing enrollment. These policies are published on each school district's website. These policies are known to PDE generally. All school district policies governing the age-out rule define it as no later than the end of the school term during which they turn 21. The policies of Pittsburgh, Central Bucks, and Upper Darby each provide*:*

> Notwithstanding any other provision of law to the contrary, a child who attains the age of twenty-one (21) years during the school term and who has not graduated from high school may continue to attend the public schools in his district free of charge until the end of the school term.

> Therefore, PA is required to make FAPE available to a child with a disability to the end of the school term in which the student reaches his/her 21st birthday.

Exhibits P-46, P-47 and P-48.

- *Lack of Enforcement Action by the USDE.* From 1975 through the present, neither the USDE nor the United States Department of Health, Education and Welfare notified the Commonwealth of Pennsylvania that its age limits on the right to a free appropriate public education violated any federal law; nor did these agencies condition the receipt of federal funding under the IDEA or any of its predecessors on the repeal, revision, or alteration of Pennsylvania's age limit on the right to FAPE. The USDE never cited the Commonwealth, disqualified a State Plan or funding application, required corrective action, or otherwise expressed disapproval of the age limitation as it appears in Section 1301. *See* Exhibit P-42.

- *No Judicial or Administrative Agency Enforcement Act.* Evidence will be presented that no court or administrative agency has ever ordered, decreed, or otherwise required that PDE extend the right to FAPE under state or federal law through the twenty-second birthday of any child with a disability. *See* Exhibit P-42.

In light of the foregoing, the evidence is overwhelming and clear that the "practices" in Pennsylvania for purposes of 20 U.S.C. § 1412(a)(1)(B) that the age-out rule was no later than the school term during which the student turned 21. As

such, this is all that is required under the IDEA in light of the clear and unmistakable language of 20 U.S.C. § 1412(a)(1)(B).

(4) The IDEA Does Not Mandate the Change of Age-Out Rule.

Ignoring state law, the practices in the Commonwealth, and the PARC Consent Decree, PDE and Amici supporting PDE[18] argue that IDEA compels the New Age-Out Rule. PDE and Amici base their contention on 20 U.S.C. § 1412(a)(1)(A) and several federal decisions interpreting this section. For example, Amici argues:

> States like Pennsylvania that accept federal funds under the IDEA are required to provide a FAPE "to children with disabilities residing in the State between the ages of 3 and 21, inclusive . . ." 20 U.S.C. § 1412(a)(1)(A) (emphasis added). Three federal circuit courts of appeal have considered the question of what "inclusive" means. Without exception, they all have held that "'inclusive' . . . means that the relevant period . . . ends on the last day of his 21st year.

(Amici brief, p.7)

Similarly, PDE argued in its Preliminary Objections as follows:

> PDE amended the Model Policy to indicate its understanding that, under IDEA, students are entitled to FAPE until the end of their 21st year of age.

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[18] On November 6, 2023, two disabled students and their families; the Council of Parent Attorneys and Advocates, Inc.; the Education Law Center; and the Juvenile Law Center (together "Amici"), filed an Application for Leave to file a brief as Amici Curiae in support of the Respondents. The PSBA does not object to the filing of the brief by said Amici. Amici appended a copy of their Brief to their Application.

(PDE's Preliminary Objections, p.3)

However, these arguments have no merit. First and foremost, the alleged need to comply so-called federal requirements[19] does not excuse PDE from complying with either the CDL or the RRA. Second, PDE's agreements in the Settlement are in direct violation of the IDEA both procedurally and substantively.

(5) Procedural Violations of the IDEA.

PDE's Settlement mandates that the Age-Out Rule in the State Plan and the Model Policy be required to change. *See* Exhibit P-3, ¶ I.2. However, the State Plan cannot be changed without going through a public hearing process. The IDEA provides:

> Public participation. Prior to the adoption of any policies and procedures needed to comply with this section (including any amendments to such policies and procedures), the State ensures that there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities.

20 U.S.C. § 1412(a)(19).

The regulations under the IDEA similarly require a public hearing process, providing as follows:

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[19] Although the Respondents argue that they are just implementing a federal requirement, the School Districts vigorously disagree that the IDEA mandates the new age-out rule, as argued in this Memorandum of Law.

> (a) Prior to the adoption of any policies and procedures needed to comply with Part B of the Act (including any amendments to those policies and procedures), the State must ensure that there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities.

34 C.F.R. § 300.165(a).

The IDEA regulations further provide:

> (b) Before submitting a State plan under this part, a State must comply with the public participation requirements in paragraph (a) of this section and those in 20 U.S.C. 1232d(b)(7).

34 C.F.R. § 300.165(b).

The statutory provision that the IDEA regulations cite (*i.e.*, 20 U.S.C. § 1232d(b)(7)) also requires a public and open process before the adoption of the Model Policies. It provides as follows:

> (b) Assurances. An application submitted under subsection (a) shall set forth assurances, satisfactory to the Secretary—
> * * *
> (7) that the State will provide reasonable opportunities for the participation by local agencies, representatives of the class of individuals affected by each program and other interested institutions, organizations, and individuals in the planning for and operation of each program, including the following:
> (A) the State will consult with relevant advisory committees, local agencies, interest groups, and experienced professionals in the development of program plans required by statute;
> (B) the State will publish each proposed plan, in a manner that will ensure circulation throughout the State, at least sixty days prior to the date on which the plan is submitted to the Secretary or on which the plan becomes effective, whichever occurs earlier, with an opportunity for public comments on such plan to be accepted for at least thirty days;

> (C) the State will hold public hearings on the proposed plans if required by the Secretary by regulation; and
> (D) the State will provide an opportunity for interested agencies, organizations, and individuals to suggest improvements in the administration of the program and to allege that there has been a failure by any entity to comply with applicable statutes and regulations;

20 U.S.C.S. § 1232d(b)(7).

Consistent with these legal requirements, Pennsylvania's State Plan submitted to and approved by the USDE promised a public process before changes are made to the Model Policy. On page 46 of Pennsylvania's Model Policy, PDE represented to the USDE as follows:

> §300.165 – Public participation. PDE's policy and procedures are that prior to the adoption of any policies and procedures needed to comply with IDEA-B (including any amendments to those policies and procedures), the State conducts public hearings, issues adequate notice of the hearings, and provides an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities. These procedures are conducted consistent with the public participation requirements of 20 U.S.C. 1232d(b)(7).

Exhibit P-56, p. 46, § 300.165.

Notwithstanding the statutory and regulatory requirements and Pennsylvania's representations in its State Plan, the Settlement Agreement that PDE entered into expressly required that the State Plan be changed. The Settlement Agreement provides, in pertinent part:

> 1. PDE will rescind and cease implementing and enforcing the Current Age-Out Policy as it exists in Section 300.101 of its IDEA Policies and Procedures.

> 2. PDE has amended Section 300.101 of its IDEA Policies and Procedures to reflect that the IDEA requires the Commonwealth of Pennsylvania to provide a FAPE to children with disabilities until their 22nd birthday ("Amended Age-Out Policy," attached as Exhibit B).
> 3. Immediately upon execution of the Agreement, PDE will implement, publish, and enforce the Amended Age-Out Policy, which will be effective no later than September 5, 2023.
> 4. The Amended Age-Out Policy will apply to all children with disabilities as defined in 34 C.F.R. § 300.8, including those who turned 21 during or after the 2022-2023 school term.

Exhibit P-3, p.2, ¶I.1 through I.4.

It is undisputed that no notice was given. *See* Exhibit P-63, Stip. ¶'s 48-49. No public hearings were held. No comment was solicited, received, or considered. In short, PDE's defense that "the IDEA made me do it" is flatly incorrect as PDE's actions were in direct violation of the procedural requirements of the IDEA, the IDEA regulations, and the State Plan.

(6) Substantively, the IDEA Does Not Compel FAPE until a Student's 22nd Birthday.

PDE now claims that it has been violating the IDEA for years because—Section 1301 to the contrary notwithstanding—the application of the FAPE mandate to age 22 would *not* be "inconsistent with State law … respecting the provision of public education," within the meaning of 20 U.S.C. § 1412(a)(1)(B)(i). PDE now believes that it provides "public education" to adults, including those between the age of 21 and 22. The FAPE mandate therefore should ride along. The question we

must examine thus boils down to whether Pennsylvania indeed *doe*s provide "public education," as the IDEA uses that term, to adults.

The answer is "no." The IDEA does not define the phrase "public education" discretely. The phrase does, however, anchor the term FAPE, which is the essential mandate of the IDEA and is defined in pertinent part as "special education and related services that … include an appropriate preschool, elementary school, or *secondary school* education." 20 U.S.C. § 1401(9)(C) (emphasis added). As noted above, and as mirrored in the definition of FAPE, the IDEA applies only to local agencies that are "elementary or *secondary schools*," and a "secondary school" is one "that provides *secondary education*, as determined under State law, except that it *does not include any education beyond grade 12*." 20 U.S.C. § 1401(27) (emphasis added). The notion, embodied explicitly in the IDEA, that secondary education does not involve education beyond "grade 12" is consistent with common practice in the field of education and with findings of the USDE's Institute of Educational Sciences, National Center for Education Statistics, which offers the following description of the upper limits of secondary education both in the United States and internationally:

> Upper secondary education immediately follows lower secondary education and includes general (academic), technical, and vocational education, or any combination thereof, depending on the country. An upper secondary attainment level is roughly equivalent to a U.S. high school diploma.

National Center for Education Statistics, Education Indicators: An International Perspective / Indicator 1 Side Bar, p. 16 (1996).

There is little doubt that the term "public education" as used in the IDEA is, at its upper limits, commensurate with a high school education that culminates with the award of a high school diploma.

In its Penn*Link announcing the Age 22 policy change, PDE cited a single statute in support of its contention that "[i]n Pennsylvania, adult education programs are made available to individuals between the ages of 21 and 22." That cited statute is the Pennsylvania Adult and Family Literacy Education Act, 24 P.S. §§ 6401 *et seq*., a 1984 law that provides for the coordination of various state and federal grant programs to support *entirely discretionary* programming offered by a variety of public and private non-profit organizations interested in supporting "adult literacy education" and "family literacy education." The Act establishes skeletal requirements for awarding grants to support such programs, *id*. at § 6404, and limitations on the use of funds, if funds are available, *id*. at § 6405. Nothing in this Act requires that the Commonwealth fund or award grants for these purposes; nor does the Act entitle any individual or group to participate in or receive state-supported adult or family literacy programming. To be eligible to participate in adult or family literacy programming, if available, an adult cannot be "currently enrolled in a public or private secondary or postsecondary school." *Id.* at § 6403. Nothing in

this Act defines grant-funded programming as "secondary education," nor requires compliance with curriculum standards applicable to high school-level education, nor allows for the award of a high school diploma for successful completion.

In its answer to the Application filed in this case, PDE cites to Section 1925 of the Public School Code, which provides as follows:

> Any board of school directors may admit persons … more than twenty-one years of age ... to suitable special schools or career and technical schools or departments.

24 P.S. § 19-1925.

This provision, however, applies to schools operated for "out-of-school youth and adults" who are not participating in secondary education. *See id*. at 19-1922, and the only application of this provision is to "Technical Institutes," the purpose of which is "offering post-high school programs to prepare out of school youths and adults for occupations requiring technical training." 22 Pa. Code § 339.56(a). Technical Institutes thus do not offer secondary education, do not confer high school diplomas, and are not typically free to participants therein, as out-of-school youth and adults can be charged up to one-third of the cost of the vocational training they receive. *See* 22 Pa. Code § 339.55.

PDE and Amici strenuously argue that the New Age-Out Rule is mandated by the IDEA as a matter of substantive law and that PDE is not doing anything other than stating its new interpretation of the IDEA. PDE and Amici base their arguments

on 20 U.S.C. § 1412(a)(1)(A)[20] and several federal cases from other states. The federal cases cited by either the PDE or Amici are as follows: *A.R. v. Connecticut State Bd. Of Educ*., 5 F.4th 155, 157–58 (2d Cir. 2021); *K.L. v. Rhode Island Bd. of Educ*., 907 F.3d 639, 641 (1st Cir. 2018); *E.R.K. ex rel. R.K. v. Hawaii Dep't of Educ*., 728 F.3d 982, 986 (9th Cir. 2013); *K.O. by & through J.O. v. Jett*, No. 21-CV-1837, 2023 WL 5515981, at *1 (D. Minn. Aug. 25, 2023). PDE and Amici argue that because of Pennsylvania's Adult and Family Literacy Education Act, 24 P.S. § 6402, Pennsylvania's public school districts must provide FAPE to a child until his/her 22nd birthday. Relying on the foregoing federal cases, Amici succinctly argued as follows:

> Pennsylvania provides adult education programs that share all of the same characteristics of "public education" as the adult education programs in Connecticut, Rhode Island, and Hawaii. These programs, which include Adult Basic Education, Adult Secondary Education, and High School Test Equivalency Preparation, (1) permit students to continue pursuing the equivalent of a high school education without an upper age limit, (2) are publicly funded, and (3) are administered by the Commonwealth.

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[20] The first recital in the Settlement Agreement also cites 20 U.S.C. § 1412(a)(1)(A), as does PDE's Preliminary Objections. Neither the Settlement Agreement nor PDE's Preliminary Objections cite the actual statutory provision that applies and supports Pennsylvania's age-out rule that is based on Section 1301—i.e., 20 U.S.C. § 1412(a)(1)(B). It is hard to understand why the section of the IDEA that governs this situation was ignored.

(Brief of Amici, p. 12)

Simply stated, the cases relied upon are distinguishable, and the Pennsylvania Adult and Family Literacy Education Act does not change the Age-Out Rule in Pennsylvania to a student's 22nd birthday. None of those cases addressed practices like the practices that exist in Pennsylvania. In addition to being distinguishable, none of the cases cited by PDE and Amici considered whether a state's adoption of a law like the Pennsylvania Adult and Family Literacy Education Act expands the ages during which school districts must provide FAPE under the IDEA under spending clause jurisprudence. *See Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 16-17, 101 S. Ct. 1531, 1539 (1981).

As stated above, PDE and Amici found authoritative three circuit court opinions in which the Ninth, First, and Second Circuit Courts of Appeal found that adult education programs in Hawaii, Rhode Island, and Connecticut constituted "public education" for purposes of Section 1412(a)(1)(B)(i). Unlike Pennsylvania's adult education programs, however, the Hawaii adult education at issue in *E.R.K. ex rel. R.K.*, 728 F.3d at 985-88, and the Connecticut versions at issue in *A.R.*, 5 F.4th at 165-66, offered credited courses or their equivalent in public schools, and the successful completion of those courses could culminate in the award of a high school diploma. Pennsylvania's Adult Literacy program does not. Both the *E.R.K.* and the *A.R*. courts, moreover, recognized that the term "public education" as used in Section

1412(a)(1)(B)(i) was necessarily commensurate with "secondary education." *See E.R.K.* 728 F.3d at 988; A.R., 5 F.4th at 166-67. These courts effectively concluded that adult education at issue in Hawaii and Connecticut was secondary in nature. There is nothing in Pennsylvania law that suggests the same. *See N.D.*, 2023 U.S. Dist. LEXIS 175828.

While the Rhode Island adult education programs at issue in *K.L.*, 907 F.3d 639, were admittedly more akin to those grant-funded programs offered in Pennsylvania, the court in *K.L.* relied on an absurdly broad interpretation and meaning of "public education," requiring only that it be state funded and state controlled. *See K.L.,* 907 F.3d. at 641. So expansive a definition would encompass everything from an art appreciation class at a public art museum to a law school program at a State University. It is incompatible with the notion that Spending Clause statutes should be narrowly interpreted in a manner consistent with the reasonable expectations of contracting parties.

In addition to the foregoing, the federal cases cited by PDE and Amici do not address the practices in those states or the existence of a Court Order, like the PARC Consent Decree. In contrast, the School Districts have presented substantial evidence of the practices in Pennsylvania that establish quite clearly that children with disabilities age out no later than the end of the school terms during which they turn 21.

The most recent federal decision on this issue that we could find is *N.D.*, 2023 U.S. Dist. LEXIS 175828. That court held that the adult education programs in that state did not work to extend the Age-Out Rule in that state. *See id.*

There is a saying that the "truth is in the pudding." In this case, the truth that the IDEA does not require PDE's alteration of the age-out rule is the fact that the USDE has consistently approved Pennsylvania's state plans and policies that state what the Age-Out Rule is.

(7) The IDEA does not Require the Adoption of the New Age-Out Rule in Violation of State Law under Spending Clause Jurisprudence.

Statutes such as the IDEA, which derive their authority from the "Spending Clause" of the United States Constitution, *see* U.S. Const., art. I, § 8, cl. 1, are essentially "contracts" between Congress and State or local recipients of federal funding. The recipients of federal munificence must enter into their contractual relationship with the federal government "voluntarily and knowingly." The Supreme Court has reasoned that recipients cannot "knowingly accept" a deal with the federal government unless they "would clearly understand ... the obligations" that would come along with doing so. *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 16-17, 101 S. Ct. 1531, 1539 (1981). The high Court in *Arlington Central School District v. Murphy,* 548 U.S. 291, 126 S. Ct. 2455 (2006), applied this spending clause analysis to the IDEA, concluding that recipients of IDEA funding did not have "clear notice" that reimbursement of parent expert witness fees could

be part of the "costs" that school districts would have to incur in IDEA litigation. *Id.* at 296, 126 S. Ct. at 2459. More recently, the Court concluded that under the Rehabilitation Act and the Affordable Care Act—both spending clause statutes—plaintiffs cannot recover damages for "emotional distress" because state and local recipients of funding under these statues could not possibly have factored such potential liability into the bargain they struck with the federal government. *Cummings v. Premier Rehab Keller, P.L.L.C,* ___ U.S. ___, ___,1452 S. Ct. 1562, 1570 (2022) (*citing, among others, Arlington Central School Dist. Bd. of Ed. v. Murphy*, 548 U.S. at 296).

The IDEA "contract" applies to states that submit annual grant applications and plans in support thereof. The IDEA permits states to retain up to fifteen percent of the grant and requires that each state award the remainder of the grant to award subgrants to LEAs. *See* 20 U.S.C. § 1411(f). Only LEAs can receive subgrants under the IDEA. *See id*. An LEA under the IDEA is—

> a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or *secondary schools* in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools.

20 U.S.C. § 1401(19).

A "secondary school" under the IDEA is, in turn—

> a nonprofit institutional day or residential school, including a public secondary charter school, that provides secondary education, as determined under State law, except that it does not include any education beyond grade 12.

Id. at §1401(27) (emphasis added). Only LEAs as thus defined can receive subgrants under the IDEA.

PDE believes that the Commonwealth's IDEA-based "contract" with the federal government requires overriding Section1301. Its belief hinges entirely on an exception to an exception in the language of the IDEA itself. Section 1412(a)(1)(A) requires states to make a "free appropriate public education" available to children with disabilities "between the ages of 3 and 21, inclusive." 20 U.S.C § 1412(a)(1)(A). The addition of the word "inclusive" would certainly suggest that the intended FAPE coverage of the IDEA contract encompasses the entire year that a child with a disability is age 3, and the entire year that he or she is age 21. That is the general rule in 20 U.S.C. §1412(a)(1)(A).

The exception, however, is that the FAPE mandate does *not* apply to children with disabilities—

> aged 3 through 5 and 18 through 21 in a State to the extent that its application to those children would be *inconsistent with State law* or practice, or the order of any court, *respecting the provision of public education* to children in those age ranges ….

Id. at 1412(a)(1)(B)(i) (emphasis added).

This rule, and its exception, has been an explicit provision of the IDEA "contract" since its inception in 1975. *See* Pub. L. 94-142, § 612(2)(B), 89 Stat. 773. PDE does not dispute that state law in Pennsylvania ends the right to public education at the conclusion of the school term during which the student attains age 21, if he or she has not graduated before that time. *See* Section 1301. By its own admission in the Settlement Agreement by which it voluntarily resolved the case of *A.P.*, Civil No. 2:23-cv-02644, PDE has notified the USDE of the age limitation embodied in Section 1301. It has done this through its submission of the State Plan for approval. The State Plan and the Model Policy are means by which PDE assures USDE of Pennsylvania's compliance with the IDEA mandates, and, until August 30, 2023, they included the following statement:

> Under the School Code (24 P.S. §13-1301) … Every child, being a resident of any school district, between the ages of six and twenty-one (21) years, may attend the public schools in his district, subject to the provisions of this act. Notwithstanding any other provision of law to the contrary, a child who attains the age of twenty-one (21) years during the school term and who has not graduated from high school may continue to attend the public schools in his district free of charge until the end of the school term. Therefore, PA is required to make FAPE available to a child with a disability to the end of the school term in which the student reaches his/her 21st birthday.

Settlement Agreement, Exhibit A (ellipses in original).

The undisputed evidence is that the USDE has never advised or notified PDE that the age limitation established in Section 1301 violates the IDEA. PDE has

received its full share of funding under its statutory contract with the federal government since 1976. *See* Exhibits P-36 – P-41.

VII. CONCLUSION

For the foregoing reasons, the School Districts respectfully request that the Court grant its Application for Summary Relief and grant Summary Judgement in favor of the Petitioners and against the Respondents.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 2135, I certify the following:

This brief complies with the type-volume limitation of Rule 2135, as it contains 11,864 words, excluding the parts of the brief exempted by the Rule.

Dated: December 29, 2023

/s/ Michael I. Levin, Esquire
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CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify that I served the foregoing Brief in Support of Petitioners' Application for Summary Relief on the following counsel and counsel on the date indicated below in the manner indicated, which service satisfies the requirements of Pa. R.A.P. 121:

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