INITIAL THOUGHTS ABOUT THE LIGONIER VALLEY CASE

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Keep in mind that the big cases present opportunity. The real impact of the case will be determined in succeeding months and years largely by (a) the strength of positions taken by parents and schools, and (b) the skill of counsel in both making the right arguments and anticipating the steps ahead. Choose positions and counsel wisely.

But for the unique mess that is special education law, *Ligonier Valley*[1] is unremarkable and tells us only two things:

- special education cases must be brought within two years of when parents knew or should have known of their claim; and
- the possible remedy for a school's failure is completely open-ended.

As a result, school districts need to:

- improve – and document – child find systems and efforts; and
- improve communication with parents – and documenting it – about the student's educational program and progress.

It also means:

- proof relating to an appropriate remedy will have a more prominent place in hearings; and
- identifying, with specificity, claims asserted is more critical, both to be able to determine:
  - ⇒ the timeliness of the claim; and
  - ⇒ that the scope and relevance of evidence submitted for the remedy is properly related to the claim.

Now that the court has ruled that there is no limiting cap on a potential remedy, schools can reasonably expect larger settlement demands. Of course, at a hearing, parents still need to prove justifying reasons for their claimed compensatory education relief. Such proof could be difficult.

Ligonier Valley notes, as we have always known, that schools have an independent obligation to identify when a child's program is not right and attempt to fix those things. But the court actually gives some emphasis to parental vigilance. Although the decision pays homage to prior decisions seeming to excuse parents, *Ligonier Valley* states that "parental vigilance is vital to the preservation and enforcement" of the child's rights. Parents "may not . . . knowingly sit on their rights or attempt to sweep both timely and expired claims into a single 'continuing violation' claim brought years later." Going forward, parents may not so easily invoke the excuse of ignorance, especially if the school starts to implement "informed disclosure and consent" strategies (see below).

Another evidentiary difficulty is that *Ligonier Valley* effectively adopted the *Reid/Penn Manor* qualitative compensatory education standard. In the concluding section, the decision summarizes that the courts, "in the exercise of their broad

1. *G.L. v. Ligonier Valley Sch. Dist. Auth.*, C.A. 14-1387, 2015 WL 5559976 (3rd Cir. Sept. 22, 2015).

discretion, may award [compensatory education] to whatever extent necessary to make up for the child's lost progress and to restore the child to the educational path he or she would have traveled but for the deprivation." The case discusses *M.C.*, not as supporting hour-for-hour compensatory education, but for identifying the compensatory time period: the child "is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem." It is for this time frame that the "restored educational path" standard applies.

As a consequence of this "restored educational path" standard, the "potential" part of "educational benefit in relation to the child's potential" gains new emphasis. There is a direct connection between "potential" on the one hand and "lost progress" (or quality of "educational loss") and the "educational path he or she would have traveled" on the other. School psychologists cannot still shy away for this sometimes delicate issue.

Given the open-ended nature of the remedy, "child find" claims will be problematic for schools. Establishing that parents should have known prior to some expert first identifying a child will be difficult. In contrast, the school - with its stable of experts - can readily be held to "should have known" at some earlier time period. Accordingly, schools need to improve their child find efforts, starting with the obvious and easy red flags: serial discipline; teacher comments bearing on academic, social, or behavioral struggles; placement in partial hospitalization programs or alternative education programs; grade retention (one of the "red flags" in the *Ligonier Valley* case); serial visits to the nurse; truancy/ attendance; etc. Less obviously, but equally important to systematic child find, is ensuring postings and notices are prominent, frequent, made in a variety of media, and both broadly made generally and targeted to identifiable demographic groups.

Apart from child find, the other area open for change and improvement is communication with parents, effectively giving schools the evidentiary bases to show parents should have known sooner (in essence, "you 'should have known' because we told you so!"). The court's emphasis on known or should have known and the important role of parental vigilance over the child's education means parental agreement to a NOREP might now actually mean something. Just what it means, however, is directly related to what the NOREP states and how well it is stated. Similarly, quarterly progress reports might put parents on reasonable notice about "progress" claims, but only in relation to the information conveyed. Schools might perhaps now view these and related matters less as "informed consent" and more as "informed disclosure:" letting parents know, in clear language, that if they have any concern about their child's educational program and progress, parents may file a complaint notice, and that the law limits the time period for filing a complaint notice.

The battles to establish just what *Ligonier Valley* means now begins. Expect those issues to involve the quality of what schools tell parents and the type and amount of compensatory education needed to restore the child's educational path. Choose your fights carefully.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.