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Re: Formal Complaint Regarding the Pennsylvania Department of Education's Ongoing Violations of Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, and Title VI of the Civil Rights Act of 1964.

Dear Ms. Bhargava,

This Complaint, filed by the Education Law Center of Pennsylvania ("ELC"), alleges that the Pennsylvania Department of Education's policies and practices regarding Alternative Education for Disruptive Youth ("AEDY") programs have resulted in the disproportionate placement of students with disabilities and African American students in AEDY disciplinary placements. ELC asserts that AEDY programs are significantly more limited and inferior to traditional public school programs and that students placed in these disciplinary settings are denied equal opportunities to access quality educational experiences. ELC files this Complaint against the Pennsylvania Department of Education ("PDE") on behalf of students with disabilities and African American students who were placed and continue to be placed in AEDY programs on a disproportionate basis in violation of Section 504 of the Rehabilitation Act of 1973 ("Section 504"), Title II of the Americans with Disabilities Act of 1990 ("Title II"), and Title VI of the Civil Rights Act of 1964 ("Title VI"), and their respective implementing regulations.

I. INTRODUCTION

The Education Law Center is a non-profit legal advocacy organization dedicated to ensuring that all Pennsylvania children have access to a quality public education. ELC's work has focused on addressing the educational needs of the most vulnerable children who historically have been at a disadvantage in the public education system, including economically-disadvantaged children, minority children, children with disabilities, English language learners, children experiencing homelessness, children in foster homes and institutions, and others. Through individual advocacy, class action litigation, and legislative initiatives, ELC has advocated on behalf of thousands of students and regularly represents students who are unfairly disciplined in school districts across Pennsylvania. ELC is recognized as a statewide and national expert in education law and school climate issues.

ELC alleges that as a result of PDE's policies and practices, including its approval of AEDY programs, numerous school districts in Pennsylvania are discriminating against students with disabilities through their misuse of AEDY placements. The disproportionate and frequent placement of students with disabilities in such disciplinary settings violates regulations implementing Title II and Section 504. ELC alleges, in part, that PDE has neglected its ultimate responsibility for ensuring that every local education agency in Pennsylvania complies with Section 504, including its prohibition against discrimination. In addition, PDE's actions in establishing, approving, and funding AEDY programs, but failing to adequately monitor them and enforce students' legal protections, have the effect of discriminating against students with disabilities in violation of Title II. By turning a blind eye towards overwhelming evidence of the disparate impact on students with disabilities, PDE has violated its duties under both Section 504 and Title II. In addition, though not the subject of this Complaint, PDE is also neglecting its duties under the Individuals with Disabilities Education Act ("IDEA") to ensure that all children with disabilities in AEDY programs receive a free, appropriate public education.

ELC independently alleges that as a result of PDE's policies and practices, including its approval of numerous AEDY programs in particular school districts, PDE is responsible for the overrepresentation of African American students in AEDY programs. The disproportionate placement of these students in disciplinary settings violates regulations implementing Title VI. This Complaint seeks to enforce the rights of African American students who are disproportionately harmed by the AEDY placement policies of PDE and individual districts. ELC asserts, in part, that less discriminatory approaches exist, which more effectively reduce disruptive behaviors in school and have a less discriminatory impact.

Furthermore, ELC asserts that PDE has chosen to ignore the rampant use of "non-AEDY" disciplinary placements of students. While little is known about these placements, given that PDE does no monitoring of these programs, it is likely that these programs are also disproportionately and adversely impacting students with disabilities and African American students. We specifically ask the Department to investigate the extent to which public schools in Pennsylvania are utilizing these non-authorized disciplinary programs, whether students placed in these programs receive a quality education, and whether particular subgroups of students are placed in these programs at a disproportionate rate.

In response to these allegations, ELC respectfully requests that the Department of Justice Educational Opportunities Section:

- Fully investigate all claims asserted in this Complaint;
- Direct PDE to improve its guidance and establish clear criteria for the placement of students into AEDY programs as well as their transition back to regular schools;
- Ensure that PDE actively monitors all AEDY programs across the state to ensure that students with disabilities and African American students are afforded proper procedural protections, including due process procedures and manifestation hearings;
- Direct PDE to perform quarterly compliance reviews of school districts' alternative school policies and procedures to ensure that school districts do not discriminate against students with disabilities and African American students;
- Direct PDE to review the records of all students with special education needs and African American students currently placed in AEDY programs;
- Direct PDE to promote and provide resources and technical assistance for the implementation of evidence-based practices to reduce disruptive behavior and protect the rights of students with disabilities and African American students by reducing disparate placement in AEDY programs;
- Direct PDE to develop a process and protocol to determine and document the placement of students into AEDY programs, to ensure that all student files are appropriately reviewed each semester, and that students successfully transition back into regular education;
- Direct PDE to develop less discriminatory alternatives to AEDY placements that can be implemented in school districts, such as positive behavior intervention supports (PBIS);
- Direct PDE to ensure that students in AEDY programs receive a quality public education that is equivalent to or better than academic and extra-curricular opportunities afforded to students in the regular education environment;
- Direct PDE to monitor and report rates of graduation for all students placed into AEDY during high school;
- Direct PDE to develop and implement a process for an administrative appeal whereby students who believe they have been improperly placed into an AEDY program can have their placements independently reviewed by PDE and reversed where appropriate; and
- Direct PDE to prohibit school entities from operating or placing students in non-approved and unregulated disciplinary settings.

II. JURISDICTION

PDE is Pennsylvania's state education agency ("SEA") and is a recipient of federal financial assistance and is therefore subject to the antidiscrimination prohibitions of Title VI, Title II, and Section 504. The Department of Justice is the appropriate venue for this Complaint, as the DOJ Educational Opportunities Section has the primary responsibility for enforcing Title II and Title VI provisions with respect to recipients of federal education funds. This Complaint is timely because the policies and practices of PDE and districts which unnecessarily cause a disparate impact on students with disabilities and African American students are ongoing and continuing.

III. FACTUAL BACKGROUND

A. *History of AEDY in Pennsylvania – Inferior Programs by Design*

Pennsylvania's Alternative Education for Disruptive Youth programs were created in 1997, when the Pennsylvania General Assembly enacted the state's first law on alternative education. This law, Act 30, created a state-level grant program through which districts, intermediate units, and a consortium of schools could apply for supplemental funding to operate AEDY programs to serve students in middle school and high school.¹ Under this law, program approval and available grant funding are to be provided to any public school (school district, intermediate unit, area vocational-technical school, charter school, special school jointure, or any combination/consortium of public schools) that meets the minimum program requirements.² In 1999, the Legislature amended the law to authorize districts to purchase AEDY services from private "alternative education institutions" approved by PDE.³

Under the law, a "disruptive student" is defined as any student who, "to a marked degree," exhibits:

- (1) a disregard for school authority;
- (2) display of or use of controlled substances on school property or during school-affiliated activities;
- (3) violent or threatening behavior on school property or during school-related activities;
- (4) possession of a weapon on school property;
- (5) commission of a criminal act on school property;
- (6) misconduct that would merit suspension or expulsion; or
- (7) habitual truancy.⁴

It is important to note that, under state law, school districts do not have the legal authority to punish incoming students for conduct that occurred while the student was enrolled in another

¹ 24 P.S. § 19-1901-C *et seq.*

² *Id.*

³ 24 P.S. § 19-1901-E.

⁴ 24 P.S. § 19-1901-C.

district.⁵ However, school districts frequently place students newly arriving in their district into an AEDY program based on alleged conduct from a previous school district, prior placement in a juvenile justice facility, or even involvement in the child welfare system.⁶ ELC believes these practices may contribute to the disparities by race and disability.

The enactment of these laws led to a major growth in the number of AEDY programs operating across the state. By 2006, there were 605 AEDY programs in Pennsylvania serving 31,080 students.⁷

In 2010, the state legislature eliminated the budgetary line item for AEDY grants. As a result, school districts stopped receiving additional grant funding for AEDY programs from PDE. However, school districts across the state continue to fund AEDY programs from general operating funds, which include state funding, and PDE continues to grant approval to districts to operate AEDY programs. The overall number of students placed into AEDY programs statewide has decreased in recent years, but a large number of students are still placed into AEDY programs. During the 2011-2012 school year, there were 705 approved AEDY programs in operation serving 14,470 students.⁸

Very little is publicly known about the quality of instruction provided to students placed into AEDY programs; however, it is clear that many programs provide fewer hours of instruction than traditional public schools (which is permissible under applicable state law), are staffed by less qualified teachers, and provide fewer academic and extra-curricular opportunities. The AEDY statute states that “alternative education programs may operate outside the normal school day of the applicant district, including Saturdays” and allows school districts to modify the separate statutory mandates regarding the number of hours and days of instruction students receive.⁹ PDE has interpreted these provisions to permit districts to provide fewer hours of instruction to students in AEDY programs than students receive in a regular education classroom. Thus, while Pennsylvania middle and high school students in regular education classrooms receive 27.5 hours of academic instruction a week, AEDY programs may provide as

⁵ The AEDY statute contains confusing language stating that AEDY “may include services for students returning from placements or who are on probation resulting from being adjudicated delinquent...or who have been judged to have committed a crime under an adult criminal proceeding.” *Id.* at § 1901-C(1). This does not authorize the automatic placement of students into AEDY programs. Pennsylvania courts have held that school districts lack the authority to punish students for conduct that took place in a different school district. *See Hoke v. Elizabethtown Area Sch. Dist.*, 833 A.2d 304, 310 (Pa. Commw. Ct. 2003)(ruling that a district did not have statutory authority to expel a student for behavior that occurred before he enrolled in the District). Pennsylvania courts have also ruled that districts may not automatically place students into AEDY programs without first holding a hearing to determine if the student meets the definition of a disruptive student. *See D.C. v. Sch. Dist. of Philadelphia*, 879 A.2d 408 (Pa. Commw. Ct. 2005) (law requiring that students returning from delinquency placements be automatically assigned to alternative schools violated Pennsylvania Constitution by not affording opportunity for a hearing).

⁶ ELC has encountered numerous cases in which schools have attempted to do this. Generally, following the threat of legal action, school districts will permit the student to enter the regular school environment. But ELC is only able to represent a small percentage of the students placed into AEDY, and we suspect that numerous violations occur on a regular basis.

⁷ These annual reports are no longer available on PDE’s website, but the most recent report can be found on ELC’s website at http://www.elc-pa.org/2006_2007_AEDY_Annual_Report_Final.pdf.

⁸ Information provided by PDE, Office of Alternative Education, via email to Marnie Kaplan (6/11/2013). Note, it is not clear whether this number includes AEDY programs operated by Pennsylvania’s Intermediate Units.

⁹ 24 P.S. §§ 19-1901-C(1); 19-1902(7).

few as 20 hours of academic instruction.¹⁰ Curricula may also be limited to core academic subjects only, thereby excluding foreign language, computer science, electives, music and art, etc. In addition, the AEDY statute permits privately-operated AEDY programs to assign uncertified teachers to their regular education classrooms.¹¹ While these programs must have certified special education teachers, most students with disabilities placed into these programs also receive instruction from uncertified regular education teachers. Currently, of the 705 AEDY programs in Pennsylvania, 478 are operated by private providers.¹² In 2009, in a formal letter to PDE, which was forwarded to the U.S. Department of Education, ELC complained that allowing AEDY educational programs to operate with fewer hours of instruction than the regular public schools and to employ uncertified teachers violated the federal No Child Left Behind Act and subjected Pennsylvania to potential loss of federal funding.¹³

B. Evaluations of AEDY Programs – Evidence of Drastically Inferior Programs

ELC has gathered a plethora of anecdotal information about AEDY programs through our parent hotline. The experiences of these students and families indicate that many AEDY programs offer significantly subpar academic instruction. ELC has fielded complaints from parents and students that the academic rigor expected in AEDY programs is well below that expected of students in traditional middle and high schools. Many programs provide nearly all “computer-based” instruction. Moreover, some parents have reported that the academic instruction consists of completing worksheets all day long. Others have complained that their high school student was receiving elementary-level math work and that all students in grades 7-12 were receiving the same academic instruction. One parent called our office alarmed that part of her child’s AEDY placement consisted of watching popular movies with no educational content.

AEDY programs are not held accountable for enabling students to meet rigorous academic standards. PDE guidelines assert that “AEDY programs must provide these students with a sound educational course of study that meets or exceeds state standards mandated by 22 Pa Code Chapter 4 and allows students to make normal academic progress toward graduation in their home district.”¹⁴ However, PDE is well aware of the fact that many AEDY programs provide only the four “core” subject areas: math, reading, science and social studies. For the purposes of Annual Yearly Progress (AYP), the standardized test scores of students in AEDY programs are attributed to their sending schools, even if the student has not attended that school in years, so there is no record of how AEDY programs perform academically. In addition, PDE

¹⁰ See PDE, 2013-2015 Alternative Education for Disruptive Youth Program Guidelines (March 2013).

¹¹ 24 P.S. §§19-1902-C(8); 19-1903-E(3)(i) (specifically exempting private providers from 22 Pa. Code Ch. 49, the state’s teacher certification regulations).

¹² Pennsylvania Department of Education, Office of Alternative Education, Program Tracker (acquired via a Right to Know Request).

¹³ See Letter from David Lapp to Dana Barron *available at* http://www.elc-pa.org/Dana_Baron_letter.pdf. (ELC received no response to the letter. However, PDE did change its guidelines to increase the required hours in AEDY from 15 to 20. As noted above, 20 hours is still significantly less than the 27.5 hours of instruction each week that students receive in regular classrooms.)

¹⁴ Most recent guidelines available at http://www.portal.state.pa.us/portal/server.pt/community/alternative_education_for_disruptive_youth_%28aed%29/7318.

has never collected or published any data regarding the academic rigor of AEDY programs or the academic performance of AEDY students once they leave AEDY programs and return to traditional schools.

The AEDY statute requires PDE to establish a “review process to annually evaluate the effectiveness of alternative education programs,” which should “include an annual report to the House Education Committee of the Senate and the Education Committee of the House of Representatives.”¹⁵ The most recent annual report completed by PDE was an evaluation of the 2006-2007 school year.¹⁶ No annual reports have been published evaluating the last five years. Moreover, the reports from the earlier years clearly demonstrated that, statewide, students with disabilities and African American students were placed into AEDY at more than double the rate of the general student population.¹⁷

The State has been on notice for many years of the problems raised in this Complaint. In 2010, ELC issued a lengthy report, which questioned the quality and effectiveness of AEDY programs and the impact of such placements on the ability of students to graduate, and provided PDE with recommendations for improvements.¹⁸ ELC’s report also raised particular longstanding concerns: the overrepresentation of students of color and students with disabilities in AEDY programs and the extent to which students with special education needs receive a free and appropriate public education.¹⁹ Other reports about Pennsylvania’s AEDY programs, issued prior to ELC’s report, also noted the large percentage of students with disabilities in AEDY programs and raised questions about whether these students were receiving appropriate services.²⁰

¹⁵ 24 P.S. § 19-1903-C(2).

¹⁶ These annual reports are no longer available on PDE’s website, but the most recent report can be found on ELC’s website at http://www.elc-pa.org/2006_2007_AEDY_Annual_Report_Final.pdf.

¹⁷ Pennsylvania Department of Education, Alternative Education for Disruptive Youth 2005/2006 Annual Report, 18, 22; Pennsylvania Department of Education, Alternative Education for Disruptive Youth 2006/2007 Annual Report, 19, 24. *See generally* Education Law Center, Improving “Alternative Education for Disruptive Youth In Pennsylvania,” 12 (2010), available at http://www.elc-pa.org/pubs/downloads2010/ELC_AltEdPA_FullReport.pdf, 21-22.

¹⁸ *Id.* (This report raised other concerns, including that some AEDY programs may be using potentially dangerous techniques, including corporal punishment, physical and verbal abuse, and the use of restraints and seclusion rooms).

¹⁹ *Id.* at 21-22, 28.

²⁰ *See* Nathaniel S. Hosley, Survey and Analysis of Alternative Education Programs (July 2003) *available at* http://www.rural.palegislature.us/alternative_education.pdf; Christina Ager, Pennsylvania Alternative Education for Disruptive Youth Evaluation Report (2006) (This report, which was commissioned by PDE, was never made publicly available. ELC acquired a copy from the author.).

C. Overrepresentation of Students with Disabilities in AEDY Programs²¹

Alarmed by the large percentage of students with disabilities in the AEDY programs, ELC testified before the state legislature in 2009²² and before PDE's Bureau of Special Education in 2011.²³ Our testimony to the state legislature recommended that PDE "monitor overrepresentation of students with disabilities in alternative education programs and deny funding to school districts accordingly."²⁴ ELC's testimony explained: "PDE should direct the Bureau of Special Education to closely monitor all AEDY programs that serve children with disabilities as part of its cyclical monitoring to determine whether the schools and the sending school districts are fully complying with the IDEA's procedural and substantive requirements."²⁵ PDE has not heeded these recommendations. In fact, PDE's Bureau of Special Education does very minimal monitoring of AEDY programs, including little to no oversight of the provision of a free appropriate public education ("FAPE") to students with Individualized Education Programs ("IEPs"), despite their clear duty as an SEA to ensure a FAPE for all children.²⁶

Based on the failure of PDE to publish annual reports, ELC's long history of receiving complaints about AEDY programs, and the State's lack of response to our efforts to bring the disproportionality problem to its attention, ELC decided to request recent data from PDE to re-examine the percentage of students with disabilities and the percentage of African American students referred to AEDY programs. Based on these requests, ELC received data regarding the 2008-2009, 2009-2010, 2010-2011, and 2011-2012 school years.²⁷ To the extent available, we examined the number of students with disabilities and the number of African American students sent to AEDY programs and compared this data to the overall percentages of these student cohorts in individual school districts.²⁸

ELC's examination of the data revealed that students with disabilities continue to be dramatically overrepresented in AEDY programs across the state. In public schools in Pennsylvania as a whole, 15% of students are identified as students with disabilities.²⁹ In recent

²¹ We use the phrase "students with disabilities" to describe students who have identified disabilities and Individualized Education Programs.

²² Education Law Center, Senate Education Committee Hearing Re: Alternative Education, May 13, 2009 (available at www.elc-pa.org/AltEdTestimonyKlehr2009.doc).

²³ ELC, Testimony Regarding Pennsylvania's Application to the U.S. Department of Education Under Part B of the Individuals with Disabilities Education Act, March 14, 2011.

²⁴ Education Law Center, Senate Education Committee Hearing Re: Alternative Education, May 13, 2009.

²⁵ *Id.*

²⁶ 20 U.S.C. § 1412(a)(1)(A); 34 CFR § 300.600.

²⁷ The raw data received through these requests is available upon request. It is important to note that for the 2011-2012 school year we were only able to obtain the overall number of AEDY students across the state and the overall number of students with IEPs in AEDY across the state. We did not receive 2011-2012 overall AEDY data by race across the state. We also only received district data (total students, IEP students, and African American students) in 2011-2012 for a limited number of individual school districts. Because 2010-2011 data is the most recently available comprehensive data, we primarily reference the 2010-2011 school year.

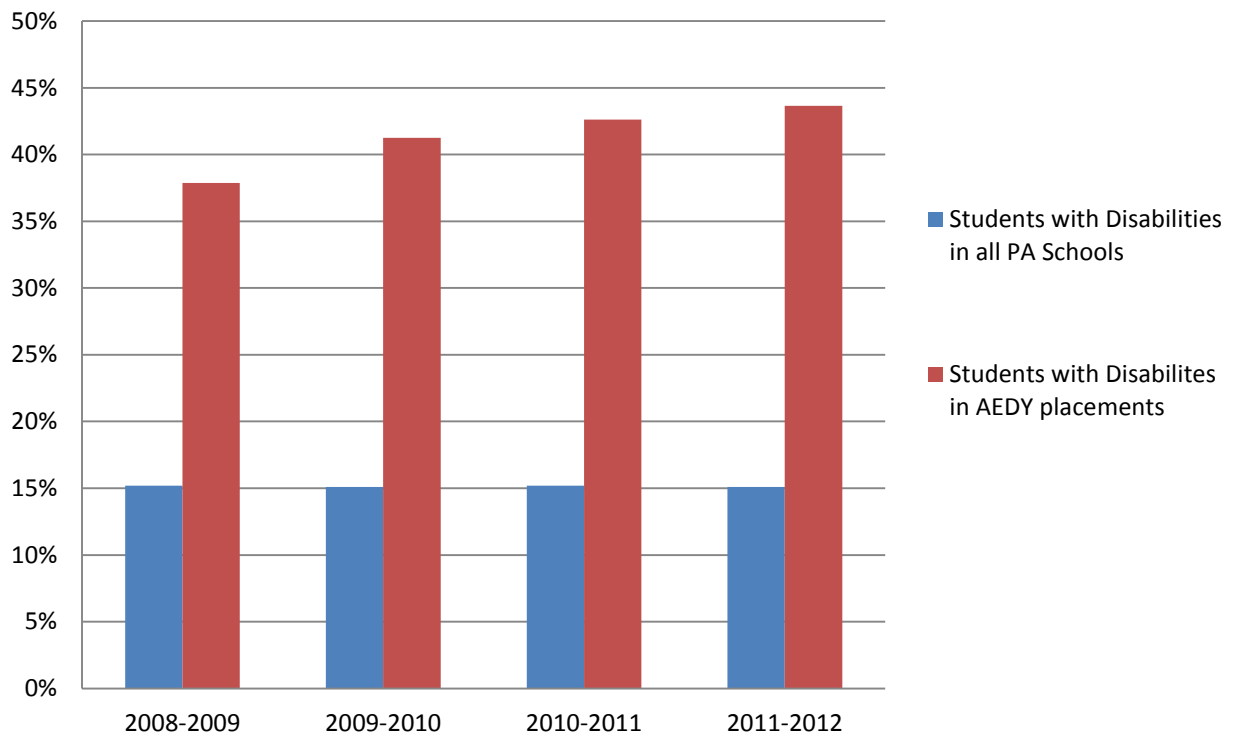
²⁸ The percentages of students with IEPs and of African American students in all schools in the state and in each individual district can be found by utilizing the "Data at a Glance" feature of the PennData Special Education Reporting System of the Pennsylvania Department of Education, which is accessible online at <http://penndata.hbg.psu.edu>.

²⁹ *See e.g.*,

http://penndata.hbg.psu.edu/BSEReports/Data%20Preview/2011_2012/PDF_Documents/Speced_Quick_Report_Sta

years, however, the percentage of students with disabilities sent to AEDY programs has increased to almost *three times the state average*. In 2008-2009, 37.88% of the students sent to AEDY across the state were students with disabilities. This disproportionate number increased over the next three years: from 41.26%, in 2009-2010; to 42.63%, in 2010-2011; to 43.66% in 2011-2012.³⁰ Thus, over the last four school years, while the total number of students sent to AEDY programs statewide has actually decreased, the percentage of students with disabilities served in these programs has increased.

Statewide Disparate Impact on Students with Disabilities in AEDY, 2010-2011



[te_Final.pdf](#). In general, most school districts have identified between 12 and 20 percent of their overall student body as students eligible for special education.

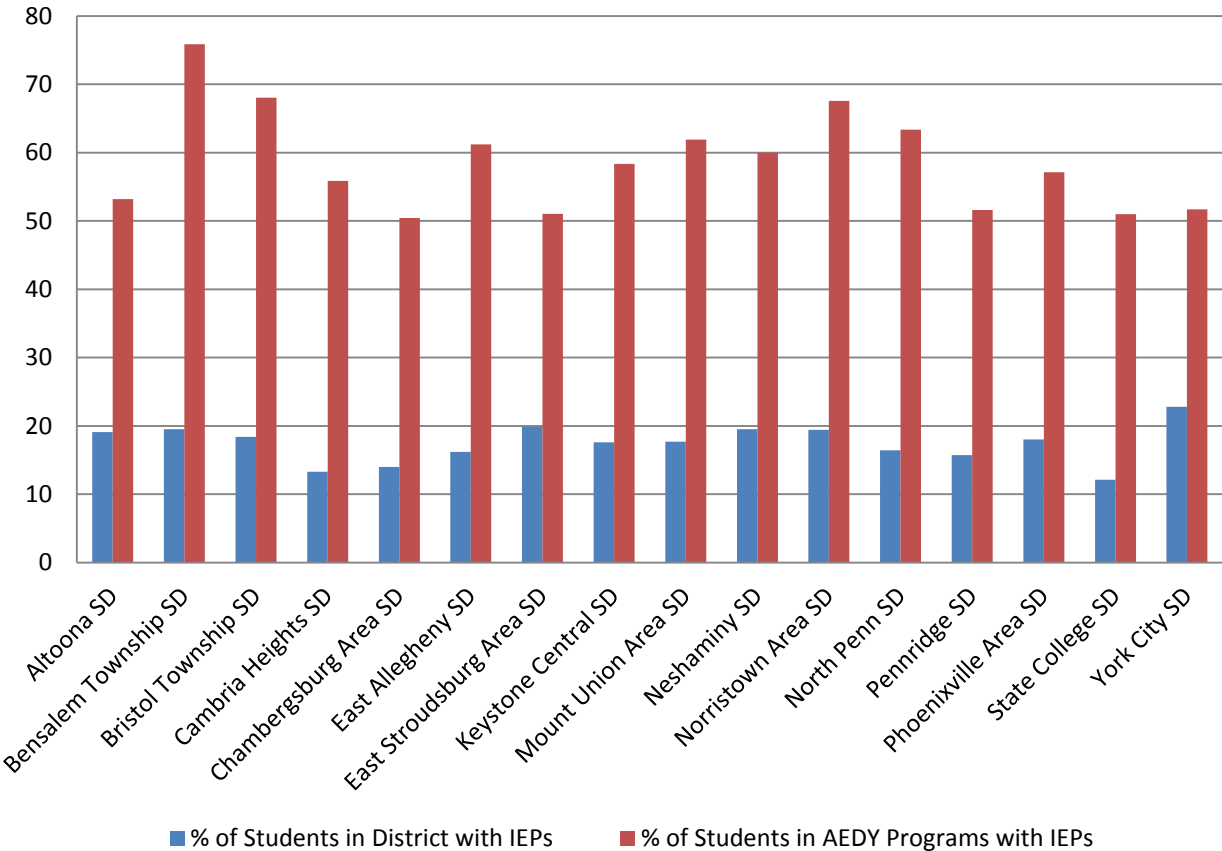
³⁰ ELC Right to Know Request, 9/14/2012.

Individual Districts with Extremely High Disparate Impact on Students with Disabilities

ELC further examined data regarding students with disabilities sent to AEDY programs by each individual school district in Pennsylvania. We found that the vast majority of school districts across the state have a significantly higher percentage of students with disabilities in their AEDY programs as compared to the percentage of students with disabilities in their district as a whole. In 2010-2011, the most recently available statewide data, *ELC identified 82 districts where students with disabilities comprised 50% or more of their AEDY population.*³¹

Of these 82 school districts, 16 school districts placed 40 or more students into AEDY programs in 2010-2011. In each of these districts, the percentage of students with disabilities in the AEDY programs was *more than double the rate* of students with disabilities in the district. *In all but three districts, the rate was more than triple.*

Disparate Impact on Students with IEPs in AEDY Programs, 2010-2011



³¹ In addition to the astonishingly high disparities above, 45 districts operated AEDYs with between 40-49% students with IEPs; 60 districts between 30-39%; and 56 districts between 20-29% students with IEPs.

In addition, disparities for students with disabilities in AEDY have existed in these 16 school districts during each year that ELC collected data.

District	% of Students with IEPs in District (2010-2011)	Total # of Students assigned to AEDY (2010-2011)	% of Students with IEPs in AEDY 2008-2009	% of Students with IEPs in AEDY 2009-2010	% of Students with IEPs in AEDY 2010-2011	% of Students with IEPs in AEDY 2011-2012
Altoona Area	19.1%	94	38.8%	35.4%	53.2%	NA
Bensalem Township	19.5%	58	38.0%	36.8%	75.9%	84.9%
Bristol Township	18.4%	122	26.7%	34.8%	68.0%	38.0%
Cambria Heights	13.3%	34	51.0%	56.8%	55.9%	61.5%
Chambersburg Area	14.0%	113	19.4%	49.1%	50.4%	47.5%
East Allegheny	16.2%	49	28.1%	45.8%	61.2%	47.2%
East Stroudsburg Area	19.9%	47	23.3%	28.6%	51.1%	71.4%
Keystone Central	17.6%	49	26.0%	56.8%	58.3%	45.2%
Mount Union Area	17.7%	42	68.0%	64.6%	61.9%	69.0%
Neshaminy	19.5%	70	54.8%	39.0%	60.0%	NA
Norristown Area	19.4%	74	68.4%	80.6%	67.6%	65.6%
North Penn	16.4%	131	42.9%	47.2%	63.4%	53.0%
Pennridge	15.7%	62	55.1%	68.1%	51.6%	NA
Phoenixville Area	18.0%	42	48.9%	NA	57.1%	70.5%
State College	12.1%	51	35.7%	48.2%	51.0%	44.4%
York City	22.8%	149	50.0%	49.8%	51.7%	37.8%

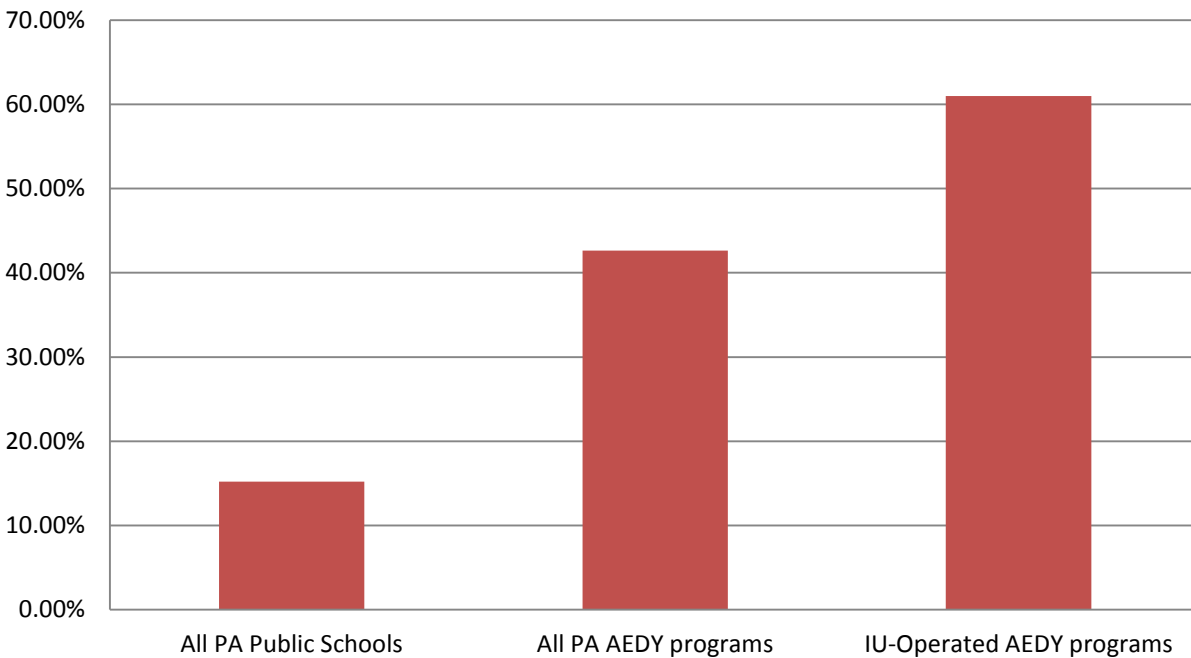
Notably, this data above, which is limited to districts that place more than 40 students, does not capture some of the most troubling disparities in the 2010-2011 data. For example, all 19 of the students that Spring-Ford Area School District placed in AEDY in 2010-2011 — 100 percent — were students with IEPs. Methacton School District placed 26 students in AEDY in 2010-2011 and 23 were students with disabilities — over 88%. Central Bucks School District sent 30 students, Spring Cove School District sent 30 students, and Upper Moreland Township School District sent 20 students. In each of those districts, 70% of the students in AEDY programs were students with disabilities.

Finally, it is important to highlight the alarming, albeit inconclusive, data submitted to PDE from AEDY programs operated by Intermediate Units (“IUs”) in Pennsylvania.³²

³² An intermediate unit is defined as “a regional educational service agency...which provides educational services to participating school districts as part of the public school system of this Commonwealth.” 22 PA Code § 4.3. Each school district of the Commonwealth is assigned to an intermediate unit and is entitled to the services of an intermediate unit in accordance with a program of services adopted by the intermediate unit board of directors. 24

Numerous Pennsylvania school districts send their students to IU operated AEDY programs. In 2010-2011, there were 16 IU operated AEDY programs. Collectively, these programs served 2,517 students and 1,536 of these children — over 60% — were students with disabilities.³³ A number of the individual IU programs were even higher, with near complete segregation of students with disabilities.³⁴ The students assigned to these programs come from many different school districts. However, based on the reported data it is impossible to tell which individual school districts were responsible for assigning these students.

Segregation of Students with Disabilities in IU- AEDY Programs



We have highlighted the data in the above school districts and intermediate units, not to allege intentional discriminatory practices by any of these particular school districts, but rather to demonstrate that the adverse disparate impact of students with disabilities in AEDY placement is widespread and systemic. It is not a problem that can be adequately addressed one district at a time. Rather, it will require statewide intervention to ensure that all districts protect the rights of all students in the state.

P.S. § 9-901-A. Intermediate units are part of the public school system of the Commonwealth and function as any other local educational agency under the IDEA. There are currently 29 intermediate units in Pennsylvania.

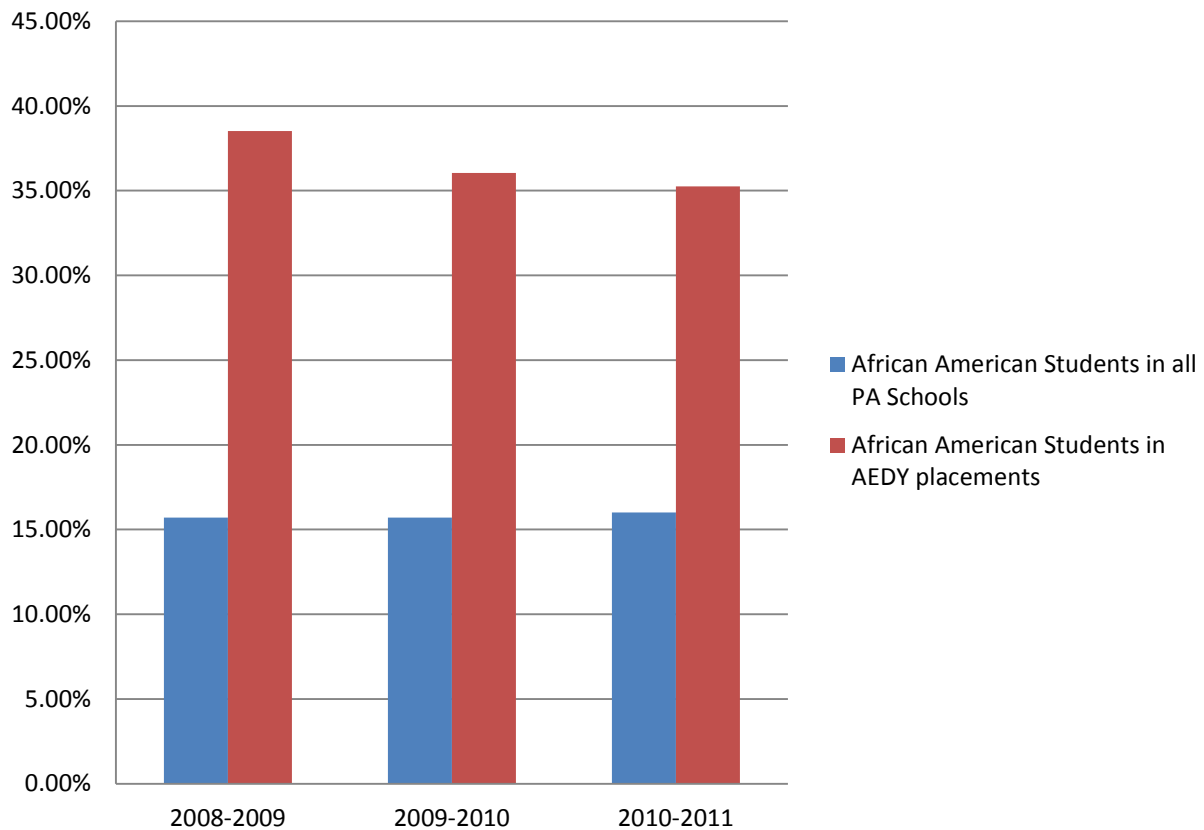
³³ DOJ should note that ELC was so concerned by the high number of IEP students in IU operated AEDY that we submitted separate records requests directly to a number of the IUs. The numbers they provided were inconsistent with the numbers provided by PDE, often showing significantly lower numbers of students overall and lower percentages of students with disabilities. In this report, we are relying on the numbers those AEDY programs submitted to PDE as part of their annual reporting obligations.

³⁴ 95.83% of AEDY students at the Montgomery County IU 23 were students with disabilities; 90.57% at Carbon Lehigh IU 21; 88.72% at Colonial IU 20; 83.48% at Delaware County IU 25; and 73.36% at Chester County IU 24.

D. Overrepresentation of African American Students in AEDY Programs

The percentage of African American students referred to AEDY programs statewide shows that state and local AEDY referral policies have had a disparate impact on African American students. The statewide percentage of African American students in all Pennsylvania public schools has remained steady at just under 16%. During the school years we studied, the percentage of African American students referred to AEDY programs has remained significantly more than two times that percentage. During the 2008-2009 school year, African American students comprised 38.5% of all students sent to AEDY programs. During the 2009-2010 school year, African American students comprised 36.1% of all students sent to AEDY programs. During the 2010-2011 school year, African American students comprised 35.3% of all students sent to AEDY programs.³⁵

Statewide Disparate Impact on African American Students in AEDY



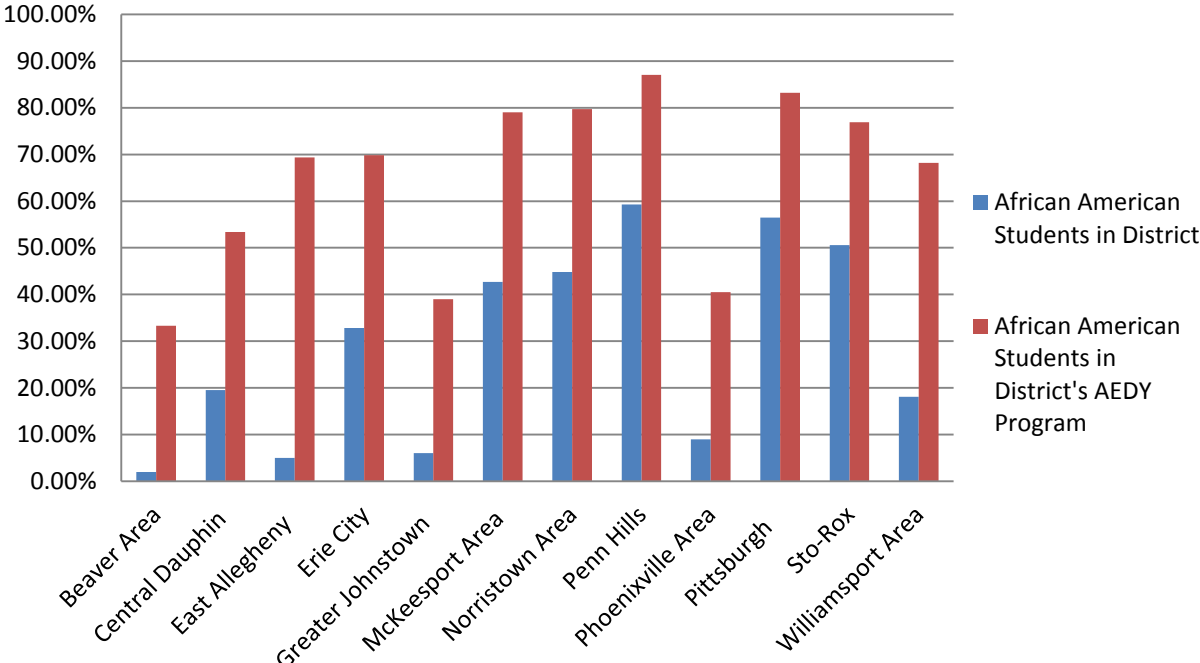
³⁵ As mentioned above, we were unable to obtain statewide data on the racial breakdown of students in AEDY for the 2011-2012 school year.

Individual Districts with Extremely High Disparate Impact on African American Students

ELC also identified a number of specific districts where the disparate placement of African American students in AEDY programs is significantly higher than even the discrepancy statewide. For example, data from the Williamsport Area School District’s AEDY program demonstrates that although African American students represent only 18.1% of Williamsport’s student population, African American students account for 60.6% of all students referred to Williamsport’s AEDY programs.³⁶ In other words, African American students are more than three times overrepresented in Williamsport’s AEDY programs. This overrepresentation has been fairly consistent for the last four school years, with the percentage of African American students in Williamsport’s AEDY programs fluctuating between 60 and 68 percent.³⁷ In the East Allegheny School District, African American students account for 25.6% of the student population, but for 66.7% of all students referred to AEDY programs.³⁸

Overall, in 2010-2011 there were 28 school districts where the discrepancy between the percentage of students in the district who were African American and the percentage of African American students in that district’s AEDY programs was greater than 25 percentage points. Twelve of these districts placed 40 or more students in AEDY.

Disparate Impact on African American Students in AEDY Programs, 2010-2011



³⁶ ELC Right to Know Request 5/22/2013.

³⁷ ELC Right to Know Request 11/27/2012, and ELC Right to Know Request 5/22/2013.

³⁸ ELC Right to Know Request 5/22/2013.

In addition, the disparities for African American students in the AEDY programs of these twelve school districts were generally consistent over all the years that ELC was able to obtain data.³⁹

School District	Total Students in AEDY 2010-2011	% of African American Students in District (2010-2011)	% of African American Students in AEDY 2008-2009	% of African American Students in AEDY 2009-2010	% of African American Students in AEDY 2010-2011	% of African American Students in AEDY 2011-2012
Beaver Area SD	51	2.00%	NA	27.27%	33.33%	NA
Central Dauphin SD	118	19.50%	46.38%	52.87%	53.39%	50.50%
East Allegheny SD	49	25.60%	50.00%	68.75%	69.39%	66.70%
Erie City SD	169	32.80%	67.02%	64.40%	69.82%	62.00%
Greater Johnstown SD	164	6.00%	22.73%	47.88%	39.02%	NA
McKeesport Area SD	81	42.70%	68.29%	69.49%	79.01%	75.70%
Norristown Area SD	74	44.80%	80.34%	79.61%	79.73%	72.00%
Penn Hills SD	85	59.30%	44.24%	88.89%	87.06%	NA
Phoenixville Area SD	42	9.00%	26.67%	NA	40.48%	35.29%
Pittsburgh SD	477	56.50%	84.84%	87.56%	83.23%	84.90%
Sto-Rox SD	52	50.60%	72.97%	77.08%	76.92%	NA
Williamsport Area SD	107	18.10%	61.63%	68.00%	68.22%	60.50%

In 2010-2011, there were also 17 districts in which the disparities for African American students in AEDY was between 20-25%.⁴⁰

³⁹ In 2008-2009 the Penn Hills School District had a lower percentage of African American students in AEDY (44.24%) than in its overall student body (59.30%). During the 2008-2009 school year, Penn Hills placed 269 students in AEDY. That number dropped rapidly to 90 students the next year (2009-2010) and 85 students the year after that (2010-2011). As the overall numbers dropped by two-thirds, the percentage of African American students almost doubled.

⁴⁰ Brownsville Area SD, Canon Mcmillan SD, Cheltenham Township SD, Clairton City SD, Coatesville Area SD, Colonial SD, East Stroudsburg Area SD, Easton Area SD, Freedom Area SD, Greensburg Salem SD, Mechanicsburg Area SD, New Kensington-Arnold SD, Philadelphia City SD, Scranton SD, Steelton-Highspire SD, West Chester Area SD, and Woodland Hills SD.

Individual Districts with High Disparate Impact for *both* African American Students and Students with Disabilities

In 2010-2011, 24 school districts, some of which did not appear on either of the individual lists above, had disparities of 20 percentage points or higher in AEDY placement of *both African American students and students with disabilities*. Thirteen of these districts placed 40 or more students in AEDY in 2010-2011.

School District	Total Students in AEDY 2010-2011	% of Students with IEPs in District (2010-2011)	% of Students with IEPs in AEDY (2010-2011)	Disparity for Students with IEPs (2010-2011)	% of African American Students in District (2010-2011)	% of African American Students in AEDY (2010-2011)	Disparity for African American students (2010-2011)
Beaver Area	51	12.60%	33.33%	20.73%	2.00%	33.33%	31.33%
Central Dauphin	118	12.80%	33.05%	20.25%	19.50%	53.39%	33.89%
Colonial	48	17.20%	47.92%	30.72%	8.40%	29.17%	20.77%
East Allegheny	49	16.20%	61.22%	45.02%	25.60%	69.39%	43.79%
East Stroudsburg Area	47	19.90%	51.06%	31.16%	22.70%	44.68%	21.98%
Greater Johnstown	164	14.40%	41.46%	27.06%	6.00%	39.02%	33.02%
McKeesport Area	81	17.30%	38.27%	20.97%	42.70%	79.01%	36.31%
Mechanicsburg Area	53	11.50%	37.74%	26.24%	7.70%	30.19%	22.49%
Norristown Area	74	19.40%	67.57%	48.17%	44.80%	79.73%	34.93%
Phoenixville Area	42	18.00%	57.14%	39.14%	9.00%	40.48%	31.48%
Sto-Rox	52	20.20%	40.38%	20.18%	50.60%	76.92%	26.32%
West Chester Area	62	13.90%	43.55%	29.65%	7.30%	29.03%	21.73%
Woodland Hills	117	20.40%	46.15%	25.75%	65.10%	88.89%	23.79%

Again, we highlight the data in the above school districts not to allege intentional racial discrimination by any particular school district, but rather to demonstrate that the adverse disparate impact of AEDY placement on African American students is widespread and systemic and requires a statewide solution.

E. Oversight for “Non-AEDY” Disciplinary Programs

An additional long-standing ELC concern has been the proliferation of “non-AEDY” disciplinary programs that operate in schools throughout Pennsylvania and that receive no oversight from PDE. ELC is concerned that the discriminatory impact of these programs on students with disabilities and African American students is even higher than in approved AEDY programs. Additionally, ELC believes that these “non-AEDY” alternative programs are of no better quality than the approved AEDY programs. While PDE has provided *insufficient* monitoring of AEDY programs, PDE has provided *zero* monitoring of these non-AEDY disciplinary programs. Because they do not call themselves “AEDY,” there is no required approval process by PDE. No one at PDE, or anywhere else, conducts any monitoring of these programs. No one knows (1) whether these disciplinary programs are providing students with due process prior to placement, either for nondisabled students or for students with disabilities; (2) whether they are providing students with the full curriculum required for all regular education students under 22 Pa Code § 4; (3) whether students receive the full hours of instruction, 900 hours a year for elementary students and 990 hours a year for middle and high school students; (4) whether these programs are staffed with highly-qualified teachers; or (5) whether these programs are discriminating against students with disabilities or students of color.

Anecdotally, we know that there are hundreds of students in these kinds of programs. In Philadelphia alone, the School District of Philadelphia operates two disciplinary schools which are not AEDY approved – Philadelphia Learning Academy North (“PLA North”) and Philadelphia Learning Academy South (“PLA South”). Originally, PLA North and PLA South exclusively served students who had been *expelled* from the District. For this reason, the District operated under the belief that PLA did not require AEDY approval.⁴¹ However, in recent years non-expelled students have also been placed into PLA North and PLA South, and it has been operated for these students in the same way as an AEDY program. Philadelphia also operates a number of alternative disciplinary programs for students who are in elementary school and, therefore, too young for placement into an AEDY program (which by statute only serves middle and high school students).⁴² PDE does not approve, monitor, or collect any data about these programs.

ELC is also aware of numerous non-AEDY alternative programs which are operated in “Renaissance Charter Schools” in Philadelphia.⁴³ For example, Success Academy is operated

⁴¹ School districts in Pennsylvania need only “make provision” for the education of students under expulsion. 22 Pa Code § 12.6(e)(2). This has been interpreted by Pennsylvania courts as requiring as little as five hours per week of home bound instruction. *See* *Abremski v. Southeastern Sch. Dist.* 421 A.2d 485, 488-89 (Pa. Commw. Ct. 1980) (finding that for students who were expelled for part of one marking period, the district had met its obligation to make provision for the students’ education through a combination of “assigned home study and weekly in-school counseling.”). ELC believes that more education would be required in the context of a longer expulsion. As the School District of Philadelphia provides more than this obligation in the Philadelphia Learning Academies, their position has been that these non-AEDY programs do not require approval by the state.

⁴² *See* Appendix for examples of the cases ELC has encountered of students assigned to the non-AEDY disciplinary programs in Philadelphia.

⁴³ Renaissance Charter Schools are schools which were previously operated by the School District of Philadelphia. Beginning in 2010, the District turned over management of these schools to various charter operators. There are currently 17 Renaissance Charter Schools. A list of the Renaissance Charter Schools is available at

under contract between Olney-Aspira and Specialized Education Services, Inc.⁴⁴ In addition to the program at Olney-Aspira, Specialized Education Services, Inc. also runs alternative disciplinary programs at the Anthony Wayne Academy used by Mastery-Gratz; at Young Scholars Frederick Douglas Charter School; and at Aspira Stetson Charter School. Meanwhile, Camelot operates a disciplinary program out of the basement of the Art and Science Charter School at H.R. Edmunds⁴⁵ and on a separate floor of the Mastery-Gratz Charter School.

These non-AEDY programs are functionally the same as AEDY programs and are even operated by the same private-providers that operate AEDY programs in other school districts.⁴⁶ Just as in AEDY programs, students in these alternative disciplinary programs are segregated from the rest of the student body, often in the basement or on a separate floor of the school.⁴⁷ However, because the program is physically located in the same building as the rest of the school, PDE has determined that these programs do not require AEDY approval or oversight.

ELC is aware that a number of these schools do not afford students due process protections prior to placement.⁴⁸ We believe that, in addition to segregating students, these programs provide a narrower curriculum with fewer hours of academic instruction. These are clearly “disciplinary” programs, and all students have an entitlement to due process prior to placement. In addition, students with disabilities should have procedural protections that ensure they are not being punished for conduct that is either caused by their disability or the result of a failure of their school to provide appropriate educational accommodations. At the very least, to protect against discrimination, PDE should be monitoring these programs and requiring school districts and charter schools to report data related to the placement of students by disability and by race.

http://webgui.phila.k12.pa.us/offices/c/charter_schools/charter-school-directory. For a fuller explanation of Renaissance schools, *see* <http://webgui.phila.k12.pa.us/offices/r/renaissance-schools/about-us>.

⁴⁴ *See* <http://www.sesi-schools.com/schools/success-schools/>.

⁴⁵ At the beginning of the 2012-2013 school year, Art and Science Charter School at H.R. Edmunds Elementary School automatically placed dozens of students into the Camelot-operated alternative disciplinary program. These students were not afforded due process and students with disabilities were not provided manifestation determinations as required under the IDEA. Parents complained to PDE’s Bureau of Special Education, which apparently investigated the school. However, because the program was operated in the basement of Art and Science H.R. Edmunds, PDE apparently determined that the program did not require AEDY approval.

⁴⁶ Camelot Academies runs an approved AEDY program for the School District of Philadelphia as well as alternative disciplinary schools in other jurisdictions. However, PDE has not required it to receive approval to operate in Renaissance charter schools.

⁴⁷ Some have lauded the approach of these disciplinary programs. However, accounts also describe a potentially humiliating environment where students are forced to walk with their hands folded behind their back, mirroring the approach of some high security prisons. *See* <http://thenotebook.org/april-2013/135809/olneys-approach-strict-discipline-personal-attention>.

⁴⁸ *See* Appendix for a sample of the kinds of non-AEDY student experiences ELC has encountered.

IV. LEGAL CLAIMS

A. PDE's Policies and Practices Discriminate Against Students with Disabilities in Violation of Title II and Section 504

Title II provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity.”⁴⁹ The regulations implementing Title II explain that a public entity may not “directly or through contractual or other arrangements, utilize criteria or methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability.”⁵⁰ These regulations also require that public entities make reasonable modifications in policies, practices, or procedures where necessary to avoid discrimination on the basis of disability.⁵¹

The term "public entity" is defined as “any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government”⁵² As made clear in federal technical assistance guidance, Title II is intended to apply to all programs, activities, and services provided or operated by State and local governments.⁵³ In this case, PDE's obligation to eliminate discrimination against students with disabilities in its administration of the AEDY program is not obviated by the fact that the programs are run by local school districts. Courts have recognized that the agency administering a public program has the authority and obligation under Title II to take appropriate steps in its enforcement of program requirements to prohibit discrimination against individuals with disabilities, regardless of whether services are delivered directly by a public entity or provided through a third party.⁵⁴

Section 504 also sets forth that a recipient of federal financial assistance cannot exclude students with disabilities⁵⁵ from participation in or deny them the benefits of its schools, or otherwise subject them to discrimination because of their disabilities.⁵⁶ Section 504's regulations state:

A recipient may not directly or through contractual or other arrangements, utilize criteria or methods of administration (i) *that have the effect of subjecting qualified handicapped persons to discrimination* on the basis of handicap, (ii) that have the purpose or effect of

⁴⁹ 42 U.S.C. § 12132.

⁵⁰ *See* 28 C.F.R. § 35.130(b)(3)(i).

⁵¹ Under Title II, an entity must modify a policy, practice, or procedure unless it can show that the modification “would fundamentally alter the nature of the service, program or activity.” 28 C.F.R. § 35.130(b)(7).

⁵² 42 U.S.C.A § 12131(1).

⁵³ Title II, Americans with Disabilities Act Technical Assistance Manual, Section II-1-2000, available at <http://www.ada.gov/taman2.html>.

⁵⁴ *See e.g.*, *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1066 (9th Cir. 2010); *Kerry v. Heather Gardens Ass'n.*, No.09-409, 2010 WL 3791484, at *11 (D. Colo. Sept. 22, 2010).

⁵⁵ Under Section 504 “individuals with disabilities” is defined to include any individual with a condition that “affects [or substantially limits] a major life activity.” 34 C.F.R. § 104.3(1)(1) (2010.) Students identified as students with disabilities under Section 504 or the IDEA would fall into the definition of “handicapped persons” under Section 504.

⁵⁶ 34 C.F.R. § 104.4(a).

defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same state.⁵⁷

It is therefore clear that the purpose of Section 504 extends beyond intentional discrimination by the school district against students with disabilities. The explicit language of the enacting regulations clarifies that local school districts and SEAs, as recipients of federal financial assistance, are forbidden from using policies that have a discriminatory impact on students with disabilities. In fact, "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by discriminatory intent."⁵⁸

ELC contends that PDE's actions with regard to AEDY programs violate both Title II and Section 504. ELC's analysis reveals that a series of school districts across the state are utilizing AEDY referral policies that have the effect of subjecting students with disabilities to discrimination on the basis of disability. The discriminatory effect of these policies is demonstrated by the data PDE collects. Our analysis discloses that students with disabilities are overrepresented in a series of districts and that this overrepresentation is widespread. For example, although students with disabilities comprised only 16.4% of North Penn School District's student population, they accounted for 53.08% of students sent to AEDY programs in the 2011-2012 school year.⁵⁹ This disparate impact is not a one-year anomaly; it is reflected in at least the past four years of data from North Penn. Additionally, although students with disabilities comprised only 19.4% of Norristown School District's student population, they accounted for 65.6% of students sent to Norristown's AEDY programs in the 2011-2012 school year.⁶⁰

It is unclear why students with disabilities are being referred to AEDY programs on a disproportionate basis. After all, the law mandates that students with disabilities receive extra support and special education services, mandates greater procedural safeguards to protect against discriminatory placements, and also requires the development of functional behavioral assessments and behavioral interventions including positive support plans. Specifically, Section 504 and the IDEA prohibit schools from placing a student in AEDY if the behavior is a manifestation of, or related to, his/her disability. The IDEA imposes specific requirements to fully implement this mandate. First, an LEA must conduct and document a manifestation determination prior to a disciplinary change in educational placement.⁶¹ Additionally, under both

⁵⁷ 34 C.F. R. § 104.4 (emphasis added).

⁵⁸ *Alexander v. Choate*, 469 U.S. 287, 296-97 (1985).

⁵⁹ ELC Data Request Response from Pennsylvania Department of Education, Office of Alternative Education (5/22/2013).

⁶⁰ *Id.*

⁶¹ 34 C.F.R. § 300.530(e)(1)(ii). The exception to this general rule applies in limited circumstances: "An eligible student may be removed to a 45-school-day interim alternative educational setting without the required manifestation determination if the student: 1) Carries a weapon or possesses a weapon at school, on school premises, or at a school function; 2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function; or 3) Inflicts serious bodily injury upon another person while at school, on school premises, or at a school function. 34 C.F.R. § 300.530(g). For children

federal and Pennsylvania laws, a manifestation determination review must be conducted to determine if the student's conduct was substantially related to or the direct result of the student's disability.⁶² If during the manifestation determination the LEA determines that the conduct was the direct result of a failure to implement the IEP, the LEA must take immediate steps to remedy the deficiencies.⁶³

Additionally, under the IDEA, if the LEA, the parent, and the relevant members of the child's IEP Team determine that a student's conduct was a manifestation of his or her disability, the IEP Team must conduct a Functional Behavioral Assessment of the child, unless one has already been conducted.⁶⁴ Similarly, the IEP Team must write a Behavior Intervention Plan ("BIP") for the child, unless one already exists. The requirement in 34 CFR §300.530(f) states that a child with a disability must receive, as appropriate, an FBA and a BIP and modifications designed to address the child's behavior when that behavior is a manifestation of the child's disability. In addition, FBAs and BIPs must also be used proactively if the IEP Team determines that they would be appropriate for the child. The regulations in 34 CFR §300.530(d) require that school districts provide FBAs and behavior intervention services (and modifications) "as appropriate" to all students when the student's disciplinary change in placement would exceed 10 consecutive school days, even if the student's behavior was not a manifestation of his or her disability.⁶⁵ Additionally, the Team may address the behavior through annual goals in the IEP.⁶⁶ The child's IEP may include modifications in his or her program, support for his or her teachers, and any related services necessary to achieve those behavioral goals.⁶⁷ Finally, IDEA regulations and Pennsylvania state law require IEP Teams to consider using positive behavioral interventions and supports in the case of a child whose behavior impedes his or her learning or that of others.⁶⁸

For a student diagnosed with emotional disturbance, Opposition Defiance Disorder, or a myriad of other disorders, there is a high probability that his/her disruptive behavior will be a manifestation of his/her disability. It is also possible that a student with a learning disability who is referred to an AEDY program exhibited disruptive behavior which is related to his/her disability. In fact, research reveals that a majority of students with learning disabilities in general exhibit social skill deficits and behavioral imperceptions issues.⁶⁹ If districts like North

placed in a 45-school-day interim alternative educational setting under 34 C.F.R. § 300.530(g), there is no requirement for a manifestation determination.

⁶² 34 C.F.R. § 300.530(e)(1)(ii).

⁶³ *Id.*

⁶⁴ 34 C.F.R. § 300.530(f).

⁶⁵ *See* 34 C.F.R. § 300.530(c) and (d).

⁶⁶ 34 C.F.R. § 300.320(a)(2)(i).

⁶⁷ 34 C.F.R. § 300.320(a)(4).

⁶⁸ 34 C.F.R. § 300.324(a)(2)(i); 22 PA Code § 14.1333 ("Positive, rather than negative, measures must form the basis of behavior support programs to ensure that all students and eligible young children shall be free from demeaning treatment, the use of aversive techniques and the unreasonable use of restraints. Behavior support programs must include research based practices and techniques to develop and maintain skills that will enhance an individual student's or eligible young child's opportunity for learning and self-fulfillment. Behavior support programs and plans must be based on a functional assessment of behavior and utilize positive behavior techniques.")

⁶⁹ *See e.g.*, Kenneth A. Kavale and Steven R. Forness, *Social Skill Deficits and Learning Disabilities: A Meta-Analysis*, 29 J. OF LEARNING DISABILITIES 226 (a review of 152 studies revealed that approximately 75% of students

Penn and Norristown were following with fidelity the procedural protections required for students with disabilities, these students should not be transferred to an AEDY program with greater frequency than their non-disabled peers. Yet students with disabilities are *two to four times* overrepresented in these districts. This data and the experiences of ELC's clients suggest that school districts across the state are sending disproportionate numbers of students with social and emotional disturbance and other learning disabilities to AEDY programs instead of meeting their needs in traditional schools and utilizing functional behavior assessments and behavior intervention plans, as mandated by the IDEA.

ELC alleges that PDE's actions in establishing and funding AEDY programs, but failing to provide adequate monitoring and accountability, has the effect of discriminating against qualified students with disabilities in violation of Title II. PDE created AEDY programs, "provided" for them by allocating grants to initiate and establish these programs, and funded them for many years. Additionally, PDE continues to fund these programs indirectly through state general funds provided to school districts that operate the programs, and PDE provides oversight to districts that run these programs.⁷⁰ PDE maintains an office that collects and reviews data, issues guidance, and is responsible for auditing these programs. Yet, PDE's Bureau of Special Education has never undertaken any concerted efforts to adequately monitor and assess local districts' placement of students with disabilities in AEDY programs in order to evaluate compliance with IDEA and state law special education requirements. Students with disabilities have been overrepresented in these programs for years, and ELC has repeatedly advised the state that these programs are operating in violation of the law. As a result of its own data collection, PDE has been aware for numerous years that students with disabilities are overrepresented across the state as well as in specific districts, such as the districts identified above. Even with this knowledge, PDE has taken no action to revoke approval or funding from these districts, nor monitor their policies and procedures, nor has PDE made reasonable modifications in state policies regarding oversight.

Furthermore, as a public entity and a recipient of federal financial assistance, PDE has a responsibility to ensure that students with disabilities have meaningful access to the state's programs and that students with disabilities are not being placed in separate, stigmatizing, and in some cases more restrictive settings at a disproportionate rate. As an SEA, PDE has the ultimate responsibility to ensure that all districts in the state comply with IDEA, including the provision of a free appropriate public education in the least restrictive environment.⁷¹ To this end, PDE must ensure that children with disabilities are afforded all applicable procedural protections proscribed by IDEA and state law when disciplinary action is contemplated and imposed,⁷² and determine if significant discrepancies exist in the disciplinary rates of children with disabilities.⁷³ PDE has failed for many years to examine the significant discrepancies that exist with regard to the disciplinary rates of children with disabilities and to take corrective action to review and revise its policies regarding procedural safeguards as appropriate. PDE's failure to properly

with learning disabilities exhibit social skill deficits including inability to perceive emotions and reactions of others); *see also* William L. Heward, *EXCEPTIONAL CHILDREN* (2005).

⁷⁰ Even though there is no longer an AEDY line item in the budget, the state continues to provide districts with basic education dollars that districts then use to pay for AEDY programs.

⁷¹ 20 U.S.C. § 1412(a)(11)(A).

⁷² *See e.g.*, 20 U.S.C. § 1415(E).

⁷³ 20 U.S.C. § 1412(a)(22); 34 C.F.R. § 300.170

oversee and ensure compliance with procedural safeguards set forth in the IDEA and state law constitutes a continual violation of the IDEA, and this violation has resulted in discriminatory outcomes for students with disabilities.

PDE's failure to monitor AEDY programs and hold districts accountable has resulted in an overrepresentation of students with disabilities in AEDY programs. This overrepresentation has subjected these students to the collateral consequences that accompany removals to AEDY programs, including exclusion from the regular education system, multiple disruptions in their education program, and barriers to graduation. Research shows that disciplinary removals from regular school are associated with significantly higher dropout rates and a negative effect on timely graduation.⁷⁴ ELC has worked with many students returning from AEDY programs who struggle when placed back in their traditional school, and far too many eventually drop out. Unfortunately, there is little evidence to rely on besides anecdotes. In fact, even though AEDY programs have existed in Pennsylvania for fifteen years, PDE has not collected any data on the outcomes of students placed in AEDY programs who are eventually transitioned back to their school districts. PDE tracks and reports how many students return to the regular school after being placed in AEDY, but does not track long-term outcomes for these students. Because PDE does not track student length of stay in AEDY programs or link these students to other longitudinal data, it is unknown how many students cycle in and out of these programs during their high school careers and how many students languish in these programs for most of high school.

Based on annual data, the statistics regarding the percentage of students statewide who eventually transition back to a traditional middle school or high school are quite alarming. During the last three years for which there is data from PDE and despite the requirement for semester reviews, less than 23% of students sent to AEDY returned to a regular school classroom.⁷⁵ Although this statistic is not currently captured, we believe that many students may drop out of high school. Thus, based on available data, the discriminatory impact of PDE's AEDY policies and practices not only results in placing students with IEPs in inferior programs, but may significantly increase the likelihood that these students eventually drop out of school.

B. PDE's Policies and Practices Discriminate Against African American Students in Violation of Title VI

Title VI prohibits discrimination on the basis of "race, color, or national origin . . . under any program or activity receiving Federal financial assistance."⁷⁶ The purpose of Title VI is to ensure that public funds are not spent in a way as to encourage, subsidize, or result in racial discrimination. The Supreme Court has held that such regulations may validly prohibit practices that have a disparate impact on protected groups, even if the actions or practices are not

⁷⁴ See Am. Psychol. Ass'n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in Schools?: An Evidentiary Review and Recommendations*, 63 AM. PSYCHOL. 852, 854 (2008) (citing Christine Bowditch, *Getting Rid of Troublemakers: High School Disciplinary Procedures and the Production of Dropouts*, 40 SOC. PROBS. 493 (1993)).

⁷⁵ ELC Right to Know Request, 9/14/2012.

⁷⁶ 42 U.S.C. § 2000d.

intentionally discriminatory.⁷⁷ Hence, Title VI prohibits government practices that have the effect—even if not the intent—of discriminating by race.⁷⁸ Under this “disparate impact” theory, if a recipient of federal funding disparately harms students of color, those policies are unlawful unless they are justified by educational necessity *and* there are no less discriminatory means of achieving the same educational goals.

We contend that PDE, as a recipient of federal funds, has acted in violation of Title VI regulations by employing practices and procedures that, while facially neutral, have a disparate impact on African American students and that such practices lack a “substantial legitimate justification.”⁷⁹ PDE has propagated a system where African American students are overrepresented in inferior district-run AEDY programs. PDE has allowed numerous school districts to employ practices which have contributed to the dramatic overrepresentation of African American students. For example, Williamsport’s AEDY program data demonstrates that although African American students represent approximately 18.1% of the Williamsport student population, African American students account for 60.6% of all Williamsport students sent to AEDY programs.

Several courts have held that a state can be included as a defendant in a Title VI complaint if the state is partly responsible for or participates in the discriminatory conduct within the “program or activity.”⁸⁰ For example, in *Association of Mexican-American Educators v. State of California*, the state created the Commission for Teacher Licensing and required passage as a prerequisite for teaching, and thus could be held liable if the test was found to violate Title VI.⁸¹

PDE bears some responsibility for the overrepresentation of African American students in district-run AEDY programs because PDE has failed to review and sufficiently monitor the placement of students in AEDY programs, failed to establish and articulate sufficiently narrow criteria governing the placement of students in these programs, and failed to encourage and support less discriminatory means of achieving the same educational goals.

In terms of monitoring, PDE has collected data about AEDY programs for numerous years, but has not taken concerted efforts to address the overrepresentation of African American students in districts they identify. Additionally, PDE has propagated a discriminatory system as a result of the criteria used to define “disruptive youth.” Currently, forty percent of all students referred to AEDY programs are referred for behavior that “disregards school authority or

⁷⁷ *Guardians Assn. v. Civil Svc. Comm’n*, 463 U.S. 582 (1983); *Alexander v. Choate*, 469 U.S. 287, 292-94 (1985); *see also* *Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir.), *reh’g denied*, 7 F.3d 242 (11th Cir. 1993).

⁷⁸ *See* 34 C.F.R. § 100.3(b)(2) (2000).

⁷⁹ *Larry P. v. Riles*, 793 F.2d 969, 983 (9th Cir. 1984); *New York Urban League v. New York*, 71 F.3d 1031, 1038 (2d Cir. 1995); *Elston*, 997 F.2d at 1407.

⁸⁰ *See* *United States v. City of Yonkers*, 880 F. Supp. 212, 232 (S.D.N.Y. 1995); *Association of Mexican-American Educators (AMAE) v. California*, 836 F. Supp. 1534 (N.D. Cal. 1993); *New York Urban League v. Metropolitan Transp. Auth.*, 905 F. Supp. 1266, 1273 (S.D.N.Y. 1995), *vacated on other grounds*, 71 F.3d 1031 (2d Cir. 1995). *See also* Title VI Legal Manual, *available at* http://www.justice.gov/crt/grants_statutes/legalman.php.

⁸¹ 836 F. Supp. 1534 (N.D. Cal. 1993)(reversed on appeal on other grounds).

violates a school rule,” the most subjective and vague category among the seven delineated.⁸² This category allows the greatest degree of discretion and thus allows the most room for potential discrimination. This discretionary category and the broad definition of “disruptive youth” may explain some of the discriminatory impact of AEDY referral policies on African American youth in certain districts. PDE can and should mitigate this impact by issuing guidance that defines these terms with greater precision and clarity and restricts placement of students under this category to narrower and less subjective circumstances. Pennsylvania’s AEDY law contains several terms and provisions that both encourage and demand such clarity. For example, the law mandates that in order to place a student in an AEDY program, a student’s disruptive behavior must be of a “marked degree.”⁸³ PDE guidance should fully define what it means for behaviors to rise to the level of “a marked degree.” In addition, under current Pennsylvania law, students improperly placed into AEDY programs have no recourse to challenge their placement (beyond the due process protections provided under the IDEA and applicable state laws).⁸⁴ PDE can and should create a venue and process for an administrative appeal to the Department when a student believes he or she has been placed in AEDY in violation of the law, including as a result of discrimination.

PDE claims that the educational goal of AEDY programs is to provide students who “exhibit extreme behavior difficulties” with “additional supports.”⁸⁵ But PDE’s current policies and practices regarding AEDY programs fail in this stated mission and have instead resulted in the creation of inferior, stigmatizing, and more limited educational programs which are not justified by educational necessity. Sadly, for many students, rather than providing additional supports, these programs have become a revolving door which spirals students away from being able to successfully complete high school, ultimately fueling Pennsylvania’s dropout rate. ELC believes that there are less discriminatory (and less punitive) alternatives to serving students in need of additional supports that would not result in an over-representation of minority students in inferior educational programs.

There are a series of less discriminatory approaches for supporting students with extreme behavioral difficulties. One alternative disciplinary policy that would help serve students who struggle in traditional middle schools and high schools is the practice known as Positive Behavioral Interventions and Supports (“PBIS”). School-Wide Positive Behavior Support is nationally recognized as an effective strategy to reduce exclusionary discipline and is often used as a remedy for districts that disproportionately discipline students with disabilities and/or students of color.⁸⁶ To that end, we believe that PDE should provide opportunities for districts to

⁸² ELC Right to Know Request, 9/14/2012.

⁸³ 24 P.S. § 1901-C(5).

⁸⁴ *See* Tyson v. Sch. Dist. of Philadelphia, 900 A.2d 990 (Pa. Commw. Ct. 2006), *appeal denied*, 591 Pa. 686, 917 A.2d 316 (Pa. Feb 21, 2007).

⁸⁵ PDE, 2013-2015 Alternative Education for Disruptive Youth Program Guidelines (March 2013).

⁸⁶ *See, e.g.*, Lucille Eber, Ed.D., Gita Upreti, Ph.D. & Jennifer Rose, M.Ed., *Addressing Ethnic Disproportionality in School Discipline through Positive Behavior Interventions and Supports* (PBIS). Illinois Principals Association - Building Leadership - A Practitioners Bulletin (May 2010). Available at <http://www.pbisillinois.org/curriculum/disproportionality>. See also Rtl for Behavior Project, Annual Report 2008-2009: Outcome and Evaluation Data, Florida’s Positive Behavior Support, (2009), at www.pbis.org/common/pbisresources/publications/FLPBS_RtlB_Project_Annual_Report20082009.pdf (OSS Rates by Implementation Level Across School Years, p. 23).

implement evidence-based prevention programs such as School-Wide Positive Behavior Supports or Restorative Practices statewide. We are happy to provide additional information on this and similar models.

V. CONCLUSION

Based on the foregoing, we request that the Department of Justice: (1) accept jurisdiction and fully investigate these claims; (2) perform district-wide compliance reviews of identified school districts, including their referral policies and practices to determine if they discriminate against students with disabilities, African American students, or other minority students; (3) compel PDE to overhaul its monitoring practices regarding local AEDY programs, including involving PDE's Bureau of Special Education in compliance reviews, requiring the collection of longitudinal data on students placed in AEDY programs, including graduation rates; and (4) develop policies and issue guidance as set forth herein on page three. In addition, we specifically ask the Department to investigate the extent to which public schools in Pennsylvania are utilizing non-authorized disciplinary programs similar to AEDY, whether students placed in these programs receive a quality education, and whether particular subgroups of students are placed in these programs at a disproportionate rate.

Respectfully submitted,



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APPENDIX-Student Stories

Over the past two years, ELC has been contacted by numerous students with disabilities and by African American students who faced improper placement in an AEDY or other alternative disciplinary programs. Their stories illustrate the overrepresentation and discrimination detailed in this Complaint. Many of these examples also demonstrate that, with proper legal protections, many students are able to avoid or ameliorate improper disciplinary placement. If PDE were providing oversight that adequately ensured adherence to these legal protections, there would likely be a reduction of the current disparities identified in this Complaint. These stories are from the school districts and charter schools identified above. However, to protect the students' privacy, their names and the school districts or charter schools they attended have been removed.

Students Placed into AEDY Programs

Q.P.

Q.P. was a 12 year-old student living in foster care who had significant emotional support needs. However, his middle school teacher and others did not follow his positive behavior support plan and the child did not have a TSS worker. Interventions delineated in his IEP were not followed, and his behaviors clearly undermined his learning. Q.P. was suspended 8-9 times prior to the school's decision to place him in an AEDY program. This placement occurred without a manifestation determination review or any input from his IEP team, and the AEDY placement did not provide the emotional supports he needed. As a result of intervention by ELC and the child's court appointed special advocate (CASA), the child was subsequently placed into an appropriate program with the 1:1 emotional support, specially designed instruction, and learning support he needed. He also received a revised positive behavior support plan with interventions that can effectively address his behaviors *before* they escalate.

N.N.

N.N. was a 15 year-old African American student with an IEP in 9th grade when he was placed into an AEDY program during the 2011-2012 school year, because he could not sit still in class and was disrupting the classroom. N.N.'s mother was told he was being placed into an AEDY program because the district's high school was not equipped for students with Oppositional Defiance Disorder and ADHD. N.N. was not given an informal hearing or a manifestation determination review. N.N.'s mother was originally told this placement would be temporary and that it would help the school develop an appropriate IEP for N.N., but N.N. attended the alternative school for the remainder of the 2011-2012 school year and the majority of the 2012-2013 school year.

T.H.

T.H., a 15 year-old student with an IEP, was adjudicated delinquent and released after six months with reports of good grades and good behavior. However, pursuant to the policy of the school district, all students returning from delinquency placement were automatically placed into

AEDY. Thus, T.H. was placed into an AEDY program, without an informal hearing or a manifestation determination review. In the AEDY program, students from all grades were educated in the same classroom. With ELC's assistance, T.H. was returned to regular school.

S.P.

S.P. is a 17 year-old African American student with disabilities living in foster care. S.P. was removed from his foster placement and placed into a group home in a different school district. S.P. is classified as having an emotional disturbance, but previously his emotional support services had always been provided in a regular class environment. However, upon enrolling in the new district, he was automatically placed into an AEDY program without the input of a legally authorized special education decisionmaker. Despite the district's clear duty under the IDEA, it failed to assign a surrogate parent for S.P. as is required for all students when parental rights are terminated and a child lacks a foster parent or other IDEA parent to serve in that role.⁸⁷ In violation of Pennsylvania case law which prevents punishment of students for conduct in other LEAs,⁸⁸ the school district placed S.P. in their AEDY program, citing his previous absences in his previous school district as grounds for the removal assignment. S.P. was then given a perfunctory informal hearing and manifestation determination review that did not clearly outline the behaviors for which he was being placed into AEDY. This occurred without the participation of anyone with the legal authority to agree to his IEP or special education change in placement. Instead, an employee of a child welfare agency from the group home where he was placed signed these documents as S.P.'s "parent."

S.P. did not spend a single day in the regular class at his new school district, and his IEP only identified him as requiring "itinerant" services for "learning support" and determined that he could spend 91% of his time in the regular classroom. Rather than be given a chance in the regular school environment, S.P. was labeled a disruptive student based on alleged attendance problems at his previous school and placed into an AEDY program with "disruptive students." As a result of the district's disproportionate placement of children in the AEDY program, S.P. was educated with disabled peers and was not placed in the least restrictive environment. Sadly, S.P. remained in the AEDY program until he was removed from the group home and placed back in foster care in his original district. S.P. now attends a charter school where he is educated in a regular education setting.

D.M.

D.M. is an 18 year-old student with an IEP for emotional support needs who attended his district high school through 9th grade. While in 10th grade, he was adjudicated delinquent for non-school-related incidents and placed into a residential facility for juvenile delinquents. When he was released from the residential facility and returned to the school district, he was automatically placed into an AEDY placement without an informal hearing and without a manifestation determination review. His mother was told he would only be in AEDY for one

⁸⁷ See generally 34 CFR 300.519 (c) (duty of LEA as a public agency to appoint a surrogate parent)

⁸⁸ See *Hoke v. Elizabethtown Area School District*, 833.2d 304 (Pa. Commw. Ct.) (holding that a school enrollment policy which gives "full faith and credit" to an expulsion from another private or public school exceeds a school district's statutory authority by disciplining a student for behavior that occurs before he enrolls in the district.)

semester. However, he was not permitted to return to the regular high school for all of 11th and 12th grades. D.M.'s mother asserted that his IEP was not properly implemented in any of his placements. He was retained in 12th grade and scheduled to return to AEDY for another year of 12th grade. With counsel from ELC, D.M.'s mother was able to successfully advocate for his return to the regular high school.

J.R.

J.R., an 18 year-old student with an IEP for emotional disturbance, was automatically placed by his school district into a privately-operated AEDY program, because, even though he did not fit the definition of a disruptive student, he was returning from a two-year juvenile delinquency placement. J.R. had entered the juvenile delinquency system after taking his uncle's car on a joy ride without permission. This occurred during the summer months when he was not in school. Upon his exit from placement, when J.R.'s grandmother enrolled him back in the school district, she was told he must attend an AEDY program. J.R. was not provided with an informal hearing or a manifestation determination review meeting prior to placement in AEDY. ELC was able to help J.R.'s grandmother convince the school district to return him to the regular high school.

C.B.

C.B. is a 15 year-old African American student with an IEP reflecting specific learning disabilities and an estimated functional level of a 7-8 year old, who has difficulty making friends. In ninth grade he was improperly threatened with an AEDY transfer based on accusations of "theft." Although C.B. had never engaged in any threatening or violent behavior, his IEP reflected significant concerns with disruptive behavior. C.B. had also received an outside diagnosis of oppositional defiance disorder and ADHD. The school was aware of this diagnosis, but C.B. was never provided a functional behavior assessment or a behavior support plan.

In a misguided effort to interact with other students, C.B. repeatedly took items from others students and then offered to trade them back. Though he had been warned numerous times, C.B. continued to engage in this behavior. The school held a manifestation determination review and concluded, over his mother's objections, that C.B.'s behaviors were *not* a manifestation of his disabilities, nor the result of the school's failure to implement his IEP. A disciplinary transfer hearing was scheduled to send C.B. to the district's AEDY program. In response to ELC's threat of legal action, the district agreed to cancel the disciplinary transfer, conduct a functional behavior assessment, update C.B.'s IEP to reflect his diagnosis, and to implement a positive behavior support plan and other appropriate accommodations so that he could remain in regular school.

D.D.

D.D., a 15 year-old African American student with an IEP in 9th grade, was automatically placed into AEDY upon return from a delinquency placement for a non-school-related violation of curfew. His mother was told by the school that the policy was that all students returning from placement are automatically placed into AEDY. D.D. was not provided an informal hearing or a manifestation determination review. Following a demand letter from ELC, D.D. was returned to regular education.

Students Placed into Unmonitored Non-AEDY Programs

J.G.

J.G., a six year-old recently adopted Latino student with an IEP, was placed into a non-AEDY alternative disciplinary by a Renaissance Charter School in Philadelphia. J.G. was having difficulty sitting still in class and was throwing temper tantrums. His mother received a letter explaining that J.G. would be placed into the alternative program. The program was located in the basement of the school, utilized a separate entrance, and the students never interacted with the regular student body. J.G. was not provided an informal hearing or a manifestation determination review. Neither did the school conduct a functional behavior assessment or implement a positive behavior support plan. After two months of placement, J.G.'s behaviors grew worse. ELC then threatened legal action and J.G. was returned to his regular class. The school also conducted a reevaluation with a functional behavior assessment and ultimately implemented a behavior support plan that allows J.G. to succeed in a regular classroom.

J.L.

J.L., a nine year-old Latino student in the 2nd grade without a disability and without a significant disciplinary history, was threatened with a disciplinary transfer on the basis of an alleged "weapons" violation. J.L. brought a science kit to school which included a small metal pick used to separate elements under microscopic examination. A 5th grade student tried to take the kit away from J.L. and, in a small scuffle, he received a minor scratch. The pick pierced the student's skin, but required only a Band-Aid. J.L. was charged with "possession of a weapon" and, under the district's zero tolerance policy, faced a transfer to a non-AEDY alternative program. ELC was able to convince the district that the science tool was not a "weapon," and J.L. was returned to his elementary school.

P.G.

P.G., a 12 year-old African American girl in the 6th grade without a diagnosed disability, was inappropriately assigned to a "non-AEDY" disciplinary alternative program. P.G. was a generally well-behaved student who was well-liked by her teachers and performed satisfactorily in her academic courses. P.G. also has a uniquely exceptional talent for music and excels on the clarinet. However, in 6th grade, on the way home from school, she and two 8th grade boys went behind an alley nearby the school and engaged in sexual conduct. A fourth student took explicit pictures. Those pictures spread around the school, eventually word reached school officials, and P.G. was suspended.

After her suspension, P.G. returned to her elementary school. For three months, she ignored and endured the occasional taunts and the teasing (as one might expect, word travels fast in 6th grade), but exhibited no additional behavioral issues. The teasing eventually died down; however, three months later, the district initiated a disciplinary transfer. P.G. was too young for AEDY, but the district held a hearing to send her to a non-AEDY disciplinary program that is unregulated by the state. P.G. desperately pleaded to stay in her school, where, more than anything, she wanted to keep taking music lessons. ELC represented her in her informal disciplinary transfer hearing armed with an impassioned letter from P.G.'s music teacher. Her

teacher explained that, while P.G. demonstrated troubling behavior that required appropriate responses, she was not a “disruptive student” who could benefit from a disciplinary transfer.

Unfortunately, because P.G. had violated the district’s rule against “consensual sexual conduct” and the district’s zero tolerance policy removed any discretion, the transfer was granted. P.G. was disappointed that she would have to leave her teachers, especially her music teacher. But she was devastated to learn that, in the alternative program, she would not receive music lessons. Even worse, she would also lose her clarinet, which belonged to the elementary school. Without any ability to appeal, she was apparently out of options. ELC wrote a letter pleading for the governing board of the district to intervene. Fortunately, that letter convinced someone to intervene and, instead of an alternative school, P.G. was given a lateral transfer to a different elementary school where she was able to keep her clarinet and resume music lessons. She has been doing well in her new school and regularly sees a therapist outside of school.

D.V.

D.V., a 15 year-old Latino student in foster care, was attending 9th grade at a Renaissance Charter School in Philadelphia, when she was accused of being in a fight and told she would have to attend the non-AEDY alternative program. She denied fighting and wanted to explain her side of the story. But when her foster mother asked for a hearing, she was threatened that if she demanded a hearing, the school would expel D.V. Her foster mother ended up waiving her right to a hearing, but wrote on the waiver, “I’m only signing this because you refused to give me a hearing and said [my daughter] would be expelled if I didn’t.”