

DPH 1617-14

## Syllabus

Due Process request alleging a number of issues. Respondent contends under jurisdictional basis that because claims, except one, were not brought before the IEP Team then they should be barred for failure to exhaust.

Procedurally held that many, although not all, of the substantive claims alleged by the Petitioners were not first exhausted, although three substantives claims passed the exhaustion test: 1:1 EA, communication, and LRE, under two different IEPs. Alleged procedural deficiency did not have to be first exhausted, nor did an implementation claim.

After close of evidence, but before proposed findings and conclusions were submitted, and this Opinion entered, two United States Supreme Court cases were issued – *Fry v. Napoleon Community Schls.*, 580 U.S. \_\_\_ (2017), and *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. \_\_\_ (2017). They were applied retroactively. See *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993) .

The claim that a procedural deficiency significantly impeded Parents' opportunity to participate in process was denied. Although Mother was Spanish speaker, Father was fluent in English, he participated in the IEP meetings, the Parents voiced concerns regarding 1:1 EA, communication, and LRE, and IEP meetings had language translator. Similarly, because Parents were not told that the term intellectual disability was called mental retardation did not significantly impede their ability to participate – specifically, under Rosa's Law, the IEP Team could no longer use that term. Other deficiencies in form notices were found not to rise to the level of a procedural violations.

Substantive violations were found for not having a 1:1 EA or communication guidance for Student subsequently diagnosed with PKAN, with symptoms arising prior to the IEP. Student determined to have cognitive, intellectual disability and orthopaedic impairment eligibilities and placed in intensive support classroom. PKAN is degenerative, with spasms arising in the classroom setting, motor skill difficulty, choking on food, safety matters with the Student being hit by another student, stress, anxiety, and other physical manifestations. Student unable to communicate due to the degenerative nature of the disease, yet I-Pad and thumbs up/thumbs down only communication methods provided. Held that FAPE violated because of no 1:1 EA and inappropriate communication tools. Prospective relief orders 1:1 EA, with new communication and educational evaluations to train 1:1 EA and all educators and staff, given diagnosis of PKAN as Student's unique circumstances for appropriate progress in his education setting, as appropriately ambitious. Compensatory education denied, since insufficient evidence to allow accounting to tie to past violations. Among other things, no denial of FAPE under LRE claim.