ANDREWS & PRICE

SPECIAL EDUCATION ALERT

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SPECIAL POINTS OF INTEREST:

- Find out what the new ADA regulations say about a child's right to bring a service animal to school
- Consider special education needs when determining where a homeless student should attend school
- Read why a Middle District of PA found child with bipolar disorder not disabled within the meaning of ADA.

INSIDE THIS ISSUE:

Service Animals	P. 1, 3-6
Special Ed Considerations for homeless students	P. 1, 7
Case Law Update	P. 2

ADA Amends Regulations Regarding Service Dogs

On July 23, 2010, amendments to the ADA Regulations were issued to provide guidance regarding the use of service animals. The amendments will go into effect in March, 2011. While the ADA is written for access for service animals for all public places in general, it will be applicable to schools as well.

Given that parent requests for their child to bring their service dog to school are on the rise, schools must become familiar with the new requirements. The new regulations answer questions such as What is and what is not a service animal?; when is a service animal required? ; and What questions can and cannot be asked?

But many other questions are left unanswered, such as Who is responsible for the dog?; Does the dog need bathroom and food breaks?; What if other children are allergic to or frightened of the dog? Is any child who has a disability and has a service animal automatically entitled to bring it to school? How does the ADA interplay with Section 504 and the IDEA?

Despite the unanswered questions, many districts will be faced with the decision of whether to allow a service dog into school. Parents, who have already spent a significant amount of money on a service dog for their child, are not likely to take a simple "no" for an answer, leaving District's subject to due process or OCR complaints, federal court injunctions and/or the headline story on the 6:00 news.

Before you find your district in this position, be prepared to handle the request by understanding the law.

SEE AN ANALYSIS OF HOW THESE REGULATORY AMENDMENTS WILL AFFECT SCHOOL DISTRICTS ON PAGES 3-6

Special Education Considerations for Homeless Students

A U.S. District Court for the Middle District of PA issued an injunction against the Steelton-Highspire School District after it refused to enroll a special education student who was temporarily residing with an aunt in another district after fire destroyed the home he was living in within the district. The Court ruled that the student was homeless within the meaning of the McKinney Vento Act until he and his grandmother obtained a fixed, regular and adequate nighttime residence. What makes this case more important is that the student had a disability and was receiving special education services and missed 5 months of services due to the District's decision.

SEE AN ANALYSIS OF THE DECISION ON PAGE 7

CASE LAW UPDATE

Weidow v. Scranton School District
MD PA

The U.S. District Court for the Middle District of Pennsylvania issued Summary Judgment in favor of the School District and held that a student with a diagnosis of bipolar disorder failed to show that she was an individual with a disability and failed to show that she was discriminated against.

FACTS

Corrina Weidow was a high school student who was diagnosed with bipolar disorder. She alleged that while she was in high school, she was severely harassed by other students. She further alleged that the District knew she had a disability. She filed suit against the district alleging:

Count I: That the district discriminated against her by failing to train or supervise its employees regarding their treatment of disabled students and failing to accommodate her disability in violation of the ADA and the Rehabilitation Act

Count II: That the district was deliberately indifferent to the harassment, causing a hostile educational environment; and

Count III: That the district treated her differently from others in violation of the Equal Protection Clause.

ANALYSIS

Weidow brought various claims against the District relating to disability discrimination, therefore, the Court looked first at whether Weidow established that she had a disability within the meaning of the law. There was no dispute that Weidow had a diagnosis of bipolar disorder, but the Court looked at whether her impairment "substantially limited one or more major life activities." The Court looked at whether she could prove that her impairment "prevents or severely restricts her from doing activities that are of central importance to most people's daily lives."

Weidow alleged that her disability substantially limits the daily activities of interacting with others, caring for self, concentrating and sleeping.

The Court analyzed each of these activities and held that Weidow failed to establish that any of these limitations were caused by her disability. There was evidence that Weidow was withdrawn, irritable, and depressed, and evidence that she exhibited self injurious behavior and panic attacks There was also evidence that she had friends. Regardless, the deposition testimony showed that her issues were caused by her reaction to the harassment that she faced. Additionally, the Court held that the record did not establish that these behaviors were severe, frequent or permanent.

As such, the Court held that Weidow was not disabled within the meaning of the ADA or the Rehabilitation Act. Given that she was not "disabled" the Court dismissed the first two Counts of her Complaint, without considering whether the district discriminated against her.

The Court also found that Weidow failed to establish that she was intentionally treated differently than other similarly situated students. Weidow alleges that the District treated her differently than other bipolar students because it did not provide her with accommodations or special education services. However, the Court found it important that although her mother made the District aware that Weidow had a diagnosis, neither Weidow nor her mother ever made a written request for special education services or a 504 Plan. Additionally, Weidow pointed to no evidence to suggest that the District's actions or inactions were intentional.

Based upon all of the evidence, the Court found that no jury could reasonably find in Weidow's favor and entered judgment in favor of the School District and closed the case. It is too early to know whether Weidow intends to appeal the decision to the 3rd Circuit Court of Appeals.

Although this case ended favorably to the School District, it remains important for Districts to be aware of and responsive to red flags under child find. A school should always consider conducting an evaluation for a child who has a mental health diagnosis and is having difficulty in school—either academically or behaviorally and socially. It does not mean that a child with a diagnosis automatically qualifies for services, but the determination should be made through the evaluation process.

Service Dogs

(Continued from p. 1)

Some questions were specifically answered in the ADA Regulations:

What is the definition of a Service Animal?: The ADA defines a service animal as any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability. Therefore, the definition includes more than just a seeing eye dog but would not include an untrained pet dog. The new regulations make clear that other species of animals, whether wild or domestic, trained or untrained are not service animals.

What type of disability is covered? Every type of disability may qualify for a service animal, including physical, sensory, psychiatric, intellectual or other mental disability. In other words, service animals are more than just seeing eye dogs for blind individuals.

What must the service dog be able to do? The work or tasks performed by a service animal must be directly related to the handler's disability. Specific examples in the ADA are: assisting individuals who are visually impaired with navigation and other tasks; pulling a wheelchair; assisting an individual during a seizure; alerting individuals to the presence of allergens; and helping individuals with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. Remember, these are only examples and not the only work or task that a service animal may do.

Are emotional support dogs services animals? No, not under the revised ADA regulations. The ADA makes it clear that the provision of emotional support, well-being, comfort or companionship does not constitute work or a task and therefore, emotional support dogs (or other animals) are not considered to be service animals.

What is a school permitted to ask? Public entities may ask whether the animal is required because of a disability and what work or task the animal has been trained to perform, except when "it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability."

What if the service animal cannot be controlled? The Regulations provide that a public entity may ask the individual to remove a service animal if it is out of control and the handler is not able to control it. The public entity may also ask that the service animal be removed if it is not housebroken. However, see the K.D. case on page 5, wherein a Court did not determine a service dog who barked, sniffed other students, tried to pull toward other dogs and required repeated commands to be "out of control."

Other questions that schools have to answer were not specifically addressed in the regulations. Some guidance to these questions have been issued by various courts in cases that can be found on pages 4-6:

Are schools required to allow a service animal if other students are frightened or allergic? While there is regulatory language that would permit exclusion of a service animal that "poses a direct threat to the health and safety of others" schools could not prohibit a student from bringing a services animal under the general explanation of "other children may be allergic." Competing circumstances do not diminish the right of a person with a disability to use a service animal at school if the animal is necessary for equal access to educational services or programs. Schools would have to accommodate both students' needs if possible. A school may be able to prove that the other child's allergy could not be accommodated, but this child's needs can be met without a service animal

What training is required? Although the regulatory requirements states that the service animal must be "individually trained", the law does not require a specific level of training or certifications that must be obtained. Therefore, although schools can ask about the training that the dog has received, it cannot require documentation that the animal has been "certified" or "licensed" as a service dog.

Service Animals

(continued from p. 4)

Must the child be able to act as the handler? The law does not specifically state that the disabled person must also be the animal's handler and in the case of a severely disabled child, likely the child will not be the handler. Schools will have to determine whether to allow another individual who has already been trained into the school as a handler or whether to train an aide to be the handler. It may be that there is no appropriate person to act as a handler during the school day, thereby making it impossible for the District to accommodate the child's request for a service dog in school.

If a child has a service dog and a disability, must the school allow the dog access? The issue of "need" is not addressed in the ADA Regulations. Nowhere do the regulations state that a child is required to "need" the service animal in order to access education or to receive FAPE. A review of the cases, supra, shows that the Courts that have reviewed this issue have generally found that the child does not have to prove that the dog is required in order to receive educational benefit or to access the school. Rather it is the school's responsibility to accommodate the child's choice to use a service animal to assist with his or her disability.

If the dog is not a "service animal" under the ADA's definition, can a school automatically exclude it? Not according to OCR. Although the decisions were issued prior to the regulatory changes, OCR has taken the position that even if the animal is not a "service animal" schools still must consider whether it is needed to provide FAPE.

WHATDO THE COURST SAY?

Although there are few cases on the issue of a child's right to bring a service animal to school, those Courts that have reviewed the issue have, for the most part, found in the student's favor.

In 1990, the United States District Court for the Eastern District of California issued an injunction against a school district when it refused to allow a student to bring her service dog to school in Sullivan v. Vallejo City Unified School District. Christine Sullivan was a 16 year old student with cerebral palsy, learning disabilities and rightside deafness and used a wheelchair for mobility. She was trained and received a service dog by an organization that trains service dogs for use by people with disabilities to become more independent. When the School District denied her request that the service dog accompany her to school, she filed suit under Section 504 of the Rehabilitation Act, alleging that the District was discriminating against her on the basis of her disability by refusing her access to school with her service animal.

The School District argued that a determination needed to be made by the IEP Team as to whether the service dog was required in school to provide her with FAPE. The Court disagreed and in fact, found that whether the service animal was necessary for her to receive FAPE was "completely irrelevant" under Section 504. Instead, the Court found that once the Plaintiff has made a threshold showing that her decision to use the service dog is reasonably related to her disability, the sole issue to decide under Section 504 is whether the District is capable of accommodating the student's choice to use a service dog. The Court held that Section 504 prevents a school from questioning the validity of the student's choice to use a service dog, but the District could exclude the dog if it can show that no reasonable accommodations are available.

In other words, the Court determined that it is the student's choice whether or not to use a service animal to assist with the child's disability. Once the student has made that choice, it is the School's responsibility to accommodate that choice. If the school district fails to accommodate the use of the service animal, it would deprive the child of the opportunity to participate in the school's education programs, thereby violating Section 504.

Service Animals

The Fifth Circuit Court of Appeals also addressed the issue in 2009 in Kalbfleisch v. Columbia Community Unit School District No. 4. The Court upheld an injunction against a school district who refused to allow a 5 year old autistic student to bring his service dog with him to school. This case was brought under an Illinois State School Code provision that specifically permitted students to bring service animals to school.

The parents testified that their child, Carter, had severe behavior issues and was nonverbal. They applied for a service dog and after being on a 2 year waiting list, received a service dog. They testified that as a result of the dog, Carter's behaviors decreased in frequency and severity and he said his first two meaningful words of his life to the dog.

The School District countered that having the dog in school would be disruptive and that Carter had an individual aide at school that could meet all of Carter's needs. They also called the parent of another student as a witness who testified that her child had a severe allergy to dogs and would not be able to attend school if a dog was in her child's classroom.

While the appellate court does not look closely at the merits of the case, but rather reviews the trial court's decision for an abuse of discretion, the Court did make several instructive points. First, the Court held that the Illinois state statute, that has language similar to that found in the ADA Regulations does not require a finding that service dog provide **educational benefit** to the child. Rather, the service animal must only be "individually trained to perform tasks for the benefit of the person with a disability."

Second, the Court balanced the hardships between Carter not being permitted to bring his service dog to school v. the District's hardships if the service dog is permitted to attend and found that the injury Carter would suffer outweighed any harm potentially incurred by the School District. The Court found that the District did not prove that having the dog in school would be disruptive nor did it show that it could not accommodate the other student or students that may have an allergy to the dog.

The Fourth Circuit Court of Appeals also affirmed a District Court's injunction in favor of a student in K.D. v. Villa Grove Community Unit School District No. 302. The school district refused to allow an elementary autistic student's Labrador service animal to attend school. Parents filed suit, also under a state statute that permitted service dogs. Parents not only requested that the Court grant permission for the dog to attend school, but also an order that the District train staff members to handle the dog, designate a staff member to hold the dog's leash during transitions throughout the school day; designate a staff member to release K.D. from the dog's tether to use the restroom and during physical activity; and allow the dog access to water and to go to the bathroom when appropriate during the school day. The Court struck the additional demands as beyond its authority under the law.

According to testimony, the dog was obtained to prevent K.D. from running away and to calm him down. The dog was specifically trained to work in school and follows the commands of its handler. However, given K.D.'s disability, he is unable to act as the dog's handler. The main handler is K.D.'s mother, but someone else could be trained to manage the dog during school.

District personnel testified that the dog does nothing to benefit K.D. because he has to be commanded by the aide to do a task; that he will bark and try to pull toward other dogs if one is nearby; that he sniffs other students; and that commands must be repeated two or three times before the dog listens. Further the District's witnesses testified that K.D.'s behavior had increased and K.D. was less dependent than in prior years.

The Court found in favor of the family stating "this is not even a close case." The Court found that

Service Animals

(Continued from p. 5)

the child had a disability and the animal was individually trained to perform tasks to benefit the individual. Further, the Court opined, the statute did not require there to be an educational benefit to the child. Therefore, the District could not keep the dog out, even if there were some problems associated with having the dog in school.

OCR has also issued an Opinion on the issue of service animals in Bakersfield City (CA) Sch. Dist., Without deciding whether a student's dog qualified as a "service animal," OCR found that the district violated the ADA and Section 504 by excluding the dog from school, because the District did not follow proper procedures for reviewing the dog's training, function, or impact on the student's education. Instead, the District unilaterally determined that the dog posed a health and safety risk to students and staff.

In addition, OCR found that even if the dog did not qualify as a service animal, the District should have considered whether the dog's presence was necessary for the student to receive FAPE. OCR noted that the student's behavior improved significantly when he brought his dog to class. Moreover, there was no evidence that staff or other students complained about the dog's presence. By failing to consider whether the dog was a necessary aid or service under the IDEA, the District deprived the student of his procedural safeguards.

Conversely, a hearing officer in California found that the fact that a seventh-grader's parents produced studies on the benefits of service dogs did not require the District to identify the student's dog as a related service in his IEP, because the dog's presence was unnecessary and overly restrictive.

The parents' experts testified generally that students with autism and developmental disorders improve when they work with service dogs. The hearing officer also pointed out that the student did not need a service dog to receive FAPE, where the District had offered to provide a one-to-one aide, which the parents rejected as overly restrictive. Indeed, the dog's presence would be more restrictive than that of the aide, because unlike the aide, who could "fade out" and allow the student to redirect his behavior on his own, the dog would be constantly at the student's side. Thus, the District did not err in denying the student's request to have the service dog in class.

School Districts that deny access to service animals face more than the possibility of defending itself in a Court of law, schools who deny access to children with service animals likely will be required to defend itself in the Court of public opinion. The use of service animals in school is becoming a hot button issue and a topic that has been a highlight of local and national news. There are numerous internet blogs on the topic, most filled with public response against schools for not allowing a child with a disability the use of a service animal.

Although there are many unanswered questions and some of the decisions provide contradictory guidance, what is clear is that Districts cannot simply have blanket policies prohibiting service dogs or unilaterally determining that a child cannot bring a service dog because the child "doesn't need it," or another child or staff member may be afraid, or allergic. Schools will have to make individualized decisions regarding each request analyzing:

- Whether the child has a disability
- Whether the dog has been individually trained
- Whether the dog does work or perform tasks for the benefit of an individual with a disability
- Whether the request for use of the dog is a reasonable accommodation
- Whether the child needs the dog to access the educational environment
- Whether the child needs the dog to receive FAPE

Homeless and Special Education

FACTS

The Student is a 13 year old child who was enrolled in and received special education services from the Steelton-Highspire School District. Student lived with his grandmother who was his educational decision maker, including participating in and developing his IEP.

The home that grandmother and student were living in was destroyed by fire and they moved into a house with the grandmother's daughter/student's aunt in Harrisburg. According to the grandmother, she and student shared a bedroom in the home and were required to live by the daughter's rules. She intended to move back to Steelton and was saving money to do so. She was also on the priority list for subsidized housing and hoped to move permanently back to the District soon.

The District recognized the student as homeless from January through the end of the school year. However, at the end of the school year, when grandmother and student were still living in Harrisburg, the District removed student from the records and refused to allow him to enroll. The grandmother attempted to enroll him in the Harrisburg School District, who also would not accept him because he was not a permanent resident. After working with several organizations, student was finally enrolled in Harrisburg School District in February, 2010, missing over 5 months of instruction. However, the grandmother wanted student to continue his enrollment in Steelton-Highspire.

THE LAW

Pursuant to the McKinney Vento Act, when a child becomes homeless, the school district is required to continue a homeless child's education in the school of origin for the duration of homelessness or enroll the child in the appropriate public school within the attendance area of the student's temporary housing. Where a homeless child attends school is to be determined based on his or her best interest and to the extend feasible should be in the school of origin, unless the parent or guardian objects.

In determining the "best interest" in this case, one of the factors that the Court considered was student's special education services. The Steelton-Highspire School District had a history of working with the student's disabilities and of implementing his IEP. In contrast, the Harrisburg School District had not yet convened an IEP meeting for the student and it was not clear whether the IEP had even been transferred to the Harrisburg School District. The Court found that the Steelton-Highspire District was in the best position to meet his special education needs because it had in-depth knowledge of the child and his learning style.

Additionally, the Court issued the injunction, finding that student would suffer irreparable harm if he was not re-enrolled in the District. The Court found it troubling that student had missed over 5 months of school because of the District's mishandling of this matter, but also stated "it is even more troubling because [student] is a student with a disability whose needs were met in the District over a period of years."

Further, the Court found that given that the grandmother intended to move back to the District, it would be detrimental for a child with special needs to be transferred out of the District to Harrisburg, then back to the District when his grandmother was able to obtain permanent housing.

WHAT DOES THIS MEAN?

While Schools should be aware of and familiar with McKinney Vento for all students, this District put itself in jeopardy when it failed to conduct a "best interest" analysis when it refused to enroll the student in school. Not only was an injunction issued, but given that the Court found that the District "mishandled the matter," it also runs the risk that it will be responsible for providing student with compensatory education to make up for the over 5 months of services that the child missed.

Andrews & Price is the pre-eminent law firm in Western Pennsylvania in the practice of Public Sector Law. Our attorneys have more than 60 years of combined experience servicing School Districts. We provide a full range of legal services to our clients, including serving as Solicitor for various school districts, serving as special counsel for special education due process hearings, presenting seminars relating to the Reauthorization of IDEA and representing our clients in all types of litigation, including defense of numerous civil rights suits in federal and state Court.

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If you have a special education issue you would like to see addressed in subsequent issues of this newsletter, please write to or e-mail Trish Andrews at the above address.

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The SLC of the Department of Administrative and Policy Studies Department of the School of Education, University of Pittsburgh functions to integrate the activities and resources of the Leadership Development Programs, the Principal's Academy of Western Pennsylvania, the Superintendent's Academy and the Tri-State Area School Study Council. All of these units are working toward the implementation of a synergistic force for school and community renewal. The goal of the Collaborative is to stimulate school and community renewal by improving the quality of educational leadership in Western Pennsylvania. Activities of the Collaborative include the preparation of present and future leaders through formal degree and certificate programs ranging from the masters through the doctorate. In addition, continuing professional development of school leaders is aligned with the formal programs and connected to on-going organizational and community renewal projects.

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Consult Your Solicitor!

The legal issues discussed herein are for the purpose of providing general knowledge and guidance in the area of special education. This newsletter should not be construed as legal advice and does not replace the need for legal counsel with respect to particular problems which arise in each district. As each child is unique, each legal problem is unique. Accordingly, when districts are faced with a particular legal problem, they should consult their solicitor or with special education counsel to work through the issues on a case by case basis.