

**SPECIAL
POINTS OF
INTEREST:**

- Two recent local cases follow Third Circuit's decision that parents must prove deliberate indifference to obtain money damages under Section 504.
- OSERS advises schools to take incidents of bullying of special education students seriously.
- Students who continue their education until they turn 21 receive a diploma dated for when they actually finish attending high school.
- Students who attend school until they turn 21 may receive ESY at the end of that school term.

**INSIDE THIS
ISSUE:**

Districts Win 504 Cases P. 1, 5-7

Case Law Update P. 2

Graduation Requirements P. 1, 3-4

FOX CHAPEL SCHOOL DISTRICT WINS NUT ALLERGY LAWSUIT

A Federal Court Judge ruled in favor of the Fox Chapel Area School District and dismissed a case filed by parents of a former student with a tree nut allergy.

Parents of a then kindergarten student filed for due process alleging that the District discriminated against their son with deliberate indifference by failing to

provide him with appropriate accommodations in a 504 Plan, isolating him, failing to respond to bullying, disclosing medical information and retaliating against the family by filing truancy charges.

The Court agreed with the administrative hearing officer that the District met all of its obligations under Section 504 of the Rehabil-

itation Act and at all times stood ready to provide the student with appropriate accommodations. He further overturned the hearing officer's decision on retaliation, finding that the District's actions were not retaliatory.

This case comes just two weeks after the same Judge ruled in favor of the City of Pittsburgh in a 504 case.

Read the Court's Analysis on pages 5-7

Graduation Requirements for Students With Disabilities

PDE recently issued a Basic Education Circular (BEC) to provide guidance on graduation requirements for students with disabilities to restate, clarify and prioritize current requirements and regulations for school district LEAs. Issues addressed in this BEC include students participating in graduation ceremonies, termination of the right to FAPE and ESY services for students who aged out of special education (turned 21) during the school term.

See pages 3-4 for a summary of issues outlined in the BEC.

CASE LAW UPDATE

OSERS Issues Dear Colleague Letter Re: Bullying

The Office of Special Education Programs issued this letter in August, 2013 to provide an overview of a school's responsibility under the IDEA to address bullying of students with disabilities. Although certainly bullying affects any child bullying of a child with a disability can result in a denial of FAPE where the student is not receiving meaningful educational benefit. The letter provides advice to Districts in recognizing and addressing bullying.

The letter sets forth the importance of taking bullying seriously. As all educators know, bullying cannot be dismissed as a normal part of adolescence. Schools should create an environment so bullying does not occur in the first place and take quick and effective action when it does.

As educators also know, children with disabilities are at high risk to be bullied. Due to their disability, they may not understand the consequences of being bullied, may be unable or not know to report bullying to an adult, and may be affected differently than other children.

Schools must ensure that a child with a disability who is the target of bullying continues to receive FAPE under the IDEA. Failure to do so can lead to compensatory education for the student and/or monetary damages if the parents can prove that:

1. the child was harassed on the basis of his disability;
2. The harassment was so severe, pervasive and objectively offensive that it altered the condition of his education;
3. The school had actual knowledge of the harassment; and
4. The school was deliberately indifferent to it.



OSERS' SUGGESTIONS TO ADDRESS BULLYING

- For a child who has been bullied, convene the IEP Team to determine whether as a result of the effects of bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit.
- If the IEP is no longer designed to provide meaningful educational benefit, the IEP Team should determine what additional services are necessary to meet the child's needs and revise the IEP accordingly.
 - If the parents, request an IEP meeting to discuss bullying, the school should grant that request.
 - The Team should exercise caution when considering whether to change the placement of the victim and the child should be kept in their current placement unless the student can no longer continue to receive FAPE in that placement.
- Moving the victim to a more restrictive setting may be a denial of FAPE.
- Schools cannot resolve bullying issues by unilaterally changing the frequency, duration, intensity, placement or location of the victim's special education services.
- If the student who is doing the bullying is also a special education student, convene that child's IEP Team to determine if s/he needs additional special education services to address the inappropriate behavior.
- Consider whether changes to the school attitude environment need to be made.

GRADUATION

(continued from p. 1)

BACKGROUND

In Pennsylvania, all children between the ages of 6 and 21 are entitled to attend school. If a child with a disability turns 21 during the summer, they are not entitled to complete another school year. However, if a child turns 21 during the school term and has not yet graduated from high school, s/he may continue to attend school free of charge until the end of the school term. The school term is defined the PA law as “the period of time elapsing between the opening of the public schools in the fall of one year and the closing of the school in the spring of the following year.”

GRADUATION REQUIREMENTS

A child with a disability can graduate from high school one of two ways. S/he may graduate either through the fulfillment of high school graduation requirements set forth in Chapter 4 or upon the completion of his/her IEP goals. The IEP Team makes the determination whether the student will graduate with a regular high school diploma through the academic standards and assessment in Chapter 4 or completion of the IEP goals.

This BEC states that graduation with a regular high school diploma is a change in educational placement that requires an IEP team meeting. Therefore, make sure graduation is discussed at some length is the student’s last IEP meeting of his or her last year. Remember though that if you forget to do so, IEP Team meetings can be waived with parental consent. If the Team did not discuss graduation at the last meeting, document that the parents have been contacted and have agreed to waive the IEP meeting. In any case, because it is a change of placement, a NOREP is required to be issued.

The procedures for graduation for students with disabilities are also outlined in the BEC.

GRADUATION CEREMONIES

The School Code was amended in 2006 to require schools to allow students with disabilities who are continuing school beyond their 4th year to participate in graduation ceremonies with their graduating class. They do not receive a diploma at that time, but receive a certificate of attendance. The BEC clarifies that the diploma is not issued at that time and “banked.” Rather, the District would not create the diploma until the student actually graduates by either completing their IEP goals or by aging out. The diploma is dated and awarded when the student actually graduates.

TERMINATION OF THE RIGHT TO A FAPE

The most common issue schools face is whether to graduate a student with his/her graduating class or continue the education until the child turns 21. While the BEC gives some guidance, it does not provide districts with specific information.

The decision to graduate a student on IEP goals is made by the IEP Team. There is no bright line test for which students graduate with their peers and which stay until they are 21. It should be an issue that is discussed early, starting in 9th grade, and each year thereafter. The BEC stresses that the decision must be appropriate and should clearly define the student’s postsecondary goals, and outline the process designed to assist the student during postsecondary transition. In other words, be sure that the IEP Team documents their decision in the IEP and provides appropriate evidence to support the Team’s decision.

The receipt of a regular high school diploma terminates a student’s right to FAPE. Whether the student is graduating with their class or aging out, the District is required to provide a summary of academic achievement and functional performance, including a recommendation on how to assist the student in meeting postsecondary goals. *(Continued)*

GRADUATION

(Continued from page 3)

Graduation with a regular high school diploma constitutes a change in educational placement. It does not require a reevaluation, but parents must be provided with a NOREP. The NOREP should outline why the District is proposing the change.

If the recommendation is to graduate prior to the age of 21, the parents have the right to agree or disagree with the recommendation. If parents request due process or mediation, this invokes stay put/pendency for children who have not yet turned 21. This means that if a hearing has not yet occurred, no decision is made, or parents continue to appeal a hearing officer's decision to court, the child would continue with his or her education in the school.

For those students aging out, parents may disagree, but there is no stay put. In other words, once a student ages out, they are not entitled to continue with their public education beyond that year.

ESY—STUDENTS WHO AGE OUT

Despite specific language in the School Code that provides that a student who turns 21 years of age during the year is entitled to finish the school term, PDE has taken the position that the student may also be entitled to ESY during the subsequent summer. The BEC provides that the IEP Team must determine whether the student is eligible for ESY for the summer. If so, the student must be provided with ESY during the summer after the school term ends. The student would then graduate at the conclusion of the ESY program with a regular high school diploma.

ESY BEC

Another BEC was issued in April, 2013 outlining PDE's policy concerning timelines and other issues related to ESY services for children with disabilities. Along with general background information about ESY, eligibility requirements and timelines, it too,

provides PDE's interpretation of requirements for providing ESY services for students who aged out of special education during the school term. The language in this BEC mirrors the ESY language in the Graduation BEC.

MAKING DECISIONS

Neither BEC provides any information on who is and who is not entitled to ESY services for the summer after a student turns 21. Eligibility requirements for children who turn 21 during the school term do not appear to be different than the requirements for other children. Therefore, it does appear from the language of both BECs that if a student who turns 21 has previously received ESY, they would continue to be eligible for ESY for the summer after the school term ends. Given that the majority of the students who remain in school until they are 21 are the more severely disabled students, it is likely that the majority of these students received ESY in prior years.

ESY programs for children who are aging out should continue to be an extension of the school district's program. The student should continue to work on their eligible goals/objectives. Schools should not agree to start new programs or provide adult services for the student during that summer.

Remember that ESY must now be an IEP Team decision for all students who turn 21 during a school term. Document eligibility/noneligibility decisions thoroughly. Issue NOREPs to reflect the IEP Team's decision. Parents would have the right to challenge this decision. Although ESY hearings are expedited, if a decision is not reached prior to the start of ESY, pendency would apply. This means that if the student received ESY in prior summers, the District would be obligated to continue to provide ESY until a decision is finalized.

Fox Chapel Case Dismissed

FACTS

Prior to the start of the 2010-2011 school year, the parents notified the District that they would be enrolling T.F. in kindergarten in the fall. A 504 meeting was held in June, 2010 during which time it was determined that T.F. qualified for accommodations under Section 504 and a Service Agreement was developed.

In August, prior to the start of school, parents rejected the plan. Five additional meetings were held and the plans were revised. Parents only agreed to one plan for one week. Instead, they proposed their own Plan that they wanted the District to adopt. The District declined to do so.

In early December, 2010, parents stopped sending T.F. to school. They claimed that they were dissatisfied with the accommodations provided and reported generally that T.F. was being teased. The District filed a truancy citation against the family. A few days prior to the hearing, parents enrolled T.F. in Pa Cyber Charter School. The District agreed to continue the truancy hearing. The Magistrate scheduled the hearing several additional times during the remainder of the school year. Each date was continued and the District withdrew the citation at the end of the school year.

In the fall of 2011, T.F. was enrolled at Shady Side Academy for first grade. Parents filed for due process in February, 2012.

DUE PROCESS HEARING

At due process the family alleged that the District discriminated against T.F. with deliberate indifference by failing to provide him with appropriate accommodations, isolated him by placing him at a separate desk to eat his lunch, failed to appropriately address alleged bullying, disclosed medical information to other parents, illegally contacted his doctor to discuss the proposed Service Agreements and retaliated

against the family by filing and not withdrawing truancy proceedings.

After four administrative due process hearing sessions, the independent hearing officer agreed with the School District on all issues, except the truancy complaint. He found the District met all of its obligations to T.F. under Section 504 of the Rehabilitation Act and at all times stood ready to provide him with appropriate accommodations. The Hearing Officer however, determined that the District retaliated against the parents for their advocacy for their son by maintaining truancy proceeding after January, 2011 and through April, 2011.

The parents appealed the decision to federal court seeking to have the Court overturn the Hearing Officer's decision. Parents sought compensatory damages, including tuition reimbursement and payment for future tuition to Shadyside Academy. The District filed a counterclaim in the nature of an appeal from the portion of the decision wherein the Hearing Officer found that the District retaliated against the family.

SUMMARY JUDGMENT

At the Summary Judgment phase, the Court must determine whether the family's factual allegations, accepted as true and viewed in the light most favorable to the family, could create an inference that the District acted with deliberate indifference toward T.F. because of his disability. The parents must allege more than negligence, they must show an element of deliberateness in order to recover monetary damages under Section 504.

The Third Circuit recently held in S.H. v. Lower Merion School District that Plaintiffs must prove deliberate indifference to sustain a claim for damages. They must prove both: (1) *knowledge* that a federally protected right is substantially likely to be violated and (2) *failure to act* despite that knowledge.

Fox Chapel Case Dismissed

(Continued from page 5)

The Court reviewed the administrative record and considered additional evidence and determined that, even if the parents' allegations were true, the District did not discriminate against T.F. or the family, did not violate Section 504 and at all times provided T.F. with a free, appropriate public education.

The Court found that the record, reviewed as a whole, showed no evidence that the District acted with deliberate indifference toward the student or his family. The Court held that the District attempted to work with the family for several months to develop a Service Agreement for T.F. and took reasonable steps to accommodate T.F. and include him in all class activities. The Court also agreed that T.F. was not subject to disability based peer harassment and was not denied transportation services. The District also did not violate the law by discussing T.F.'s plan with his doctor.

The Court in this case stressed a School's obligation under Section 504 to provide ***reasonable*** accommodations so a child with a disability can meaningfully participate in educational activities and meaningfully access educational benefits. Schools are not required to grant the specific accommodations requested by the parents or make substantial modifications to programs that are used for all other students. Citing a prior 3rd Circuit decision, the Court held Section 504 does not mandate substantial changes to the school's program and courts should be mindful of the need to strike a balance between the rights of the student and the legitimate financial and administrative concerns of the school district.

The School District also prevailed in their counterclaim and the Court reversed the Hearing Officer's decision that the District retaliated against the Plaintiffs through truancy proceedings. The Court found that the School District correctly instituted truancy proceedings after the parents stopped sending T.F. to school. The record was devoid of evidence to suggest

that the District's decision to file, continue or not immediately withdraw the truancy charges was done because the family had previously advocated for a service plan. Rather, the Court found that the parties mutually agreed to continue the hearings and ultimately withdrew the charges against the family.

Parents' attorneys are frequently adding "retaliation" claims to due process complaints as another way to obtain monetary damages against the District. This decision will make it more difficult for parents to prevail.

To prove a retaliation claim, parents must prove a causal connection between their protected activity (in this case advocating for their child's 504 plan) and some adverse action taken against them by the District (in this case, filing and not immediately withdrawing truancy charges). To establish the causal connection, parents must prove either:

1. an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action; or
2. A pattern of antagonism coupled with timing.

In this case, the Court found no evidence of a causal connection between any of the parents' activities and the District's filing and then continuing the truancy proceedings. While the truancy proceedings were filed within temporal proximity to the parents disagreeing with the 504 plan, the Court realized this would naturally occur where, as in this case, parents stopped sending their child to school because they disagreed with the Plan because schools are legally required to file truancy charges quickly.

Importantly though, there was no evidence of any antagonism, unprofessionalism or that the District acted in an unsympathetic manner. The record, in fact, revealed the opposite. This is extremely important to remember when dealing with parents, who may at times, be overly zealous in their advocacy. It is imperative to show that the District worked cooperatively with families and exhibited no inference of ill will.

SECTION 504

The Fox Chapel case was issued on the heels of another favorable Section 504 decision from Judge Schwab. In K.K. v. Pittsburgh City Schools, parents of a student at Allderdice High School also filed a lawsuit claiming discrimination under Section 504. Similar to Fox Chapel, the Court found no evidence that the school district acted with deliberate indifference and dismissed the case.

FACTS

K.K. was a gifted student at Allderdice, taking advanced classes and actively participated in extracurricular activities. During her junior year, she became very ill and was diagnosed with gastroparesis. She received homebound instruction for the spring of that year.

K.K. started 12th grade symptom free, but she became sick again early in the school year, causing her again to miss school. She was approved for homebound again. She was also found eligible for accommodations under Section 504 and a plan was developed. Parents provided the District with a new diagnosis of adjustment disorder with mixed anxiety and depressed mood. Although a PTE was issued to determine eligibility under the IDEA, parents did not give permission to proceed.

In January, the Team met and revised K.K.'s 504 Plan for her transition back to the high school. The Principal devised a schedule for her and her teachers all agreed to provide her with direct instruction during their prep periods. K.K. returned to school at the end of January.

However, on her first day back, she became anxious about a test and overwhelmed by the outstanding work she had to make up. She began hiding in the school library on a daily basis to avoid class. Because of her prior absences, teachers thought she was missing class due to her illness. She finished the year with private tutors. Despite her numerous absences, she graduated and was accepted to Johns Hopkins.

ALLEGATIONS

Parents' complaint alleged that the District acted with deliberate indifference in violation of Section 504 by:

1. Providing insufficient homebound instruction
2. Failing to provide homebound instructors qualified to assist K.K. with her rigorous course work
3. Failure to meet at the parents' request
4. Failing to review the 504 plan
5. Failing to implement the 504 plan, leading to K.K. spending her days in the library instead of in class.

DELIBERATE INDIFFERENCE

While the Court acknowledged that the District may have made some mistakes, it found no evidence to support a claim of deliberate indifference. There was no evidence that the District had knowledge that K.K.'s rights were likely to be violated and failed to act. There was no evidence of "serious or repeated" failures on the schools part and no evidence that the District intentionally refused to take any remedial or corrective action to remedy a problem. Isolated incidents do not rise to deliberate indifference. Rather, the District took reasonable actions to assist K.K. They met and modified her plan in an attempt to help her.

These two favorable opinions set a high standard that parents must meet in order to prove deliberate indifference and obtain monetary damages against a school district. Mistakes and imperfect plans are not sufficient to prove deliberateness. Thus, schools should attempt to work cooperatively with parents, offer reasonable accommodations and document all action offered and taken to show that the District made every effort to appropriately accommodate the student.



Andrews & Price, LLP

1500 Ardmore Boulevard
Suite 506
Pittsburgh, PA 15221

Phone: 412-243-9700
Fax: 412-243-9660
E-mail: tandrews@andrewsandprice.com

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.

Andrews & Price, LLP 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.



Tri-State Area School Study Council
Department of Administrative and Policy Studies
School of Education
University of Pittsburgh

230 S. Bouquet Street
4302 Wesley W. Posvar Hall
Pittsburgh, PA 15260
Phone: (412) 648-7175
Fax: (412) 648-7185

TRI-STATE AREA SCHOOL STUDY COUNCIL

Tri-State Area School Study Council of the Administrative and Policy Studies Department of the School of Education of the University of Pittsburgh seeks ways to increase organizational capacity in schools through problem solving, technical service, and staff development so all students will be better prepared to make contributions to both our democratic society and the world community.

Tri-State was founded in 1948 by Dr. Maurice Thomas. Since its inception, Tri-State has provided a wealth of comprehensive technical assistance, strategic planning, and employment searches to school districts in the Western Pennsylvania region. Tri-State's vast knowledge and experience base draws upon a membership of 100+ school districts and a team of leaders and consultants with rich backgrounds in education, including former school superintendents and professors of education.

Dr. Diane Kirk, Co-Director
PH: (412) 648-1716

Dr. Sean Hughes, Co-Director
PH: (412) 648-7165

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.