

## SPECIAL POINTS OF INTEREST:

- Find out how to handle custody issues under the IDEA
- Learn when you may place a child with a disability into an Alternative Education for Disruptive Youth Program
- Hearing Officer Rules that 504 plans for food allergies extend to PTO activities
- OSEP issues guidance on releasing test protocols to parents

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## Who Is the Parent?

### Handling Child Custody Issues

Special education is no easy task to handle and often it can become even more complicated when dealing with divorced parents or situations where you are not quite sure who the “parent” really is. The broad definition of “parent” under the IDEA does not always help to clarify the situation.

For example how many of these scenarios can you relate to:

- a mother does not want you to provide any information to her divorced husband.
- A different mother

does not want you to provide information to her divorced husband’s new wife.

- A father does not want his ex-wife to be invited to an IEP meeting.

- One parent requests an evaluation while the other says no.

- You are at an IEP meeting with parents who are divorced and one parent agrees with the services and the other parent does not.

- One parent revokes consent for special education services and the other parent

wants special education services.

- Although you had always been dealing with a child’s grandparents, suddenly the child’s biological mother begins attending IEP meetings.

- A CYS caseworker tells you that she can act as the parent and wants to make educational decisions.

Read this article to find out how to handle these and other all too familiar special education situations.

**Read more about custody issues on pages 4-6**

## Special Education and Alternative Education Programs

Can students with disabilities legally be placed in an established Alternative Education for Disruptive Youth Program? The Department of Education has issued a Basic Education Circular (BEC) regarding school district’s requirements when placing a child with a disability into an AEDY program. Schools are permitted in some circumstances to place a special education student into an AEDY, but must follow certain procedures. This article will highlight who is eligible, the procedures that must be followed when placing a child and the requirement for continuing special education services after the child is placed.

**Go to page 7 to read more about AEDY programs for special education students**

## CASE LAW UPDATE

### 504 PLANS FOR FOOD ALLERGIES

**Holding:** A Hearing Officer ordered a school district to notify the PTO that it is required to follow a child's Service Agreement with respect to programs/activities provided in the School District's buildings and grounds, including prohibiting use of peanut and tree nut products in its cooking activities.

**Facts:** The Upper Dublin School District created a 504 Plan for a 1st grade student with a severe peanut and tree nut allergy. The Service Agreement contained such accommodations as:

- Training of staff for responding to an allergic reaction
- Notification of all school staff and parents in the grade level that no peanut/tree nut products will be used in classroom projects/activities
- Notification to parents that grade level classrooms are to remain allergen free and told not to bring any peanut/tree nut products into the classroom
- Cafeteria precautions, including a "nut free table", hand washing, cleaning of tables, chairs and utensils and a nut free lunch option for purchase
- Field Trip precautions
- A nut free food option at after school sponsored activities when food is served
- Cleaning of computer keyboards.

The parents were not satisfied with the Agreement, believing that it was insufficient to protect the student's safety. They wanted additional items included in the Service Agreement, most of which the District stated were being done and did not need to be in the Service Agreement itself.

Additionally, after registering for an annual PTO sponsored after school activity, the parents were notified that the student's first choice, a cooking activity

called "Fun with Food" may not be safe because the instructor could not guarantee that peanut and tree nut free products would be used in the activity. Parents were able to choose another activity in the program, but wanted the District to include in the Service Agreement that the PTO would follow the child's service agreement and either not use/provide peanut or tree nut products or provide an alternative food for the student. The District contended that it has no control over an independent entity such as the PTO and could not be responsible for PTO activities.

**Analysis:** The Hearing Officer found that the Service Agreement was sufficient to protect the student's safety but ordered the District to add language to include the additional accommodations that the District was providing, but did not have listed in the Agreement.

With regard to the PTO, the hearing officer found that because the PTO program occurred on school property, using school facilities without charge to the PTO, the program was equivalent to an extracurricular school activity. As a matter of law therefore, the District was required to also assure that the child was not denied access to the program because of his disability. Therefore, the hearing officer ordered the District to notify the PTO that they were required to follow the student's Service Agreement.

**Ramifications:** The School District did not appeal the decision, but the family filed a Petition in Federal Court for attorney's fees. Although the specific amount has not yet been determined, the Court held that the Hearing Officer's order for the District to ensure the PTO's compliance with the 504 Plan was enough to give the parents "prevailing party" status and thus, they are entitled to at least some attorney's fees. After numerous negotiations and seven due process hearings, the school district will likely be paying parents a significant amount for a very small victory.



## Test Protocols

How do you handle a parent's request for copies of all tests and assessments, including standardized tests given to their child? While trying to comply with the law under the IDEA and the Family Education Rights and Privacy Act (FERPA), Districts may run afoul of copyright laws because the test protocol itself is usually a copyrighted document owned by the test publisher. OSEP has addressed this issue to some degree.

In 2008, OSEP addressed the issue of when a test protocol is considered to be an "educational record" under the IDEA and FERPA in Letter to Shuster. An educational record is broadly defined as any document, record, file and other material directly related to the student and maintained by the school district.

Test protocols are educational records when they contain personally identifiable information about the student. For example, when the student answers questions directly on the test protocol that protocol would be an educational record because it contains personally identifiable information related to the student. However, a protocol would not be an educational record if it is separate from the sheet on which the student records his answers to the test and the protocol contains no personally identifiable information about the student.

However, OSEP noted that both the IDEA and FERPA require Districts to respond to reasonable requests for explanations and interpretations of educational records. Therefore, if the District maintained a copy of a student's test answer sheet, the parent would have a right to request an explanation and interpretation of the record. That explanation and interpretation may require that the school show the parent the test question book (the protocol). The District may be able to avoid even showing the protocol by reading the questions to the parent—although nothing would prevent a parent from writing down the question him or her self—or providing some other explanation of the response for the parent to understand.

While this may seem like an easy solution, there are circumstances where this may either not be possible or may not be in the best interest of the child. For example, if a child has a visual processing problem tests may not be valid if a child is required to read the test booklet then answer on a different answer sheet.

In 2010, OSEP addressed the copyright issue more specifically in Letter to Price. When the test protocol itself does contain personally identifiable information, it is an educational record under the IDEA and FERPA. However, **generally, neither statute requires the distribution of copies of educational records**. Rather, parents have the right to **inspect and review** the records. Simply reviewing the records does not implicate copyright laws.

However, there may still be circumstances where records are requested to be mailed. For example, both statutes indicate that parents have the right to request copies of records when they reside too far away to make inspection in person a reasonable option. In those cases, OSEP stated that the District may wish to contact the copyright holder (usually the test maker) and determine whether they will permit a summary or report of the assessment be provided in lieu of the protocol. OSEP wrote "such a summary or report would provide parents with the necessary and pertinent information regarding their child's developmental functioning and areas of strengths and needs."

**A word of CAUTION:** Some Districts try to circumvent this issue by destroying the test protocol itself after the results have been summarized in the ER or RR. This could be a dangerous and costly practice. At least one Texas Judge found the District's evaluation to be invalid without being able to review the actual assessment results themselves. As a result, he ordered the school district to pay for an independent evaluation so that test results could be reviewed.

# Custody Issues

(continued from p. 1)

When dealing with custody disputes, it is always important to first understand some key definitions:

## **Custody:**

**Physical custody:** the actual physical possession and control of the child.

**Legal custody:** the legal right to make major decisions affecting the best interests of the child, including medical, religious and educational decisions.

**Sole custody:** exclusive legal or physical custody in one of the parents as evidenced by a court order specifying sole custody.

**Shared custody:** joint legal or physical custody, or both of the child. With shared custody, both parents have rights and obligations.

Most commonly, parents have shared custody. If there is no court order granting sole custody, shared custody is presumed.

## **Parent:**

1. A child's biological or adoptive parent
2. A foster parent
3. A guardian generally authorized to act as the child's parent or authorized to make educational decisions for the child.
4. An individual acting in the place of a biological or adoptive parent (including grandparent, stepparent or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or
5. A surrogate parents who has been appointed by the school district to serve as a child's parent

Given these definitions, several questions can be answered.

## **Who Has The Right To Access Educational Records?**

Pursuant to the Family Educational Rights and Privacy Act (FERPA) either parent, regardless of "custody" has the authority to inspect and review the education records of the child unless the School District has been provided with a court order that specifically revokes that right.

Such a Court Order would be rare, but can be found in circumstances where a protection from abuse order has been issued. Therefore, in most cases, both parents, regardless of custody, have the right to review and have access to their child's educational records. Both parents should be invited to IEP meetings and both parents have access to special education records.

Therefore, unless a court order exists revoking a parent's rights, a school may not honor a custodial parent's request to withhold records from the other parent, even if that parent has no custodial rights.

## **Who Can Make Educational Decisions?**

In divorce situations, only parents with "legal custody" can make educational decisions for the child. If both parents "share" legal custody, both parents have the right to make educational decisions.

## **Who Can Request Due Process?**

Again, only parents with "legal custody" have the right to request due process. If one parent has sole legal custody, the other parent does not have the right to request due process. Where the parents share legal custody, again, both parents have the right to exercise special education due process procedures. Both parents would be entitled to special education documents, including ERs, IEPs, NOREPS and procedural safeguard notices and either parent may request a due process hearing.

# Custody Issues

In joint custody situations, the three issues school face most often are:

1. One parent agrees to an evaluation and the other does not. In that case, the District may proceed with the evaluation, **BUT** the parent who disagrees should be given a NOREP and their Procedural Safeguard Notice and has the right to challenge the decision through due process.

2. One parent agrees to the IEP and the other does not. Again, the District may implement the IEP, **BUT** the parent who disagrees may request due process.

3. One parent revokes consent for services and the other parent wants services. In that case, the School District would be obligated to immediately stop services. The parents would have to go to Court or work it out amongst themselves. They would not be able to go to due process.

## What If More Than One Person Meets the Definition of "Parent"

When more than one person qualifies as "parent" under the IDEA's definition, a biological or adoptive parent who is attempting to act as the parent must be presumed to be the parent unless their legal right to make educational decisions for the child has been terminated. Therefore, provided that a biological or adoptive parent's rights have not been terminated, they "trump" stepparents, grandparents, foster parents and surrogate parents.

However, if a judicial decree or order identifies a specific person or persons to act as the "parent" or to make educational decision for the child, that person shall be determined to be the "parent" under the IDEA. Therefore, Court appointed educational guardians would have the right to make educational decisions over everyone, including the biological or adoptive parents.

## What Should You Do When CYS Is Involved:

CYS case workers do not have the right to make educational decisions for the child, unless a Court Order specifically permits them to do so. First, determine whether the biological or adoptive parents' rights have been terminated. If they have not, consent should still be sought from the parent and the parent should be invited to all meetings. If foster parents are involved, they should be invited to all meetings, but the biological parent's decision trumps that of the foster parents.

If the biological parent's rights have been terminated, s/he is unavailable or refuses to act and the child is living with foster parents, the foster parents can then make educational decisions for the child. If the parent's rights have not been terminated, it is important for District to make numerous good faith attempts to contact the parents and DOCUMENT those attempts in your records.

## What If No "Parent" Can Be Identified or Located?

If you have made numerous attempts to identify or locate a parent, the child is a ward of the State or the child is an unaccompanied homeless youth, you must consider assigning a surrogate parent for the child. The surrogate parent may not be an employee of the District, have no conflict of interest and have knowledge and skills to adequately represent the interests of the child.

The surrogate parent then has the right to represent the child in all matters relating to his or her identification, evaluation, placement and the provision of FAPE. Again, if a surrogate is appointed, then the biological parent exercises their rights under the IDEA, the biological parent's decision trumps that of the surrogate parents.

# CUSTODY ISSUES

*(Continued from page 5)*

## **TIPS FOR DEALING WITH CUSTODY ISSUES**

- **REQUEST COPIES OF COURT ORDERS.** If one parent claims the other does not have educational rights or asks you not to share information with the other parent, ask for a copy of their Court Order that establishes parental rights.
- **KEEPS BOTH PARENTS IN THE LOOP.** In general, both parents will have the right to at least have access to information about their child. The Court Order must specifically revoke this right. Therefore, unless the Court Order says otherwise, information such as grades, progress reports, emails regarding daily incidents, etc. should be shared with both parents and both parents should be invited to participate in IEP meetings.
- **ONE PARENT CAN CONSENT TO AN EVALUATION** If two parents who share custody disagree about whether a child should be evaluated and the school agrees the child needs an evaluation, you can proceed with the agreement of only one parent. However, remember to issue a NOREP and Procedural Safeguards to the parent who disagrees. They do have the right to request a due process hearing.
- **DON'T LET PARENTS DERAILED IEP MEETINGS.** IEP meeting can be difficult enough, but can be especially hard when parents are fighting among themselves. Set ground rules from the beginning about proper decorum at the meeting. Take breaks if needed. Reschedule the meeting if you are within your timelines. Discuss alternative ways for one or both parents to participate in the meeting. But remember, it remains the School District's responsibility to offer FAPE. Therefore, offer the program that the District feels is appropriate.
- **DETERMINE WHO MAKES EDUCATIONAL DECISIONS.** If one parent has "sole legal custody" they have the right to make all educational decisions, even if the other parent objects. More frequently however, parents have "joint" or "shared" custody and are both able to make educational decisions. In those cases, don't forget to issue NOREPS and Procedural Safeguard Notices to BOTH parents.
- **ONE PARENT CAN REVOKE CONSENT FOR SERVICES** If one parent requests that services stop but the other continues to want special education, services must stop. Advise the parent who disagrees that they will have to address the issue in Family Court. Still issue Procedural Safeguards
- **TRY MEDIATION** In some situations it may be helpful to try to use a mediator from the Office for Dispute Resolution to facilitate a possible agreement. This can be less costly for the School District who is often caught in the middle of two disputing parents than due process.
- **DON'T BE A FAMILY COURT JUDGE** Don't try to interpret confusing Court Orders. Contact your solicitor and give him or her a copy of the Court Order. They may be able to contact the divorce attorneys and resolve issues with the attorneys involved.

# AEDY PROGRAMS

*Continued from page 1)*

## WHAT BEHAVIORS QUALIFY?

AEDY programs are designed for seriously and persistently disruptive students. Students may only be placed in an AEDY program, if at the time of the placement the child demonstrates, to a marked degree, any of the following:

1. disregard for school authority, including persistent violation of school policy and rules;
2. Display or use of controlled substances on school property or during school activities;
3. Violent or threatening behavior on school property or during school-affiliated activities;
4. Possession of a weapon on school property;
5. Commission of a criminal act on school property or during school-affiliated activities;
6. Misconduct that would merit suspension or expulsion under school policy; and
7. Habitual truancy.

## WHEN CAN STUDENTS WITH DISABILITIES BE PLACED IN AEDY PROGRAMS?

Pursuant to the BEC, students with disabilities may be placed in AEDY programs, but the placement must be consistent with the disciplinary provisions of the IDEA. What does that mean? Schools may remove a child with a disability from his current educational setting for more than 10 consecutive school days or 15 cumulative days only in the following circumstances:

- Before a school may change a placement for a child to an AEDY, they must conduct a manifestation determination. Schools may not place a child with a disability in an AEDY if the conduct is determined to be a manifestation of the child's behavior.
- In circumstances involving drugs, weapons or the infliction of serious bodily injury, schools may place a child with a disability in an

AEDY for up to 45 school days, regardless of whether the behavior was a manifestation of the child's disability.

## WHO DETERMINES IF AN AEDY IS APPROPRIATE?

The decision should be made by the child's IEP Team. The IEP Team should determine whether the AEDY can offer the child the services he or she needs to receive a free, appropriate public education. The School District is still responsible for assuring that a child in an AEDY receives FAPE.

## WHAT SERVICES MUST THE CHILD CONTINUE TO RECEIVE?

- A child with a disability must continue to receive special education services to enable the child to continue to participate in the general education curriculum and to progress toward meeting the child's IEP goals.
- A functional behavior assessment should be done to determine if the child's behavior impedes the child's learning or that of others and a positive behavior support plan would be required.

## CAN PARENTS CHALLENGE THE DECISION TO PLACE CHILD IN AEDY?

Yes, because children with disabilities can only be moved to an AEDY in conformity with the IDEA, parents would have the right to challenge the manifestation determination and whether the AEDY is an appropriate placement.

## WHAT DOES THE STATE SAY?

PDE, Bureau of Special Education issued a letter summarizing their position: Students with disabilities can be placed into AEDYs only when the IEP Team determines it to be an appropriate program the student's behavior meets at least 1 of the 7 behaviors, and it is not a manifestation of the child's disability.



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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.

**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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## *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.*