

SPECIAL POINTS OF INTEREST:

- Schools must provide student with disabilities with related aides and services that are necessary for the student to participate in field trips
- Schools can exclude participation in field trips in limited circumstances, but decisions must be made on an individualized basis
- Similarly, qualified students with disabilities must also be given an opportunity to participate in and benefit from extra curricular activities equal to that of students with disabilities.
- Courts apply the exhaustion requirements of *Ery*

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Disabled Students' Rights to Participation in Field Trips . . .

Questions often arise regarding school districts' obligation with regard to disabled students participation in field trips.

In general, Section 504 of the Rehabilitation Act requires school districts to provide extra-curricular services and activities, including field trips, in a manner that affords students with disabilities an equal opportunity to participate. In doing so, schools must provide the student with

related aids and services that are necessary for the student to participate in the field trip.

A school district cannot simply prohibit or limit the rights of a student with a disability from participating in field trips.

The Office for Civil Rights has determined that on very limited, individual basis, there may be circumstances permitting schools to limit field trip participation, how-

ever, it will be the school district's burden to demonstrate why the student should not participate.

This article will highlight your school district's responsibility regarding disabled students' participation in district field trips.

Read More about field trips on pages 3-4

. . . AND EXTRACURRICULAR ACTIVITIES

OCR has also weighed in on the rights of students with disabilities to participate in extra-curricular activities, including athletics. Pursuant to Section 504, a school district is required to provide a qualified student with a disability an opportunity to participate in and benefit from the school district's extra curricular programs equal to that of students without disabilities. Review this article to ensure that your District's procedures comply with OCR's expectations.

Review this Article on pages 5-6

CASE LAW UPDATE

Wellman v. Butler Area School District **Third Circuit Weighs in On** **Exhaustion Post Fry**

FACTS: A high school student who sustained a concussion and had post-concussive syndrome filed a Complaint directly in Federal Court without first going through the due process administrative system. The student claimed that the District failed to accommodate his disability in violation of the American's with Disabilities Act (ADA), the Rehabilitation Act and the Equal Protection Clause.

Wellman sustained a concussion playing flag football in 9th grade gym class. That afternoon, he attended football practice and sustained additional head injuries. He returned to school but his mother asked that he receive several accommodations, including removal from German and gym and be given extra study halls. Although this was done, teachers used the study halls to make up exams rather than allowing him to rest.

A doctor's note was provided asking for tutoring and additional time to complete assignments. The District did not honor these requests. Further while attending a football game, Wellman was holding the markers because he was still not cleared to play. He was not wearing any protective gear and was run into by a player causing another head injury.

Thereafter, his symptoms worsened, and he had severe headaches, problems focusing and exhaustion. He missed school and he claimed the teachers provided no accommodations. He claimed this caused severe anxiety, stress and embarrassment.

His mother asked for an IEP and after being found not eligible, the parents filed for due process. This resulted in a settlement agreement and release.

PROCEDURAL HISTORY: Thereafter, Wellman filed suit in the U.S. District Court against the

School District and Principal claiming failure to accommodate. The case was dismissed for failure to exhaust administrative remedies. The family appealed the decision to the 3rd Circuit.

THIRD CIRCUIT: The US Supreme Court recently ruled on the requirements of exhausting IDEA remedies in non-IDEA claims in Fry v. Napoleon Community Schools. The Supreme Court held that even in non-IDEA claims, exhaustion is required when the "gravamen (or essence) of the plaintiff's suit" is the denial of the IDEA's core guarantee—FAPE. In reaching this conclusion, the US Supreme Court asked:



1. Could the plaintiff have brought essentially the same claim if the alleged conduct occurred in a public facility—and not a school (like a public theater or library)?
2. Could an adult at the school, like an employee or visitor, have filed the same claim?

The Court explained that if the answer to these 2 questions is yes, it is unlikely that the claim involves FAPE; but if the answer is no, then it is likely that it does concern FAPE.

Here the 3rd Circuit found that the framework of Wellman's entire complaint all stem from the alleged failure to accommodate his condition and fulfill his educational needs. In answering the questions above, the conduct complained of could not have occurred in another setting and a nonstudent could not have raised the same complaints. Therefore, under Fry, the claims clearly involve the issue of FAPE and seek relief under the IDEA and exhaustion is required.

Here, however, the Court went on to find that the parents signed a settlement agreement releasing all of the claims based on a denial of FAPE. He therefore, had no claims to be brought before a hearing officer and therefore, the complaint was dismissed.

FIELD TRIPS

(Continued from page 1)

Accommodations to Participate

If a student with a disability requires a related aid or service to participate in a school program, including a field trip, the district must provide the service to the student. For students with disabilities, Districts should be proactive in working with parents to determine what, if any, accommodations the student may need while participating in a field trip. This can be done at the IEP or Section 504 meeting. Have an open discussion with the parents about any field trips that are scheduled during the year and how their child can be accommodated in order to attend.

For example, the Office of Civil Rights (OCR) found that a school district would be required to provide a student with ambulatory issues with an aide to assist the student in navigating the class's field trip. OCR also found that a District would be required to accommodate a student with a nut allergy with a nut-free lunch option and an aide to administer his epi-pen while attending a field trip.

On the other hand, at least one Court found that District's do not need to make unreasonable accommodations during a field trip. A student with an mobility impairment wanted to participate in a field trip with his class to nearby caverns. The caves, however, were not wheelchair accessible and there were no other caves nearby that were. The teacher developed individualized hands-on experiences and alternative activities for the student to participate in while the other students explored the caves. The Court found that the District was not obligated to carry the student into the cave or travel to another state to find a cave that was accessible so the student would be included.

Again, communication with parents is key. OCR found that a District who was prepared to provide appropriate accommodations still violated Section 504 because those accommodations were not communicated to the parents. A student with health issues required a nurse whenever she traveled outside of a 15 minute 911 response area. If she was within a 15 minute response area, her plan required supervision of a trained staff member. A field trip was scheduled to a

camp that was within the 15 minute response area. The District trained 3 adult chaperones to recognize and respond to the student's seizures while at the camp. However, the District never informed the parents that 3 individuals were trained to monitor her; rather they simply informed the parents that no nurse would be present. As a result, the parents did not allow their child to stay at the camp. OCR found the District to be noncompliant because they failed to inform the family of the accommodations that were in place.

Parent Participation

OCR has held on multiple occasions that a school district cannot require the parent of a student with a disability to attend the field trip as a condition of attendance when a similar requirement is not placed on parents of nondisabled students. While District's cannot require attendance, they are permitted to invite a parent or ask them to attend. However, if the parent is unable or unwilling to do so, the District must provide the accommodations that the student needs to participate.

Be clear with parents that are attending field trips with their child with a disability that your District will provide appropriate accommodations if they choose not to attend. This will avoid the possibility of parents filing a claim later with OCR alleging that they only attended because the District didn't provide the accommodation that their child needed to participate.

Notification of Field Trips

OCR has also held that students with disabilities must receive equal notice of field trips. The failure to provide equal notice can result in the illegal exclusion of students with disabilities and deny the student an equal opportunity to participate.

FIELD TRIPS

(Continued from page 3)

Individualized Decisions

As stated previously, students with disabilities must have an equal opportunity to participate in field trips. The District cannot simply preclude students with disabilities as a whole from a particular field trip. For example, the District could not exclude the Life Skills class as a group from a school field trip.

However, there may be times where the District questions whether a field trip is appropriate for a particular student. OCR has held in numerous cases that the determination of whether a student with a disability can be denied access to or the opportunity to participate in a field trip must be made on an individual basis.

For example, OCR found that a school district who excluded four students with disabilities from a field trip based on concerns about behavior, failed to make individual decisions as to each student's ability to participate in the field trip. In another case, a principal excluded a middle school student with anxiety from participating in a field trip to Washington, D.C. because he felt the trip was too much for the student to handle. OCR however, held that the Principal was not entitled to make that unilateral decision. OCR found that the District failed to comply with Section 504 because the failed to hold a meeting with "a group of people knowledgeable about the child."

As such, it is recommended that if your District is considering excluding a student with a disability from a field trip, that those issues be discussed in an IEP or Section 504 meeting.

Exclusion Based on Money

As with all special education services, expense is not a valid reason to deny a child with a disability participation in a field trip.

Exclusion Based on Academic Factors

OCR has allowed the exclusion of students with disabilities where the purpose of the field trip is relat-

ed to the curriculum and students with disabilities are not studying that curriculum. For example, OCR held that a District did not violate Section 504 when it excluded an autistic student from a field trip to a museum because the trip was part of the social studies curriculum on American history and the student did not participate in that class. However, keep in mind that just because a student is not in the particular class, they may be studying similar material in an alternate curriculum and may benefit from the field trip. Again, this should be discussed as a team.

OCR has upheld policies that condition attendance on passing grades, violations of the code of conduct and attendance, as long as the policy is applied to all students equally. For example, OCR found that a district did not discriminate against a middle school student by excluding him from a field trip where the District sent notice to all parents that students who had two or more "Fs" on their report card would not be able to participate. OCR opined that the policy was applied equally to all students—of the 15 students who were unable to attend, 9 did not have disabilities.

Exclusions Based on Medical Conditions

A District may not prohibit a student from going on a field trip simply because the student has a medical condition. However, a school may prohibit attendance if it believes participation presents an unacceptable risk to the student's health or safety. The District should be prepared to demonstrate the necessity of the exclusion.

For example, while OCR found no discrimination when a district excluded an epileptic student who had a seizure that day from a field trip, in another local case, OCR sought the District's assurance that it would attempt to contact the child's physician prior to making such decisions.

Extra Curricular Activities

(Continued from page 1)

504 Overview

504 prohibits school districts from:

- Denying a qualified student with a disability an opportunity to participate in or benefit from an aid, benefit or service;
- Affording a qualified student with a disability the opportunity to participate in or benefit from an aid, benefit or service that is not equal to that afforded others;
- Providing qualified student with a disability with an aid, benefit or service that is not as effective as that provided to others and does not afford that student with an equal opportunity to obtain the same result, gain the same benefit, or reach the same level of achievement in the most integrated setting appropriate to the student's needs;
- Providing different or separate aids, benefits or services to students with disabilities or to any class of students with disabilities unless such action is necessary to provide a qualified student with a disability with aids, benefits or services that are as effective as those provided to others; and
- Otherwise limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage or opportunity enjoyed by others receiving an aid, benefit or service.

This does not mean that students with disabilities must be allowed to participate in any program offered



of
or
as
by the school regardless of the student's skill level or ability. Schools can still require a level of skill or ability of the participants long as the selection or competition criteria are not discriminatory. But the law does require that students with disabilities

have the right to an **equal opportunity** to participate in the school's extracurricular activities. That does mean that schools must provide **accommodations and modifications** for a child with a disability in order to give them the opportunity to participate in extracurricular activities.

Do Not Act On Generalizations and Stereotypes

OCR has stressed that schools will need to keep an open mind regarding who can participate in extracurricular sports and activities. Schools cannot make participation decisions based on generalizations, assumptions, prejudices or stereotypes about disability in general, or a specific disability in particular and must not generalize about what students with a type of disability are capable of doing. Participation decisions must be individualized—one student with a certain type of disability may not be able to play a certain sport, but another student with the same disability may be able to participate.

This should be stressed to Athletic Directors and coaches!

Ensuring Equal Opportunity For Participation

In order to ensure that children with disabilities are given an opportunity to participate, schools are required to make reasonable modifications and provide those aids and services that each child needs. First, schools must engage in an **individualized** inquiry to determine whether the modification is necessary. If the modification is necessary, the school must allow it unless doing so would result in a fundamental alternation of the nature of the extracurricular athletic event.

EXTRA CURRICULAR ACTIVITIES

TIPS

- Meet with Principals, AD's and Coaches to review OCR's position regarding students with disabilities participation in extra curricular activities
- Ensure an understanding that children with disabilities have the right to participate in extra-curricular activities, even if they require accommodations or supports.
- If coaches have eligibility criteria:
 - Criteria must be nondiscriminatory
 - Should be in writing
 - Developed in advance of tryouts, not after the fact
 - Still may need to be modified for children with disabilities.
- Be prepared to discuss the accommodations/modifications child may need to participate at IEP/504 meetings
 - **DO NOT GUARANTEE PARTICIPATION!**
 - Instead say: If the child meets eligibility criteria for a sport/club, s/he will need the following accommodations
- Determine if the accommodations will fundamentally alter the program
 - If not, then the accommodation must be provided to the student
 - If so, it does not. However, the Team should then go back to the drawing board to determine whether other accommodations could be provided.



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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, 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.



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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.

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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.