ANDREWS & PRICE

SPECIAL EDUCATION ALERT

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SPECIAL POINTS OF INTEREST:

- When addressing a student's discipline, do not predetermine the results of manifestation determinations, the student's programming or placement prior to meeting and allowing for parental participation
- Before agreeing to pay for an IEE at public expense, consider whether it may be in the District's best interest to defend its own evaluation.
- Ensure Athletic Directors and Coaches know what to do when parents request accommodations for their child to participate in a sport or extracurricular activity.

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When Discipline Decisions Result In A Denial of FAPE

It is often difficult for principals and administrators to set aside their feelings about a student and their behaviors, especially when it comes to discipline and removing difficult students from the building.

However, a recent hearing officer case outlines the dangers of not following the IDEA and predetermining a student's program and placement based on the student's behaviors. Failing to follow the legal obligations of the IDEA can not only lead to compensatory education, but can open the door to a finding of retaliation and/or deliberate indifference that can lead to an award of monetary damages.

In this case, a former special education student in the Mechanicsburg Area School District moved but attended a school dance as a guest of another student. At that dance, the student engaged in a serious physical altercation. A few months later, the student sought to reenroll in Mechanicsburg.

Upon his enrollment, the administration unilaterally placed him in the district's remote learning program.

Review the Hearing Officer's Analysis on Page 3

IEE Requests

Parents frequently request independent educational evaluations at public expense. It may seem easy to simply agree to pay for the evaluation, but it may not always be the right decision. If the District's evaluation meets the legal requirements for a thorough evaluation, hearing officers cannot order an IEE at public expense. Review the Chart on page 5 before providing a response to an IEE request—and of course—consult your Solicitor!

IEE Requests continues on page 5

CASE LAW UPDATE

Davis v. Cumberland Valley School District

Middle District of PA

Accommodations for Extra-Curricular Activities

Facts: Dekaeda Davis was a member of the Jr. Varsity cheerleading squad. She was diagnosed with "significant unilateral hearing loss." Her doctors identified specific accommodations that she would need to participate safely in cheerleading due to her disability. For example, Davis's physician required that she be "positioned in the middle of the mat rather than at the front, back, or sides which ensured she had a clear view of her teammates." The coaches were aware of her need for accommodations. Parents claimed that the coaches failed to implement those accommodations. Instead they "suggested" that Dekaeda may be happier participating in a different activity. The athletic director told parents there was nothing he could do. Parent also alleges that the coaches told Dekaeda she could not participate in all of the competitions as retaliation for requesting accommodations.

Parent also claimed that after Dekaeda missed a stunt because she did not have a clear view, both the coaches and her teammates began to mock her and bully her relentlessly for needing accommodations. As a result, Dekaeda's mother removed her from the cheer team.

Claim: Parent filed a federal lawsuit, alleging, among other things that the District discriminated against Dekaeda on the basis of her disability by failing to provide her with reasonable accommodations in violation of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act. Parent alleges that her daughter is disabled due to her hearing loss and that the District unlawfully prevented her from participating in cheerleading by failing to provide her with reasonable accommodations even though she was otherwise qualified to compete with the team.

Court Decision: At the Motion to Dismiss stage, the Court held that the family pled sufficient facts to state a claim that Dekaeda was a qualified individual with a disability and she was precluded from participating in or denied the benefits of a program, service, or activity offered by the public entity (the school district) or was otherwise subject to discrimination because of her disability. The program, services or activities includes extracurricular activities and sports.

The Court found that alleging that the coaches refused her request for accommodations is sufficient to form the basis for her Complaint. Moreover, the Court found that the family pled sufficient facts to support a claim that the District intentionally discriminated against Dekaeda due to her disability when it failed to provide accommodations despite knowing she had a disability.

Key Takeaways: Often coaches and even Athletic Directors are not aware of the legal requirements for accommodations. Training our coaches and ADs to treat requests for accommodations seriously and promptly is essential. Coaches should not make unilateral decisions or independently approving or denying accommodations requests. Rather, coaches and ADs should know that any such requests should involve administration—especially the Principal and the Section 504 Coordinator. Informal denials by coaching staff can create significant liability.

Once administration is aware, the District should determine if the student is already identified under the IDEA or Section 504. If they are, discussions should be held with the team to determine accommodations that the student may need to participate in extracurricular activities. If the student is not already identified, the request for accommodations may trigger your child find obligations.

Administrators should meet with the parent and student to understand the nature of the student's limitations, the request for accommodations and review any supporting medical information. The District—not the individual coaches—should determine if the accommodations requested are reasonable and necessary and assess whether the accommodations fundamentally alter the activity. Once those accommodations are agreed to, coaches need to understand the importance of implementing the plan.

When Discipline Decisions Result In A Denial of FAPE

(Continued from page 1)

Although the parents disagreed with the placement, the school refused to consider other options. The next series of back and forth events reads as a quid-pro-quo that resulted in the parents' claim of retaliation:

- Parents filed for mediation over their disagreement with student's placement

- After the parents filed for mediation, the district moved to expel the student

- Parents then filed a due process complaint

- A week later, the District held a manifestation determination and determined the fight was not a manifestation of his disability (ADHD and a math learning disability).

- The Board held an expulsion hearing and voted to expel the student

DENIAL OF FAPE

While the Hearing Officer understood the difficulties that districts face when dealing with disciplinary issues, particularly one that involves a serious fight, safety concerns and substantial disruption to school activities, it does not relieve a school district of its obligations to follow the IDEA's procedural and substantive requirements. The Hearing Officer made clear that District's cannot ignore those obligations even in these circumstances.

In this case, it was clear through the testimony of the Superintendent, Principal and Special Education Director that as soon as the student reenrolled – the decision was made that he could not return to the District's high school and he would be placed in an alternate placement. This decision was made before the IEP Team met which amounts to illegal predetermination.

After the student's program and placement were predetermined by the Administration, the case manager was told how to write the IEP, the staff was informed the student would not be returning and administration determined how the family would be informed of these decisions at the IEP meeting. The predetermination of placement in an on-line program:

- Significantly impeded the parents' right to participate in the decision-making process;

- Was not an appropriate placement; and

- Was not the student's LRE

Moreover, because the placement was determined prior to developing the IEP, the IEP failed to include needed supports and decreased the amount of special education provided in order to fit what could be provided through the on-line program. In fact, the on-line program provided no math assistance at all to support the student's math learning disability. As the hearing officer noted: this is predetermination in its purest form.

RETALIATION

The events that unfolded after the student enrolled in the District reflect clear retaliatory behavior. As long as the parent agreed with the on-line placement, the District took no action toward his behaviors. However, when parent sought to exercise her right to challenge the decision through mediation and due process, the District began expulsion proceedings.

When Discipline Decisions Result In A Denial of FAPE

(Continued from page 3)

While typically a finding of retaliation requires a hearing officer or judge to consider causation, timing and motivation, none of this was necessary as the District openly admitted that its position was to expel the student to ensure he never attended their high school again.

The Hearing Officer particularly chastised the District for holding a manifestation determination in March for an incident that occurred in October when the student was not even enrolled in the District and the District was not providing special education services. The MD resulted in the not-surprising decision that the acts were not a manifestation of the student's disability.

In all, the hearing officer found that the District's actions entirely sidestepped its obligations under the IDEA in order to attain its predetermined desired result – that the student would not be educated at the high school.

AWARD AND OTHER POTENTIAL OUTCOMES

As a result of the District's actions, the hearing officer awarded over 850 hours of compensatory education. With at least an average cost of compensatory education, this award alone will cost the District over $40,000.

Although the hearing officer does not have jurisdiction to award monetary damages or attorney's fees, both of these outcomes may be possible if the family files a claim in Federal Court.

In order to obtain an award of monetary damages, Plaintiffs have to prove intentional discrimination. This intent can be established by demonstrating that the District was "deliberately indifferent." To be deliberately indifferent, the school must have known that there was a strong likelihood that their actions would violate federally protected rights of the student. While the Supreme Court has held that this is more than just "negligence" or a simply mistake, Plaintiffs do not have to prove bad faith or gross misjudgment.

Again, although the hearing officer did not have the authority to award damages, the decision clearly was written to support an argument that the District was deliberately indifferent. For example, although an IEP meeting was held, the student's program and placement were "presented" to the family rather than engaging in the IEP process. In fact, the Hearing Officer stated in his opinion: "to be blunt, the District's position across the entirety of the record can be reduced to a simple phrase: 'we know, we had our reasons and we don't care.'" This is almost the exact definition of deliberate indifference.

KEY TAKEAWAYS

Handling discipline of special education students can be difficult. While parents often cooperate with the District, Administration cannot circumvent the regulatory requirements of the IDEA if parents don't agree. Predetermining manifestation determinations, programming and placement will lead to adverse rulings when challenged.

Should You Agree to Pay For An IEE?

	Under the IDEA, parents of a child with a disability have the right to obtain an independent educational evaluation of their child, either at their own expense, or at the School District's expense if they disagree with an evaluation conducted by the school district. While it may seem easier and cheaper to simply grant the request and pay for an IEE, you may want to consider whether it is the best choice to make.
What is An IEE?	An IEE means an evaluation conducted by a qualified examiner who is not employed by the school district responsible for the education of the child in question. The criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the school district uses when it initiates an evaluation.
What Options Do You Have If An IEE Is Requested?	There are only 2 options if an IEE is requested at public expense. The School **must** either: • File for due process to request a hearing to show that its evaluation is appropriate; or • Ensure that an IEE is provided at public expense (agree to pay for the IEE)
Disagreement With The Current Evaluation	In order to obtain an IEE, parents must have disagreed with the evaluation of the District. If parents are not challenging the results of the District's evaluation, an IEE at public expense is not required. However, Courts have interpreted the term "disagreement" broadly. Parents do not have to expressly disagree with the evaluation, however, if they check "agree" on the evaluation, Courts have held this cannot be interpreted as disagreement.
Has an Evaluation Been Conducted By the District?	Courts have held that parents are not entitled to an IEE at public expense if they have not allowed the school district to conduct its own evaluation. If the parents refuse to consent to a proposed school district evaluation, they are not entitled to an IEE at public expense.
Is the District's Evaluation Appropriate?	If the District's psychologist has followed the IDEA's requirements for conducting an evaluation, the family is not entitled to an IEE at public expense. Ensure that a variety of technically sound tools and strategies were used and that all of the student's suspected disabilities were reviewed and assessed. Disagreement with the conclusion of the report is not grounds for an IEE.
Is Any Part of the Evaluation Inappropriate?	The Third Circuit held in an unpublished opinion that once the evaluation is found to be inappropriate in any area, parents are entitled to an IEE as a matter of law.

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.

Nolan Baker
PH: (412) 389-4957

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.