

SPECIAL POINTS OF INTEREST:

- Disabled students who were enrolled in the District during the 2021-2022 school year and turned 21 during the school year or this summer can attend school again for the 2022-2023 school year, even if they accepted a diploma
- Some discipline rules do apply to students with 504 Plans.
- PA Hearing Officer rules a counselor's concussion is a serious bodily injury.
- OSEP issues Dear Colleague letter and FAQs for special education discipline

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Act 55 Permits Students Who Turned 21 To Remain In School

Due to the effects of COVID, last summer Pennsylvania added Section 1383 to the PA Public School Code to permit special education student who turned 21 during the 2020-2021 to continued services beyond the age of 21 and further permitted all students to repeat a grade level during the 2021-2022 school year. This provision was in place for one year only.

With the signing of the state Budget, Governor Wolf also signed into law Act 55 that will now permit a student with a disability who was enrolled during the 2021-2022 school year and turned age 21 during the school year of this summer to continue to attend school again during the 2022-2023 school year, even if they accepted a diploma. The student would continue to receive ser-

vices as outlined in their most recent IEP and would continue to receive all of the protections under the IDEA.

Parents/guardians and students who wish to continue for an additional year, must complete, sign and submit the Act 55 Student Enrollment Notification Form that was developed by PDE, to their school district **on or before** August 1, 2022.

[Read More about PDE's Guidance to Act 55 on page 3](#)

Discipline Requirements for Section 504 Students

While most Districts and Principals understand the requirements for disciplinary protections for special education students under the IDEA, confusion often remains regarding discipline under Section 504. Section 504 does not contain the same disciplinary language as the IDEA, but does provide generally that eligible students should not be disciplined for behavior that is a manifestation of their disability. The Office for Civil Rights (OCR) has interpreted this to mean that schools must conduct manifestation determination reviews for 504 eligible students prior to a significant change in placement, which includes suspensions or expulsions for more than 10 consecutive days.

[Read more about OCR's interpretation of 504 discipline on page 6.](#)

Case Law Update

C.R. v. Bensalem Twp. School District PA Hearing Officer Finds a Concussion To Be A Serious Bodily Injury

FACTS: C.R. is an elementary school student who qualifies for special education services under the IDEA under the categories of OHI and SLD. C.R. received itinerant support for social and emotional issues and also had a PCA provided by the District. By November, 2022, the IEP Team reconvened due to increasing school behaviors. A PBSP was added as was an additional PCA. By January, the IEP Team was recommending its supplemental emotional support classroom. Several of C.R.'s behavioral episodes led to suspensions and manifestation determination meetings. The Team concluded that his behavior was a manifestation of his disability.

On April 26, 2022, C.R. engaged in a prolonged behavior incident that led to injury. C.R. began by throwing water bottles at the backs of other students and the behavior continued to escalate. C.R. was removed from the classroom and escorted to the guidance office to cool down, where the behaviors cycled for about an hour. At one point, when the behaviors became unsafe, PCA #2 and a behavior specialist attempted to intervene. C.R. kicked the PCA in the stomach once or twice, forcing her to leave the room in pain. C.R. then slapped and kicked the behavior specialist but did not cause injury.

At this point, the School Counselor entered the office and was concerned for C.R.'s safety because the student was standing on a chair on tiptoes trying to take something off of the walls. When she approached, C.R. swung a closed fist down on the Counselor's head, immediately causing pain. C.R. continued to slap the Counselor's head until C.R. was finally



redirected. The Counselor testified that as a result of the attack, she experienced "the worst headache" she ever had and a sense of foginess. She sought medical treatment the following day and was diagnosed with a concussion. She was placed on light duty work and told to avoid long periods of mental focus. On May 16, the date of the hearing, she was still experiencing headaches, forgetfulness and difficulty finding words. She continued to take over the counter pain medicine.

DID THE INJURY MEET THE DEFINITION OF SERIOUS BODILY INJURY (SBI)?: The hearing officer held that it did. The IDEA permits Districts to unilaterally remove a student to a 45 day placement, without regard to whether the behavior is a manifestation of the child's disability if the child has "inflicted serious bodily injury upon another person." SBI is defined as bodily injury which involves:

- A. a substantial risk of death;
- B. Extreme physical pain;
- C. Protracted and obvious disfigurement; or
- D. Protracted loss or impairment of the function of a bodily member, organ or mental faculty.

While the hearing officer found that the counselor's amount of pain alone did not rise to the level of extreme physical pain, he did find that the counselor's mental faculty (her ability to perform mentally strenuous tasks for a sustained period, her inability to "find" words while talking) were impaired as a result of the injury. He further found that the impairment was protracted because the symptoms were continuing 20 days later at the time of the hearing. Therefore the definition of SBI was met.

Be aware that all cases are fact specific and not every concussion may rise to the level of an SBI. However, this is the first case to make such a determination.

Act 55

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PDE has developed the Student Enrollment Form, but clearly states that those forms would be submitted to each school district for continued enrollment. Further, PDE did issue Answers to Frequently Asked Questions regarding implementation of Act 55. Below are the essential points derived from that document:

- The decision to stay an additional year is made by the parent or guardian and the student. It is NOT an IEP Team decision. However, PDE's Bureau of Special Education *recommends* that this decision be made in consultation with the IEP Team and after a review of data. Given that this law just passed and decisions must be made by August 1, it is highly unlikely that IEP Teams are going to convene solely for this purpose.
- Because this is not an IEP Team recommendation, NOREPs are not required to be issued if the student elects to stay an additional year.
- Schools may strictly adhere to the August 1, 2022 deadline. While Districts are legally permitted to allow a student to reenroll for the 2022-2023 school year if parents miss the deadline, they are not required to do so. Whatever the District decides to do, it should be consistently applied.
- PDE's form must be signed by the parent/guardian AND the student. In Pennsylvania, the rights of the parents transfer to the student at age 21. If the 21 year old student is unable to provide consent or approval to stay an additional year, parents would be required to legally secure educational decision-making rights.
- Students who stay for an additional year would be entitled to ESY during the summer of 2023 if their IEP from 2021-2022 indicated that they qualified.
- Despite language in the Act that says that the student continues to receive the services that were in his or her most recent IEP, PDE advises districts to follow Section 300.342 of the Federal Regulations with regard to reviewing and revising the IEP. This regulation requires IEP Teams to review IEPs no less than annually and revise the IEP as appropriate. The Answer to the FAQs does not address this contradiction, therefore until PDE says otherwise, it would be advisable for IEP Team to review IEPs that have expired already or to do so for those that will expire during the school year.

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Act 55

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- PDE advises that reevaluations should occur if the school district believes it is needed or if the parent requests an evaluation. However, the requirement that a reevaluation be conducted every 2 or 3 years does not appear to apply. To be safe, if a student who elects to stay has an RR that is expiring during this extra year, and there is no indication that a reevaluation or warranted, have the parents sign a waiver agreeing that the reevaluation will not be conducted.
- Age range requirements set forth in Section 14.146 of the State Regulations continue to apply. Therefore, a four year range at the secondary level would still apply unless an exception is determined by the IEP Team.
- On the other hand, PDE advises that students staying an additional year **do not** count toward caseload limitations because students who are staying beyond the age of 21 do not meet the state definition of “student with a disability.”
- However, the student **is** included when ensuring that each special education class is composed of at least 28 square foot per student.
- Districts should report students who are staying an additional year on the October 1 and December 1 Child Counts and on the July Submission PIMS Collections and also on the Act 16 reporting.
- The good news is that Districts continue to be eligible for Basic Education Funding and Special Education Funding for students with disabilities who are staying for an additional year.
- PDE advises that Districts will receive IDEA funding for those students with disabilities who stay an additional year if they are reported on the 2022-2023 December 1 Child Count **and** the student is still 21 years of age when reported. Although not said, one would infer that this means that if the child has already turned 22 by the December 1 Child Count, they **would not** be eligible for IDEA funding. This is not surprising given that Act 55 is a state law that would not supersede the IDEA.
- If your District already marked a student with a disability as a leaver and the student has already completed the Pa Post School Outcome Survey (PaPOS) for secondary transition but then elects to stay, that student will be removed from the sample during the post process and would be included in the process for the 2022-2023 school year.

Although PDE may issue additional guidance, given the tight timelines, if you have any specific questions regarding the implementation of Act 55, contact your solicitor for further discussion.

WHAT DO YOU THINK?

Johnny is a 7th grade student who has been consistently sent to the office for behavioral issues in the classroom. He is a special education student but does not currently have a positive behavior support plan nor does his IEP contain any other strategies to address behavior. The Principal and teachers want him disciplined. Sending him to the office hasn't stopped anything—they are pressing for suspension(s). They think that is the only thing that will get his attention.

As the Special Education Director, what steps would you take to address Johnny's behavior?



The Office of Special Education Programs (OSEP) just issued a “Dear Colleague” letter as well as FAQs to implore Districts to review and address discipline policies that may lead to disproportionality in disciplining special education students. OSERS stresses that discipline is not always the answer. OSERS advises that the failure to consider and provide for needed behavioral supports through the IEP process may result in the student not receiving FAPE.

- Convene the IEP Team to discuss next steps to ensure the IEP addressed the behavior that is impeding Johnny's learning or that of others
- Team should decide if additional data is needed to determine how the behaviors should be addressed (A functional behavior assessment should be considered)
- If so, issue a Permission to Reevaluate
- If the team has sufficient data, revise the IEP to provide additional supports and services to address the behavior. This can also be done in the interim while the team conducts the FBA
- OSEP provides a list of suggested supports and services: counseling for mental health needs like anxiety or depression; social skills instruction; reinforcement of positive behavior; explicit instruction in stress, anxiety or depression management; consultation with behavioral professionals; changing class schedules; training staff on behavior supports
- If the student already has behavior supports in the IEP, review whether they are being consistently implemented or whether they need to be changed.

504 Discipline

OCR has reviewed the disciplinary requirements for students eligible for services under Section 504 and has provided the following guidance for schools to follow in the event of discipline:

To do	Details
Conduct a Manifestation Determination	<ul style="list-style-type: none"> • Must be completed if student is being suspended or expelled beyond 10 consecutive days • Same procedures as under the IDEA • Conducted by a team, rather than one individual • Ask whether the conduct in question was caused by or had a direct and substantial relationship to the child's disability or whether the behavior was the direct result of failure to provide accommodations as required under the 504 Plan • If the answer to either question is yes, the behavior is a manifestation and no further discipline should occur • If both answers are no, the team can proceed to discipline to the same extent as other students
Stay Put	<ul style="list-style-type: none"> • No specific language in Section 504 that guarantees stay put pending the resolution of disputes over MDR determination • OCR interprets language to require Districts to wait for the results of due process prior to making a disciplinary change
Be Aware of Patterns of Removal	<ul style="list-style-type: none"> • There is no limitation to 15 total days of suspension in a school year under Section 504 • However, OCR still applies the "pattern of removal" test to determine if suspensions beyond the 10 days in a school year constitute a change in placement
Consider Whether the 504 Plan Provides Sufficient Services	<ul style="list-style-type: none"> • If behaviors are continuing and the 504 is not adequately addressing the student's needs, the Team should discuss whether the child needs more support through an IEP • If the student's behavior rise to the level of needing a PBSP, Team should do an IDEA evaluation and include a functional behavior assessment • These terms are unique to the IDEA so if a child needs this level of services, they should have an IEP rather than a 504 Plan
Did the Conduct Involve Use of Illegal Drugs or Alcohol?	<ul style="list-style-type: none"> • Section 504 specifically excludes students who are caught using illegal drugs from receiving disciplinary protections when the discipline is based on the illegal drug use. • Similarly, OCR has opined that students caught with alcohol are also not protected under Section 504. • In these circumstances, an MDR is not required and the student can be disciplined to the same degree as a regular education student.



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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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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.