

**SPECIAL
POINTS OF
INTEREST:**

- **Ensure that your IEP Teams are being responsive to a child's continuously changing needs by reviewing and revising IEPs when needed.**
- **Parents informing a school of a diagnosis is not sufficient to provide "knowledge" for discipline.**
- **Thorough discussions are required by the team to determine whether a behavior is a manifestation of ADHD**

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Revising IEPs to Address Continuing Needs

Does the fact that a child with autism continues to exhibit behaviors in school mean that the child's school district denied the child a free, appropriate public education?

Parents often argue that a child's lack of progress in any area automatically means that the school district did something wrong and/or denied the child FAPE. They often seek compensatory education for

that period of time.

But the reality is that the IDEA does not guarantee that a child will make progress or obtain a certain level of success. It does not guarantee that a school district will eliminate a student's behaviors.

The U.S. Supreme Court held that an IEP must be "reasonably calculated to enable a child to make progress in light of the child's circumstances." Alt-

hough an IEP has to be reasonable, it does not have to be perfect. Moreover, "a program need not and cannot guarantee a student's academic progress," so an IEP is not deficient simply because the child's progress is slow. [S]o long as the IEP responds to the [child's] needs, its ultimate success or failure cannot retroactively render it inappropriate.

Read A Recent 3rd Circuit Opinion On This Issue on page 3

Appropriate IEPs

As more and more due process Complaints are threatened or filed and more parents then ever are bringing attorney's with them to IEP meetings, it is important to be prepared to offer an IEP that meets legal requirements and will stand up in a due process hearing. Developing a clear, thorough and complete IEP is essential to proving that the District offered and provided the student with a free, appropriate public education

Read Tips for Developing Appropriate IEPs on page 4

CASE LAW UPDATE

Canon-McMillan School District Thought To Be Eligible

FACTS: A regular education teenage student in the high school engaged in behaviors that resulted in the School District imposing disciplinary consequences, including a change in the student's educational placement. Parents sought the discipline protections of the IDEA claiming that he was a "thought to be eligible" student and requested a manifestation determination hearing prior to the disciplinary action.

Parents alleged that by notifying the district when the student was in intermediate school that he was diagnosed with anxiety and depression and was taking medication they provided sufficient "knowledge" to the District that prevented them from imposing discipline several years later.

The District provided evidence that the student exhibited minor issues during that time, was doing much better after he began taking medication, and that the student's grades during the 4 years in question were mostly As and Bs.

ISSUE: The issue was whether parent report of a diagnosis and medication management was sufficient "knowledge" to entitle the student to disciplinary protections under the IDEA and/or Section 504 as a thought to be eligible child.

HOLDING AND ANALYSIS: The Hearing Officer held that the School District was not required to apply the discipline protections of the IDEA and conduct a manifestation determination prior to disciplining the student as he was not currently eligible as a student

with a disability and the District did not have "knowledge" of his disability.

Under the IDEA, a student who is not eligible for special education services is not entitled to disciplinary protections unless the District had knowledge of a disability before the behavior that led to the discipline. However, the IDEA is clear that there is a narrow definition of "knowledge." A District is deemed to have knowledge only if:

- a. Before the behavior that precipitated the proposed disciplinary action, the parent of the child expressed concern in writing to supervisory or administrative personnel or a teacher of the child, that the child is in need of special education and related services;
- b. Before the behavior that precipitated the proposed disciplinary action, the parent of the child requested an evaluation of the child; or
- c. Before the behavior that precipitated the proposed disciplinary action, the teacher of the child, or other district personnel, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency.

In this case, although the parents told the district several years prior to the disciplinary action that the student had a diagnosis, the Hearing Officer held that that alone does not equate to the District having reason to suspect that the teen had a disability under the IDEA and required special education services. The Hearing Officer found that the teacher's testimony that he did not manifest anxious or other concerning behaviors at school and the parents did not report any issues until after the disciplinary infraction supported the District's position that they did not have "knowledge" as defined by IDEA.



Section 504

(continued from page 1)

The Third Circuit Court of Appeals recently addressed this issue in an unpublished opinion in *I.K. v. Manheim Twp. School District*.

SUMMARY OF FACTS

I.K. moved to the Manheim Twp School district in 2nd grade after being identified for special education services at her previous school in Delaware. When she enrolled, the District adopted her Delaware IEP and requested an evaluation. By the IEP meeting, teachers were reporting that I.K. was significantly behind academically and parents were reporting behavioral issues. The District revised the IEP to address these issues and began an FBA.

While the FBA was being conducted both the teachers and parents became more concerned with her behaviors, including interaction with peers, noncompliance, off task and negative self talk. The IEP was revised again in April, 2018 to incorporate the PBSP and address the additional academic and behavioral concerns that were continuing. The Team met again at the parents' request prior to the start of 3rd grade. The IEP Team revised the IEP again, including updating 4 goals that were met.

I.K. started the school year with continued social and emotional needs. The District had an autistic support teacher observe I.K. She recommended additional services which were incorporated into the IEP and implemented in October. Despite the increase in support, I.K.'s behavior continued to decline. Another IEP meeting was held in November. A six step plan to address I.K.'s anxiety issues was added to the IEP as were additional SDI and a plan to meet again in January.

Despite this plan, I.K.'s anxiety increased, including specific issues that I.K. had with one student in her class. Prior to the January meeting, the guidance counselor called the parents to report that I.K. was having a bad day. Her father came to pick her up and the next day withdrew her from school and enrolled her in private school. They sued the District for tuition reimbursement.

COURT DECISION

The Court denied tuition reimbursement. The Court upheld the hearing officer and District Court's decision that the District provided FAPE. The Court agreed that the District made "good faith efforts" to address the student's ongoing behaviors.

Parents argued that I.K.'s improvements once she enrolled in her private school showed that the District's program was inappropriate. The 3rd Circuit disagreed. As the Supreme Court held in *Andrew F.*, when evaluating the appropriateness of an IEP, the document is evaluated based on information available at the time that the IEP was developed.

The Court noted that her IEPs addressed both her academic and behavioral needs. While the Court recognized that she continued to have behavioral issues and that some of her behaviors actually declined, the IEP Team responded by conducting an FBA and meeting multiple times to address the behavior. The IEPs included daily communication regarding behavior; adult supervision at all times; and an observation by a behavior specialist. The court found that while her behaviors were "troubling" the District's efforts to address her needs provided her with FAPE.

WHAT IT MEANS

Students with disabilities may continue to exhibit behaviors, even with supports in their IEPs. Lack of progress alone does not mean that the District's IEP was inappropriate. But failure to address that lack of progress will lead to a determination of denial of FAPE and an order for compensatory education.

Districts are required to address these continued behaviors—they cannot be ignored. Districts must continue to hold IEP meetings to discuss any ongoing behavioral issues and review and revise the IEP and PBSP to address those needs. Districts must be able to show a Hearing Officer or Court that they were responsive to the student's ongoing behavior needs.

TIPS FOR DEVELOPING APPROPRIATE IEPS

- * Are the Present Education Levels (PELs) of the IEP sufficiently detailed?
- * Do the PELs describe and outline the child's circumstances and potential that may be interfering with or affecting progress?
- * Have all of the child's needs (academically, behaviorally, socially, emotionally) as identified in the ER, RR or PELS been appropriately identified?
- * Are all of the child's needs addressed within the IEP—either in goals, objectives, SDI or through related services? If the team chooses not to address a need in this IEP, document why that decision was made.
- * Are there any problems from the prior IEP and are they addressed and documented through changes to the child's IEP?
- * If the child did not receive meaningful educational benefit or significant learning, what changes to the educational program are documented in the IEP?
- * Are there new or different areas of concern that must now be addressed in the IEP?
- * Is it evident through the wording of the IEP that the goals are at a higher level or are more challenging than the year before?
- * Have we documented and are we able to articulate the rationale behind the decisions that were made by the IEP Team in developing the child's educational program?
- Does the Team feel that the IEP is reasonably calculated to allow the student to receive meaningful educational benefit?
- * Are there any problems from the prior IEP and are they addressed and documented through changes to the child's IEP?
- * If the child did not receive meaningful educational benefit or significant learning, what changes to the educational program are documented in the IEP?

Manifestation Determinations for ADHD

There is a misperception that a student with ADHD cannot be disciplined because their behavior will always be a manifestation of their disability. This is not accurate. However, the manifestation determination team will need to carefully analyze the evidence to determine if the behavior was “caused by or was substantially related” to the child’s ADHD. Consider the following:

<p>Determine whether impulsivity is one of the symptoms of the student’s ADHD</p>	<ul style="list-style-type: none"> • Review the student’s Evaluation and Reevaluation reports, including behavior rating scales for a description of the student’s ADHD. • Review the FBA to determine whether the student’s behaviors have been impulsive in the past • Review the IEP and PBSP to determine what supports are being provided and what types of behaviors are being addressed. • Get information from teachers and parents about whether the student has been impulsive in the past.
<p>Is there evidence that the behavior was planned?</p>	<ul style="list-style-type: none"> • Did anyone hear the student discussing the behavior before it occurred? • Was anyone aware that the student was going to engage in the behavior before it occurred? • Had the student made threats before the behavior occurred that he was going to engage in the conduct in question? • Ask the parents whether they were aware that the student was planning to engage in the behavior • Did the student plan to engage in the behavior during a time that s/he thought he would not get caught?
<p>Is there evidence that the behavior was deliberate?</p>	<ul style="list-style-type: none"> • Is there evidence that the student knew what s/he was doing was wrong and did it anyway? • Is there evidence that that the student had time to think about how s/he would act? • Was the student’s actions a deliberate response to the actions of another person?
<p>How has the student acted in the past under similar circumstances?</p>	<ul style="list-style-type: none"> • Is there evidence that the student has acted appropriately in the same or similar situation? • Has the student been able to control their behavior in the past?
<p>Was the IEP appropriate</p>	<ul style="list-style-type: none"> • As with all disability categories, ensure that the IEP was appropriate and was implemented by the teachers

WHAT DO YOU THINK?

Jake is a kindergarten special education student that has been having behavior issues throughout the year. He has a Positive Behavior Support Plan included in his IEP that provides him with support and helps to address behaviors—most of the time. But there are days that no matter what behavior support is provided, Jake just cannot control his behaviors. These behaviors can range from work refusal to aggressive behaviors like hitting, kicking and head butting. As the Principal, you do not like to issue suspensions for kindergarteners, so when Jake's behaviors get out of control, you call his mother and suggest that she pick him up early so he can calm down at home. She always does. Is this permitted?

- A. Yes—as a kindergartener he is not required to be enrolled in school so IDEA discipline doesn't apply to him.
- B. Yes—as long as they don't exceed the IDEA's 15 total day removal
- C. No—a student with a disability should not be removed due to behaviors



Did you say A? That answer is incorrect. Once a child is enrolled in school, even if they are under 6 years old, they are considered of compulsory school age. Therefore, IDEA's discipline protections apply.

Did you say C? That answer is incorrect. Of course Districts should be careful to limit discipline for special education students, but it is permitted to the same extent you would remove a regular education child.

That leaves B. While asking a parent to pick up their child would be permitted under the law, Schools do need to recognize that asking a parent to pick up their child due to behavior issues should be tracked as a removal from the current educational placement, even if the District is not formally calling it a suspension. Schools should not use this practice to get around or avoid the IDEA and State rules limiting the removal of a child with a disability to 15 total days in a school year. Moreover, if this practice is occurring often, the IEP team needs to convene to review and revise the child's IEP. This requirement can be easily missed if the District is not tracking the days. Finally remember that sending a child home early from school is considered a full "day" under the IDEA!



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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.