

**SPECIAL POINTS OF INTEREST:**

- **U.S. Supreme Court rules that monetary damages for emotional distress are not available in Section 504 cases.**
- **Objective Progress Monitoring is essential to proving that a child with a disability received FAPE.**
- **Act 66 does not entitle children with disabilities to instruction beyond their 21st year.**
- **“No trespass” orders are permitted as long as parents remain able to meaningfully participate in their child’s IEP**

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## U.S. Supreme Court Limits Monetary Damages

### In Section 504 Cases

Since 1995, the 3rd Circuit Court of Appeals has held that monetary damages are available as a remedy under Section 504 of Rehabilitation Act. W.B. v. Matula. They are not available under the IDEA.

To recover any form of monetary damages, parents must prove that intentional discrimination in the form of deliberate indifference

occurred. To prove deliberate indifference parents must show that the District had knowledge that a federally protected right is substantially likely to be violated and that the District failed to act despite this knowledge.

Almost every due process complaint filed under the IDEA also contains an allegation that the District violated Section 504 “with de-

liberate indifference” to obtain money damages.

Despite this available remedy, questions have widely loomed over what type of monetary damages are available. Punitive damages are not permitted. The U.S. Supreme Court recently limited this further, holding that monetary damages for emotional distress are NOT available under Section 504.

[Read More about the Supreme Court’s decision on page 3.](#)

## Importance of Progress Monitoring

Pursuant to the U.S. Supreme Court’s opinion in *Endrew F. v. Douglas County School District* from 2017, IEP teams are required to develop IEPs that are reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. In order to make this determination, IEP Teams must monitor each student’s performance on each identified goal in the IEP and track whether the student is in fact making such improvement. Parent attorneys are consistently using this information, or lack thereof, to argue that a student has not received FAPE. As such, it is extremely important to ensure that accurate and detailed progress monitoring data is tracked, maintained and reported.

[Read more about Progress Monitoring on Page 5](#)

## Act 66 and Graduation

### **B.L. v. Owen J. Roberts School District Hearing Officer Decision**

**FACTS:** Act 66 was passed on June 30, 2021 to mitigate the effects of school closures during the pandemic. Pursuant to Act 66, all students that were enrolled in school during the 2020-2021 school year, could choose to repeat the same grade level during the 2021-22 school year. Additionally, children with disabilities who turned age 21 during the 2020- 21 school year could choose to receive an extra year of public education.

B.L. resided within the Owen J. Roberts School District, but has attended an APS. At the conclusion of the 2020-2021 school year, parents timely elected for B.L to repeat the grade, even though the APS does not operate specific grade levels.

B.L. turned 21 during the 2021-2022 school year and therefore would be aging out of instruction. The District notified the family that B.L. would be receiving his diploma. Parents disagreed arguing that Act 66 allowed B.L. to stay for an additional year beyond the year in which he turned 21.

Parents filed for Due Process to seek an additional year of instruction for B.L. and to prohibit the district from issuing B.L. a diploma. The facts of the case were not in dispute.

**ISSUE:** Does Act 66 require schools to educate special education students beyond their 21st year if they elected to repeat a grade or instruction after the 2020-2021 school year?

**HOLDING: NO** In this case, B.L.'s right to education ended after the school year in which he turns 21.

**ANALYSIS:** The Hearing Officer analyzed Act 66, which states:

Notwithstanding any other provision of law, for the 2021-2022 school year, a parent or guardian may elect ... to have a child ... repeat a grade level to make up for any lost educational opportunities due to COVID-19, notwithstanding whether the child met the requirements to be promoted to the next grade level.

The Hearing Officer found that this language is not a direct entitlement to an extra year of public education. Rather, the regulation only entitles the child to repeat the grade level they took in the 2020-21 school year during the 2021-22 school year. It does not address or change age-based eligibility for education.

In this case, because the student was enrolled in an APS that does not follow traditional grades, the concept of grade levels does not apply. The Hearing Officer agreed with the District that in this case, repeating a grade level means reteaching skills that were previously presented. Therefore, the District's only obligation under Act 66 was to reteach the Student's 2020-21 curriculum during the 2021-22 school year (or, more accurately, fund that programming at the APS) which the district did.

Further, the Hearing Officer concluded that pendency does not apply. He found that pendency does not require the District to maintain the Student's enrollment or fund the Student's tuition at the APS during the 2022-23 school year because the Student will no longer be a child with a disability once the 2021-22 school year concludes and is therefore not entitled to additional instruction.

## LIMITATION ON MONETARY DAMAGES

*(Continued from page 1)*

While the case of Cummings v. Premier Rehab Keller, P.L.L.C., did not involve a school district, the holding will apply in due process cases. In Cummings, the plaintiff, who is legally blind and deaf requested that her physical therapy provider retain a sign language interpreter to allow her to communicate with her therapist during her sessions. The therapy provider, who receives federal dollars from the Medicare and Medicaid programs, was subject to the anti-discrimination requirements in Section 504 of the Rehabilitation Act.

When the provider refused to accommodate her request, she filed suit, alleging failure to provide an interpreter constituted disability discrimination under Section 504. She sought damages, declaratory relief and an injunction. The lower courts dismissed her claim, holding that her only compensable damages were for emotional distress, which is not available under Section 504. She appealed those decisions to the U.S. Supreme Court.

The U.S. Supreme Court affirmed the decisions. The court's analysis hinged on the fact that the Rehabilitation Act was enacted under the Spending Clause of the U.S. Constitution and conditions the receipt of federal dollars by an agency on that agency's promise not to discriminate. The Court compared this to a contract and thus analyzed what types of damages are available in breach of contract cases. Emotional distress damages are generally not available in such cases and accordingly, the Court ruled, are also not available in antidiscrimination statutes like Section 504.

Although this case did not involve any schools or students, the opinion noted that the holding would apply to other antidiscrimination legislation like Title IX

and Title VI, both of which apply to educational institutions. It would obviously also impact cases that are filed against school district under Section 504. This is a positive development for school districts as it greatly reduces the risk of significant damage awards in lawsuits filed under Section 504.

The decision however does not entirely eliminate the risk of liability under Section 504. Of course, compensatory education has always been the main remedy awarded under Section 504 and the IDEA. This in of itself can be costly depending on the amount of compensatory education awarded. In cases where parents can prove deliberate indifference, monetary damages unrelated to emotion distress can still be awarded. However, Plaintiffs will actually have to prove that they actually suffered some form of damages and not just that they deserve money because the District violated the statute.

For example, they may be able to show that the student needed counseling or tutoring as a result of the District's deliberate indifference and seek reimbursement for those costs. The Third Circuit Court of Appeals has also held that tuition reimbursement in 504 cases in a form of monetary damages that would require a plaintiff to prove deliberate indifference to obtain.

Therefore while this case limits the risk of extensive compensatory damages in 504 cases, it does not eliminate a school's requirement not to discriminate on the basis of disability nor does it eliminate damages entirely. While compensatory education will continue to be awarded for violations, parents still have to prove deliberate indifference to obtain any form of monetary damages, which is a high standard to meet.

## WHAT DO YOU THINK?

Joey is a special education student in your District. On multiple occasions, Joey's mother has come to school to yell at various staff members when she is unhappy about something. Often those rants involve swearing at the teachers. However, last week's meeting was the final straw. Not only was Joey's mother yelling and swearing at his teacher, she threatened to "come after her." Furthermore, this all took place right outside of the office, where other students were sitting. They all witnessed the outburst. As a result, your Superintendent called the solicitor and asked him to write a letter to the parent prohibiting her from being on school property since she could not maintain appropriate behavior. Any and all communication was required to be sent to the Principal only and she was not to contact Joey's teacher directly. She was told that she would be permitted to participate in any IEP meeting through Zoom only.



Parent filed for due process claiming that this letter was illegal and furthermore limited her ability to meaningfully participate in her son's IEP in violation of the IDEA.

Will she win?

Most likely—no! Courts have upheld a school district's ability to restrict a parent from entering school property for engaging in inappropriate conduct. However, always keep in mind that parents are mandatory members of the IEP Team and districts must take steps to ensure the participation of one or both parents in the meeting.

Therefore, even if the District has solid ground to issue a "no trespass letter" to a parent of a student with a disability, it must still comply with its obligations under the IDEA. To that end, the no trespass order should not interfere with the parents' right to participate in their child's IEP meeting. Of course the parents' in person attendance at the meeting is preferred. However, the IDEA specifically permits the district and parent to use alternative means, including video conferences or conference calls, in order to enable the parents to meaningfully participate in their child's IEP meeting.

In the scenario above, the District certainly had reasonable grounds to ban this parent from campus, but took reasonable steps to ensure that the parent could still meaningfully participate in their child's IEP meeting, by alterative method. They should prevail at a hearing.

## Progress Monitoring

*(continued from Page 1)*

**Present Education Levels:** An essential part of measuring a student's progress is a properly drafted statement of the student's present level of academic achievement and functional performance. This statement helps establish a baseline for measuring the student's progress. Much like IEP goals, the IEP should express this statement in objectively measurable terms. While reading each consecutive annual IEP, the reader should be able to determine the progress that was made.

**Establishing Student Needs:** The student's needs should drive the IEP development. Each need should be addressed in the student's IEP, either through an annual goal, specially designed instruction or a behavior support plan.

**Measurable IEP Goals:** The IDEA requires that every IEP include a statement of measurable annual goals, including academic and functional goals, designed to: meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and meet each of the child's other educational needs that result from the child's disability. The IEP must state how the child's progress toward meeting the annual goals will be measured; and when periodic reports on the progress the child is making toward meeting the annual goals.

Courts have held that the purpose of IEP goals is to allow the IEP team, the parents, and the district to measure a student's progress in a specific area of need. Because the evaluation of a student's progress is so closely tied to the student's IEP goals, the goals in each student's IEP must be clear and objectively measurable. Without clear and measurable goals, it is very difficult to determine if progress is being made.

Goals should start with the established baseline. Using that baseline information, the IEP team must discuss what the student should be able to achieve during the next 12 months in light of that child's unique circumstances. Document what those unique circumstances are,

**Repeating Annual Goals.** Be very cautious about repeating an exact goal that was in the IEP the year before, which parent attorneys argue means that no progress was made. If the team is addressing the same need, be sure to update baseline information to document any progress that was made. The team may be able to specify that the same skill is being worked on but be able to change the student's instructional level or increase the complexity of the skill. If limited progress was made, document in the IEP why that occurred. For example, a student with a significant disability may make slow progress in light of their ability level. Document this. Also document in the IEP what the District will be doing different this year if limited progress was made the year before.

**Reporting Progress:** If the goal is in fact written objectively and is measurable, teachers should not have difficulty reporting the amount of progress that the child has made in an objective manner. Data is essential when reporting progress. This data should be obtained and kept throughout the progress period. Using subjective terms (like student made good progress) or simply stating "progress was made" without supporting documentation and data will be more difficult to defend if challenged in a due process hearing. Progress, or lack of progress, is easy to monitor and see when objective data is maintained.

**Lack of Progress:** While progress monitoring is important to show that the instruction being provided is working, it is equally important to monitor if no progress or very limited progress is being made by the student. If a student fails to make progress within a reasonable period of time, the district must convene an IEP meeting to address the student's lack of progress. The Team should review the IEP to determine what additional or different services the child may need to begin making progress and revise the IEP accordingly. A district's continuation of providing the same inadequate services when a student fails to make progress within a reasonable period of time will almost certainly result in a finding of denial of FAPE.

Remember—detailed and objective progress monitoring sent on a regular basis is essential to ensure that a child with a disability is receiving FAPE

## Exiting Students From Special Education

There are times when school staff feel that a child with a disability no longer needs special education or related services to obtain meaningful educational benefit in school. Remember however, that this recommendation requires a reevaluation in all areas of suspected disability. Be sure to review data and information from a variety of sources prior to making the recommendation.

To do	Details
<b>Review a variety of data points</b>	<ul style="list-style-type: none"> <li>• Don't just rely on the student's good grades. They may be getting their grades <u>because of</u> the supports being provided</li> <li>• Conduct new standardized assessments</li> <li>• Review progress toward goals</li> <li>• Conduct/review curriculum based assessments</li> <li>• Review prior data</li> </ul>
<b>Obtain Input from all Staff</b>	<ul style="list-style-type: none"> <li>• Do not rely on input from the special education teacher alone</li> <li>• What do regular education teachers think?</li> <li>• Is information from all teachers consistent?</li> <li>• How is the student doing across all settings—academic, structured and unstructured settings</li> <li>• Are academic improving but behavior is still an issue?</li> <li>• Consider issuing rating scales</li> </ul>
<b>Seek input from student and parents</b>	<ul style="list-style-type: none"> <li>• What are the student's thoughts on exiting special education?</li> <li>• Find out from the parents how the student is doing at home</li> <li>• Are there any concerns with academic struggles, behaviors or other issues in the home?</li> <li>• While services should continue to address school issues, a student may still be struggling with homework completion, etc.</li> <li>• Consider issuing rating scales</li> </ul>
<b>Obtain input from outside providers</b>	<ul style="list-style-type: none"> <li>• Ask parents for consent to speak to any outside provider the child is seeing</li> <li>• Are there any new diagnosis that the team should consider?</li> <li>• What progress has the outside provider seen?</li> </ul>
<b>Consider whether the student qualifies for other supports</b>	<ul style="list-style-type: none"> <li>• Is the child still considered to be a child with a disability?</li> <li>• Do they need accommodations or modification through a Section 504 Plan to maintain their success?</li> </ul>





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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.*