

SPECIAL POINTS OF INTEREST:

- Failure to be prepared to provide appropriate special education services to homeless children who are enrolled in your District could result in compensatory education awards.
- Schools also must be prepared to provide the full range of supplementary aides and services to children with disabilities who are in inclusion settings.
- Meeting the definition of “serious bodily injury” is a very difficult task. Follow tips on page 6 if a staff member is seriously injured by a student.

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Ensure Plans Are In Place To Educate Homeless Children With Disabilities

Two attorneys from Pennsylvania’s Education Law Center (ELC) presented at the 2015 annual conference of the National Association for the Education of Homeless Children and Youth (NAEHYC) advising District to create district wide plans to meet the needs of homeless students with disabilities. The ELC is proactive in this area.

Schools are required to educate all children

who are homeless. There are specific provisions under the IDEA to ensure that children who are homeless receive a free, appropriate education. Sometimes it can be difficult to follow those provisions, but Districts that fail to meet the needs of special education students who are homeless run a substantial risk that the ELC will become involved and compensatory education and per-

haps attorney’s fees will be awarded.

Homeless children can be enrolled in any district, from the most affluent to the poorest. The key is to be prepared so enrollment and services are not delayed and the child receives appropriate and required services.

Learn Your Legal Requirements on pages 3-4

What Is Considered Serious Bodily Harm Under The IDEA

School Districts are permitted under the IDEA to unilaterally remove a special education student to an interim alternative educational setting for not more than 45 school days if the child is in possession of drugs, weapons or inflicts “serious bodily injury” on another person while at school, on school premises or at a school function. But what does the term “serious bodily injury” mean? How bad does the injury have to be to remove the student?

See page 5-6 for a summary of how PA Hearing Officers have ruled and tips to follow.

CASE LAW UPDATE

Norristown Area S.D. v. F.C.
3rd Circuit
Tuition Reimbursement,
Compensatory Education,
Attorney's fees

FACTS: F.C. is an autistic student who attended the District from kindergarten through 2nd grade. In kindergarten, F.C. was placed full time in an autistic support classroom with 7 children and 2 paraprofessionals.

F.C. began 1st grade with the same level of support. However, in January, the District implemented an inclusion plan as part of a mainstreaming initiative. As a result, F.C. began to transition out of full time autistic support. By the end of 1st grade, F.C. spent 38% of the day in regular education classes.

Initially his 2nd grade IEP called for the same level of support, but that was dramatically changed in the summer. Under the revised IEP, F.C. was to spend 87% of his school day in regular education classes. Early into 2nd grade, F.C.'s behaviors regressed. The IEP Team met in January and agreed that F.C. had behaviors that impeded his learning, but did not include a Positive Behavior Support Plan.

F.C.'s IEP was revised in the summer before 3rd grade to include a PBSP. However, the IEP also included a provision that 1:1 paraprofessional support would end in November of that year, even though the IEP was through April. Parents disagreed with the IEP and placed F.C. in a small private school for students with learning disabilities.

PROCEDURAL HISTORY: Parents filed for due process claiming a denial of FAPE from 1st-3rd grade. They sought compensatory education for 1st and 2nd grades and tuition reimbursement for 3rd.

The hearing officer found no denial of FAPE for 1st grade but awarded 2 hours of compensatory education per day and 30 minutes of speech per week for 2nd grade. He also awarded tuition reimbursement for 3rd grade. Both parents and school appealed to District

Court. The Court agreed with the hearing officer's decision for 1st grade, but reduced the amount of compensatory education to 2 hours per day for 2nd grade. The Court found that F.C. met his speech goals and therefore compensatory education was not warranted. The Court also awarded tuition reimbursement for 3rd grade.

Parents filed for attorney's fees and the District appealed to the 3rd Circuit.

HOLDING: The Third Circuit upheld the Court's decision finding that F.C. could only be successful in regular education with 1:1 support. The Third Circuit also upheld an award of full attorney's fees in the amount of \$139,629.34. Although parents did not prevail on every issue raised, the Court found them to be "overall successful" and did not reduce the amount of attorney's fees sought.

IMPACT: This case emphasizes the need to ensure that students with disabilities placed in regular education classes are provided with all of the supplementary aides and services necessary to be successful in that environment. In this case that meant 1:1 paraprofessional support and a PBSP which the District failed to provide. Once the District knew that F.C. was struggling in regular education, it was obligated to provide the supports he needed rather than cutting back paraprofessional support.

This case is also instructive on the cost of due process. Even though the Courts held that the District provided FAPE during 1st grade and reduced the amount of compensatory education offered, the Court awarded full fees to the parents. Districts should always consider the potential costs of a lawsuit when determining whether settlement is the most efficient solution.



Educating Homeless Children With Disabilities

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The Law

The McKinney-Vento Homeless Assistance Act is the primary federal law addressing the educational requirements for homeless students. The recently enacted Every Student Succeeds Act of 2015 amends the McKinney-Vento Act.

Definition of Homeless

It is important to know the definition of homelessness as it is a very broad definition and may cover students not ordinarily thought of as homeless. It is imperative that the District's Special Education Director work closely with the District's Homeless Coordinator to identify homeless children who have or may need special education services.

Under the Act, homeless children are those who lack a fixed, regular and adequate nighttime residence. This includes children and youth who are:

- Sharing the housing of other persons due to loss of housing, economic hardship or a similar reason.
- Living in motels, hotels, trailer parks or campgrounds due to the lack of alternative adequate accommodations.
- Living in emergency or transitional shelters.
- Abandoned in hospitals.
- Awaiting foster care placement. (Note that this phrase will be deleted from the definition in the Act on December 10, 2016).
- Living in a primary nighttime residence that is a public or private place not designated for or ordinarily used as a regular sleeping accommodation for human beings.
- Living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations or similar settings.

Enrollment

Again, schools must be prepared when a special education student who is identified as homeless seeks to enroll in the District. Remember that homeless children or unaccompanied youth have the right to immediately enroll in the District without providing enrollment documents that may be required for nonhomeless children.

While this is an important requirement for all homeless children, it is especially important for special education students. Failure to immediately enroll could result in your District owing that student compensatory education for the time services were not provided.

Under the newly enacted Every Student Succeeds Act of 2015, if a dispute arises over school selection or enrollment in a school, "the child or youth shall be immediately enrolled in the school in which enrollment is sought, pending final resolution of the dispute, including all appeals."

Child Find

School Districts are required to identify, locate and evaluate all children suspected of having a disability who may need special education, including homeless children. Due to high mobility, homeless students often fail to remain in one school long enough to be appropriately evaluated.

Again, being prepared is key. Homeless liaisons and Special Education Directors should work together to develop a plan to identify homeless children who may have disabilities. This includes reviewing any prior records to determine if the child was struggling in their last school(s); talking to the prior school district or the parents to determine if an evaluation has already started for the student; and ensuring that teachers in your District closely monitor the student to determine academic achievement.

Educating Homeless Children With Disabilities

(Continued from page 3)

Remember that contacting the parents to obtain consent for evaluations or the provision of services may be difficult as they may not have an address to send documents or a phone to call. When a child is enrolled, work with parents to develop an efficient and effective communication system. Work with the homeless shelter or child's case manager to have a back up means of communication. If a child is unaccompanied, immediately begin the process of appointing a surrogate parent for the child. Appointing a surrogate must be done within 30 days of identifying that one is needed for a child.

FAPE

Homeless children with disabilities must have equal access to FAPE. School Districts cannot limit services based upon a child's status as homeless.

As part of the enrollment process, ask parents whether their child has ever received special education services. Ask if they have a copy of the child's most recent IEP; but keep in mind that given the family's living situation they are likely to not have access to their child's records or may not have to most up to date forms. Work with the child's prior school to have special education documents such as evaluation reports, IEPs and Behavior Support Plans forwarded to your school immediately so that services are not delayed. Conduct your own IEP Team immediately to either accept the most recent IEP or develop your own.

Consider whether the child may need additional supports and services given his or her current living situation. Has becoming homeless taken an emotional toll on the child? Have the Team discuss counseling or psychological services. Remember, all of the child's needs must be met even if it is not specifically related to his or her disability. A learning disabled child can still receive emotional support services if there is a need.

Be prepared to meet your timelines. Don't wait until the last minute to attempt to schedule meetings. Again, it may be difficult to contact parents or parents

may have other pressing issues that they are dealing with. Contact them well in advance of your deadline to ensure you are in compliance with timelines and parents can participate in meetings.

Transportation

Pursuant to the law, free transportation must be provided for all homeless students from the location that they are living to the school they choose to attend. This is true even if the child is living outside the District's boundaries. The cost of transportation is then split between the District in which the child is living and the District in which the child is attending.

Transportation often causes the most difficulty in providing services. Special Education Directors and Homeless Liaisons must work closely with the District's transportation department to ensure that there is very little delay in providing transportation services to the child.

While this may not be an easy job and requires coordination with the bus company and often another school district, KidsVoice and other advocacy agencies are watching this issue. Several Compliance Complaints have been filed against schools who, despite their best efforts, have not been able to provide transportation in a timely manner. Again, failure to do so can lead to compensatory education awards.

Based on these issues, Schools must BE PREPARED to provide services to homeless children.



SERIOUS BODILY INJURY

(Continued from p. 1)

The IDEA uses the federal definition of “serious bodily injury” which is defined as: bodily injury which involves substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ or mental faculty. Compare this language to the definition of “bodily injury” which is “a cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary.” The definition of serious bodily injury is a much higher standard to meet.

The term means that the injury to the person must be serious—it must be significant and extreme. Most student assaults will not meet this definition. In fact, there are very few cases where Hearing Officers have found that the student’s conduct resulted in a serious bodily injury. To the contrary, several cases outline how difficult it is to prevail on this issue at a due process hearing.

In one Pennsylvania case, a high school student with a disability followed another student into the bathroom, kicked and punched him several times and broke his nose. The Hearing Officer found that although the student’s behavior was injurious, frightening and intimidating, “a broken nose does not fit within the IDEA’s narrow definition of the infliction of serious bodily injury.”

In another Pennsylvania case, a child with a disability assaulted a school employee on the bus. A Hearing Officer found that the employee’s injuries, which were not described in the decision, did not amount to “serious bodily injury.” The evidence showed that the employee returned to work immediately after the incident, did not seek medical care and did not miss work. Under those facts, the Hearing Officer concluded that the employee was not in extreme physical pain.

Two Pennsylvania hearing officers have found that a bite to another person is not a serious bodily injury. In one case, a third grade student bit her teach-

er. Right after the incident, the teacher left the building to go to an unrelated appointment with her son. She then came back to the District and filled out worker’s compensation paperwork. After she left, she went to a medical express clinic where she declined pain medication, but did get an antibiotic and a tetanus shot. At the hearing, the teacher testified that she had pain in her arm for a few days and was dizzy from the antibiotic. She did not take any days off work. Although the wound did bruise, by the time the hearing was held, it had almost healed.

While the Hearing officer concluded that there was no doubt that the teacher was injured, the wound did not rise to the level of serious bodily injury. He found that the teacher’s actions after the incident led to the conclusion that she was not in extreme physical pain. He concluded that her injury fit the definition of “bodily injury” but not the definition of “serious bodily injury.”

Similarly, a different Pennsylvania Hearing Officer concluded that a bite to a Principal did not rise to the level of serious bodily injury. In this case a 2nd grade emotionally disturbed student diagnosed with bipolar disorder, kicked the Principal in the stomach and legs and bit her upper arm through her suit jacket. The area around the bite was sore and red, but the skin was not broken.

The principal filled out a written report immediately after the incident, but did not mention being in pain. She then went directly to the doctor who diagnosed an arm contusion and abrasions to the hip, leg and ankle. No pain medication was prescribed nor was pain mentioned in the medical records. Tylenol was recommended as a precaution. The Hearing Officer concluded that the evidence did not support that the Principal was in extreme physical pain as a result of the student’s conduct.

(continued on next page)

Serious Bodily Injury

(Continued from page 5)

TIPS

Based on these cases, can a District ever place a child in an interim alternative setting for inflicting serious bodily injury on another person? To have a chance at success, ensure that staff are following these tips if an injury that might rise to the level of serious bodily injury occurs:

- Make sure that staff know to report any injuries caused by students immediately to their Supervisor.
- The report should include a description of the injury and the level of pain the employee is in.
- Take pictures of any injuries—especially those that may heal prior to a hearing.
- Have them seek medical treatment immediately. Do not delay or wait or tell them to finish out their work day.
- The employee should be honest and forthright with their doctor about their level of pain.
- Employees should follow the Doctor's recommendations, including filling prescriptions and completing prescribed therapy.
- Employees should follow up with the Doctor if their pain continues.
- If the pain continues, the employee should document the level of pain on a scale of 1-10 daily.



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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

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.