

**SPECIAL
POINTS OF
INTEREST:**

- **Ensure that outdoor and/or alternate facilities chosen for graduation are accessible.**
- **School attorneys may now participate in mediation if parents bring an attorney.**
- **Take complaint about disability harassment or bullying seriously, investigate and appropriately respond.**

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GRADUATION ISSUES

Graduation is quickly approaching and there are several issues that Districts need to be aware of relative to special education and 504 students as well as accessibility issues and requirements for both students and family members who are attending graduation ceremonies.

The issue of graduation and aging out of services may become

even more complicated with the anticipated passage of new legislation that would permit currently enrolled special education students who have already reached the age of 21 during this school year (20-21) and those who turn 21 during this summer to extend their special education services and attend school for the 21-22 school year based solely on the parents' election to en-

roll. Further, it would permit any student to repeat a grade in school at parents' discretion. While this bill has only passed to date in the Pennsylvania Senate (Senate Bill 664) it is likely it will pass the House in the near future.

This article will explore other considerations for graduation.

[Read More about Graduation Issues on page 3](#)

Attorney Participation in Mediation

Mediation is available as a dispute resolution option for parents and school districts that need assistance in resolving a disagreement about a student's education program. Recently, the Pennsylvania Office for Dispute Resolution implemented new rules permitting attorneys to participate in mediation under certain circumstances. PDE issued Frequently Asked Questions about Attorney Participation in Mediation which will be discussed in this article.

[Read more about attorney participation in mediation on page 5](#)

CASE LAW UPDATE

D.A. v. PENN HILLS SCHOOL DISTRICT Transportation Accommodations for Private School Students

FACTS: D.A. is a resident of Penn Hills School District, but is enrolled in Central Catholic High School. As required by Pennsylvania law, Penn Hills provides D.A. with transportation to Central Catholic. D.A. has been diagnosed with several conditions, including asthma, depression, anxiety and a peanut allergy.

Prior to the 2019-2020 school year, Penn Hills provided D.A. with door to door transportation pursuant to a Section 504 Plan. However, in September, 2019 Penn Hills informed the family that it would continue to provide transportation, but it would no longer be door to door. The family filed a complaint with the Office of Civil Rights, which was settled through mediation in January, 2020.

The following month, the District notified the family that they would discontinue providing services set forth in the 504 plan because the student was enrolled in a private school. Parents filed for Due Process alleging that the District violated Section 504 by failing to provide D.A. with access to specialized transportation. The Hearing Officer dismissed the case and it was thereafter filed in Federal Court.

ISSUE: The parents argued that the District has an obligation to accommodate the student on an equal access basis and failed to do so. The District argued that there is no liability because they have no legal obligation to provide any FAPE related services to a student that is enrolled by their parents in a private school.



The Court agreed with the parents and framed the issue as whether Penn Hills denied D.A. equal access to its busing services by refusing his requested accommodation of door to door transportation. The Court therefore looked at whether D.A. had been denied the opportunity to participate equally to all others in public facilities and federally funded programs, rather than whether he was denied FAPE by the District.

HOLDING AND ANALYSIS: The Court held that Penn Hills had a duty to accommodate D.A. under Section 504 of the Rehabilitation Act even though he was not enrolled in the district. PA law requires schools that transport their own students to also provide the same transportation to students who attend private schools within a ten-mile distance of the District's boundaries. Because Central Catholic is within 10 miles of Penn Hills' boundaries, Penn Hills is required to transport students that are enrolled there, including D.A. Once Penn Hills offers transportation, they cannot discriminate against students with disabilities by denying them equal access.

To accomplish equal access schools have an affirmative duty to make reasonable accommodations to avoid discrimination on the basis of disability and must provide access to the program equal to the access provided to nondisabled students.

In this case, it was agreed by the parties that D.A. could not access the transportation that is being provided to all Central Catholic students unless he was given the accommodation of door to door transportation. The Court determined that this request was a reasonable accommodation to allow D.A. to access the service. Thus, Penn Hills was required to provide door to door transportation to D.A. to allow him equal access to the service.

GRADUATION

(continued from page 1)

ACCESSIBILITY

With COVID, many Districts have moved their graduation ceremonies to outdoor facilities or places that will allow for greater social distancing. This may not be a facility where the District typically holds their graduation ceremony. Districts must ensure that the new facility or location adheres to the accessibility requirements of Section 504 and of the ADA.

Accessibility issues apply not just to students, but also to parents, grandparents and siblings—and anyone else who chooses to attend. Therefore, when choosing your alternate location, make sure it is wheelchair accessible, with plenty of handicap parking. For example, consider whether a student in a wheelchair can navigate a grassy football field or access a outdoor stage. Can family members access seating in the facility? If not, you may need to make adjustments to the facility to accommodate the student or family member. If you need to retrofit a facility, ensure that it meets the requirements of the ADA.

Remember that this would also apply to sports banquets, end of year concerts, plays or musicals, prom and other end of year activities that are moved to alternate facilities.

Think about including contact information for the District's 504 Coordinator in brochures or advertisements that families can contact if they feel that they need an accommodation to the facility that has been chosen for the event.

GENERAL GRADUATION PROCEDURES

Obviously graduation is an issue that should be discussed with families at IEP meetings throughout the student's high school career. But remember, that graduation is considered a "change of placement" for a child with a disability under the IDEA and terminates a student's right to FAPE. Therefore, schools are required to issue a NOREP to the family to provide them with notice of the graduation decision and the opportunity to disagree. If parents disagree with the recommendation, the issue can be resolved through mediation or due process. Pendency applies

for graduation (if parents request mediation or due process) after 12th grade but does not apply to students that are aging out of services.

Remember that the District must also provide the student with a summary of academic achievement and functional performance, which includes recommendations on how to assist the student in meeting their postsecondary goals.

PARTICIPATION IN CEREMONIES

In 2000, the PA Commonwealth Court upheld the Woodland Hills School District's decision to not permit a student with Down Syndrome to participate in graduation ceremonies with his class because he had not yet met graduation requirements and was remaining in school beyond his 4th year of high school. Since that time, Pennsylvania has amended the law to require schools to allow students with disabilities to participate in graduation ceremonies with their class, even if they have not met graduation requirements and are continuing with their education beyond their 4th year of high school. The student would receive a Certificate of Attendance at the ceremony. The District would not create the diploma until the student graduates with a regular diploma. A diploma is dated and awarded when the student with disabilities actually graduates.

ESY FOR STUDENTS AGING OUT

If a student with a disability turns 21 years of age during the school term, that student may still be eligible for extended school year services during the subsequent summer. The IEP team must determine whether that student is eligible for extended school year during the summer. If the IEP team determines that extended school year is a part of FAPE, that student must be provided with extended school year services during the summer after the end of the school term. The student would exit special education thereafter and receive his or her diploma. Again, that student would be permitted to participate in graduation ceremonies prior to attending ESY.

AVOID MISTAKES IN RESPONDING TO DISABILITY HARASSMENT

Parents can sue school districts alleging a denial of FAPE under the IDEA and seek monetary damages under Section 504 with a deliberate indifference claim to reports of disability based harassment and bullying. Deliberate indifference can be found where the school had knowledge of the harassment and failed to respond adequately.

Ensure that District administrators are responding appropriately to reports of disability-based harassment (or any other form of harassment) to address the concerns of the family and student and to avoid liability.

DO NOT IGNORE COMPLAINTS: Often parents complaint to multiple school staff about incidents that are occurring. These complaints cannot be ignored. Train teachers and other staff that if a parent reports peer on peer harassment they **MUST** report it to the Principal as soon as possible. The Principal or other administrator in charge of harassment complaints **MUST** investigate to determine what is happening. Don't forget to document all investigations.

REPORTS AT IEP MEETINGS: Parents may also make complaints at their child's IEP meeting. Unfortunately, teams often respond by telling parents that the IEP meeting isn't the right time to discuss these issues; however, the appropriate administrator fails to follow up with the parents to discuss it at the "right time." Parents notifying the team of the harassment puts the District on notice of the issue. Multiple staff members are present who know the child and any issues that may be occurring. Again, the District's **MUST** respond to such complaints.

Additionally, the IEP meeting may be the perfect time to address the complaints. The Team can discuss and address whether the harassment is depriving the student of FAPE. The team should ask whether the student's needs have changed as a result of the harassment and revise the IEP accordingly. Look at factors like whether the student's grades or attendance have declined or whether the team is seeing new or increased emotional or behavioral concerns.

RESPONSIVE ACTION IS REQUIRED TO AVOID LIABILITY Section 504 requires a school with notice of possible disability-based harassment to take prompt and effective steps to investigate and determine what occurred and to take reasonable action to prevent any harassment and eliminate a hostile environment if one has been created, and prevent harassment from recurring.

FAQs For Attorney Participation In Mediation

Beginning March 1, 2021 the Office for Dispute Resolution began permitting attorneys to participate in mediation. The FAQs explain how the process will work.

<p>When can attorney's participate in mediation?</p>	<ul style="list-style-type: none"> • If the parent/guardian chooses to bring an attorney to the mediation session, the local education agency (LEA) may bring its attorney. • If the parent/guardian does not bring an attorney to the mediation session, the LEA may not bring its attorney. • However, if the LEA brings an attorney even though the parent/guardian does not, the parent/guardian may continue with the mediation, postpone, or cancel the mediation
<p>If the parent has an attorney, are they required to participate in the mediation?</p>	<ul style="list-style-type: none"> • No, parents may still choose whether they bring their attorney or not • ODR encourages parents and school staff to keep open lines of communication with one another
<p>If parents' attorney is attending mediation, is the school required to bring their attorney?</p>	<ul style="list-style-type: none"> • No, there is no requirement that the school district bring a lawyer • While this is the answer in the FAQs, our office would advise our clients to always bring your lawyer if parents will have theirs present.
<p>What if the parties cannot agree on participation of attorneys in the mediation process?</p>	<ul style="list-style-type: none"> • Mediation is voluntary and neither party can be forced to participate. • Therefore, if the parties cannot agree on this issue, then the other side does not have to agree to mediate. • Parties can then decide if they want to participate in facilitated IEP meetings; a Hearing Officer Settlement Conference or proceed to due process.
<p>Who pays for the attorney?</p>	<ul style="list-style-type: none"> • Each party bears the cost of their own attorneys unless there is an agreement between the parties that states otherwise • Attorney's fees can be an issue that is mediated at the mediation, although ODR encourages parties to do this outside of the mediation process, so the focus can be on issues regarding the educational program of the child.

WHAT DO YOU THINK?

Student attended a public school district for 3 years and was identified as a special education student and had an IEP. Two years ago, Student's parents unilaterally enrolled her in a private school, where she continued to struggle and developed some additional issues. However, in April of this year, Student's mother contacted the District to reenroll her for the 2021-2022 school year and requested that she receive an IEP. They also provided the District with medical records explaining her new diagnosis.

Roughly a month later, the district issued a Permission to Evaluate for an initial evaluation. Several weeks later, parents returned the PTE with permission to evaluate. However, because of summer, the District did not complete the evaluation prior to the start of school and therefore did not develop or offer an IEP to start the school year.

Parents issued the District a 10 day notice of their intent to place Student in a private school and to seek tuition reimbursement. The District issued their report the following September which was 60 school days after receiving the PTE back and sent a proposed IEP 30 days later at the end of October.

Did the Court award tuition reimbursement for the District's failure to have an IEP in place to start the school year?



The Court in M.D. v. Colonial School District overturned the hearing officer's decision and awarded tuition reimbursement for 1 year only. The Court found that the District committed a procedural error by conducting an initial evaluation rather than considering the student immediately eligible and conducting a reevaluation. The Court held that the student did not lose her eligibility simply because parents enrolled her in a private school. Once a child is found eligible for special education, they remain eligible until an evaluation deems the student ineligible, even if they leave the public school. Therefore, when she reenrolled in the District, she remained eligible for special education services. Thus the District should have conducted a reevaluation rather than an initial evaluation to determine eligibility.

Further, the District failed to make the Permission to Evaluate/Reevaluate "readily available" to the family when they enrolled. The District's delay of more than a month was inappropriate. Had they not delayed, they could have finished the evaluation prior to school ending and had an IEP in place to start the school year.

The Court rejected the District's argument that this was only a procedural error and did not deny the student FAPE. The Court agreed with parents that based on the District's timelines, student would not have an IEP in place until the end of October. The Court found this to be a denial of FAPE.



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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.

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.

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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.