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School Law Review

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Inside This Issue:

OSEP Gives Clarification on Bus Suspensions for Students With IEPs

***Sarzynski*, Letter to, 59 IDELR 141 (OSEP 2012).**

The Office of Special Education Programs ("OSEP") was presented with three questions regarding serving children with disabilities who are eligible for transportation. Below is a summary of the questions and answers provided.

Question 1:

If a student, whose IEP includes transportation, is suspended from the bus (or other mode of transportation) for more than ten school days, does the district have to do a manifestation determination even if the parent voluntarily transports the student to the school or educational program during the suspension? Specifically, is there a violation of IDEA if a manifestation determination is not completed when this related service is temporarily affected, but there is no change in the educational services the student receives?

The district must treat the bus suspension as a removal under 34 CFR 300.530 (e). Therefore, within 10 days of the decision to suspend the student from his or her transportation services for more than 10 consecutive school days, the district must convene the IEP team to determine whether the conduct that caused the transportation suspension was a manifestation of the student's disability.

Question 2:

When determining whether the 10 day threshold is met, in regards to a bus suspension, must the district include any previous suspensions from instruction?

All disciplinary removals, including disciplinary suspensions from instruction, must be considered when determining whether a child's current removal from the IEP-prescribed transportation services constitutes a change in placement due to a pattern of behavior.

Question 3:

If a district is deciding on suspension from instruction, is the district required to include any previous transportation suspensions in deciding whether the 10 days threshold has been met?

This issue works in the same manner as discussed in question 2. When deciding whether a current disciplinary removal from instruction constitutes a change of placement due to a pattern of disciplinary removals, the district must consider previous suspensions from IEP-prescribed transportation services.

How This Affects Your District:

The first thing that IEP teams should be careful of is identifying a student as needing specialized transportation in order to benefit from the educational setting. Often, IEP teams give in to parents who want the district to continue to provide transportation after the district has decided to go to state minimums in regards to bus transportation. With the budget cuts that have occurred over the past few years, many districts have switched to state minimums. These minimums only require districts to transport students in K-8 who live outside a two mile radius from the school and to students attending nonpublic or community schools that are located within 30 minutes of the public school the student would otherwise attend. As more and more districts have begun providing transportation to only these students, parents of students with disabilities have pushed for transportation to

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be provided as a related service in their child's IEP.

Each IEP team must determine if transportation is required to assist a child with a disability to benefit from special education and related services. In a case where transportation is required, disciplinary removal from the bus does count towards the 10-day disciplinary removal rule. The 10-day threshold must count both disciplinary removals from transportation and from instruction.

Federal Court Upheld $1 Million Award in Racial Harassment Case

***Zeno v. Pine Plains Central School District*, Case No. 10-3604-cv (2nd Cir. Dec. 3, 2012).**

A federal appeals court recently upheld an award of $1 million to a student who endured years of racial harassment in his school.

The student was 16 when he moved to the largely white school district. The student was half white and half Hispanic, and was part of only five percent of the student body that was a racial minority. Further, the student was in special education, but originally planned on trying to achieve a New York State Regents diploma. After enduring three years of constant racial harassment, the student decided to pursue a special education diploma rather than continue on toward his ultimate goal.

Almost immediately after he began attending school in the district the harassment began. The harassment included the student being called racial slurs and other students telling him to go back where he came from. At one point a necklace was ripped from the student's neck and the attacker referred to the necklace as "fake rapper bling bling." The student was threatened often and other students even referred to lynching him.

When complaints were made, the school took some action, which included suspending offenders. However, the superintendent never met with the student's mother, even though she made various requests for a meeting. Further, the district was asked to provide a "shadow" for the student in order to protect him from the other students while he was at school. Then, the district scheduled a mediation session that was supposed to occur between the student's mother and the parents of his attackers. The problem with the mediation was that the district failed to inform the harassed student's mother of the time and place that the session would occur. Therefore, nothing of substance was accomplished.

The student continued to receive harassment for the next two years of his high school career. His lawsuit alleged race discrimination under Title VI of the Civil Rights Act of 1964. After a trial, the jury awarded him $1.25 million which the judge reduced to $1 million.

The district argued that it responded reasonably to all of the complaints it received from the student and his mother. However, this court found that it was reasonable for the jury to have found that the district's response to the harassment was inadequate and that the district, in its lack of response, was deliberately indifferent. The court gave three examples of the district's deliberate indifference.

First, the district was slow to implement non-disciplinary measures, such as bias training. Even though the district did act to discipline the student's antagonizers, the district took no proactive steps to teach the student body about harassment and the policies against that action.

Second, the steps that were taken to remedy the situation were "half-hearted."

Third, the district ignored many signs that a larger, more directed set of actions was needed. Because the district was aware of the verbal harassment the student endured for the entirety of his time in school and it took no steps to keep that action from continuing, it was reasonable for the jury to believe that the district was ignoring the problems.

When a district knows that there is student on student harassment based on race or other protected factors and the response is not reasonably calculated to end the harassment, the district falls short of its duties under Title VI.

How This Affects Your District:

Recently there has been much talk about bullying and policies that districts should have in place regarding bullying. However, districts should be aware that some types of bullying will also fall under the prohibitions of harassment in Title VI, including race, color, and national origin.

The standard used for liability under Title VI harassment is "deliberate indifference." The case above notes three particular issues that indicated to the court that the district had been deliberately indifferent. The district did not take steps to train students in regards to harassment, the steps taken to remedy the problems were weak, and the district ignored the fact that the harassment was continuing and took no steps to keep discontinue the harassment. The severity of the harassment certainly impacted the court's analysis,

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Federal Court Upheld $1 Million Award in Racial Harassment Case, Cont.

but deliberate indifference, in relation to prohibited harassment, is a problem regardless of severity. Districts should also be aware that Title IX prohibits discrimination on the basis of gender, so this same analysis could be used in that situation.

When facing situations where harassment is occurring, districts should take proactive steps to keep the harassment from continuing. This means that the antagonists should be punished, the parents should be included in the discussion of solutions, and, if needed, greater steps should be taken to ensure that any harassed student has protection from further harassment.

Legislative Update

HB 191 – Passed House – Will Be Sent to Senate

This would establish a minimum school year for school districts, STEM schools, and chartered nonpublic schools based on hours, rather than days, of instruction. Further, it would prohibit public schools from opening prior to Labor Day or after Memorial Day, except in specified circumstances.

HB 555 – Passed House – Will Be Sent to Senate

This would replace the current academic performance ratings system for public schools with a system under which districts and schools are assigned letter grades.

HB 462 – Reported out of House Committee – Waiting for Full House Vote

Would establish that when a complaint is filed alleging that a child is an abused, neglected, or dependent child, the judge may order the board of education of the school district where the child is enrolled to release the child's records to any district in which the child enrolls after the complaint is filed. It further requires the board of education to comply with the order, regardless of whether the student owes fees. There would also be a reporting component.

HB 143—Passed Senate and Needs House Approval of Changes

Requires various precautions to ensure that students who have or may have incurred concussions do not suffer any further damage from continued athletics participation.

Some of these requirements include:

- Parents must submit a signed form stating that the student and the parent/guardian has received the concussion and head injury information sheet prior to the student being allowed to participate in athletics for a particular school year.
- Referees for athletics must hold a pupil-activity program permit and must have completed (within the last three years) training on recognizing the symptoms of concussions and head injuries.
- Any student who is practicing or competing in an athletic event and exhibits signs of a concussion or head injury must be removed from practice or competition and cannot return on that day.
- If a student is removed from practice or competition for exhibiting signs of a concussion, the student cannot return until: (1) the student's condition is assessed by a physician or other licensed health care provider; and (2) the student receives clearance that it is safe to return to practice or competition from a physician or other licensed health care provider.

Note that none of these bills have been signed into law, but are under consideration. We will continue to update you through our Twitter (@erflegal) and through our blog, which can be found at: http://blog.erflegal.com/.

Advisory Opinions on Ohio's Revolving Door Law for Public Employees

The Ohio Ethics Commission has adopted two new hypothetical advisory opinions regarding Ohio's revolving door law for public employees.

The revolving door law prohibits public officials and employees who leave a public position from representing or acting in a representative capacity for any person, including a new employer, on any matter that the official or employee personally participated in while serving in the former position. This prohibition does not apply to teachers and lasts for one year after severing the original employment.

The new advisory opinions detail several exceptions to this law and are summarized below:

Advisory Opinion 2012-03:

This opinion explains two new exceptions, RC 102.03(A)(8) and RC 102.03(A)(9), which apply to non-elected public officials.

The (A)(8) exception applies to non-elected state officials and employees who leave one state agency to become an official or employee of another state agency. The exception allows these officials to represent

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their new state agency on any matters, except audits and investigations, in which he or she participated in their former position. "Audits" include audits conducted by the Auditor of State's Office, the State's Internal Audit Committee, the Casino Control Commission, the Department of Taxation and any other state agency. "Investigations" include those conducted by the Ethics Commission, Inspector General's Office, AG's Office, Auditor of State's Office, the EPA and any other state agency.

One should not that the (A)(8) exception does not apply to a former state official or employee who accepts employment with a local public agency, which includes village, township, city, and county agencies.

The (A)(9) exception applies to non-elected local officials and employees who leave one position in a local public agency for another position in the same public agency. Under this exception, these officials are permitted to represent their new department, division, etc. on any matters in which he or she personally participated while serving in the former position.

Both of these exceptions remove the one-year prohibition that would otherwise apply.

Advisory Opinion 2012-04:

This explains a separate exception to the law, RC 102.03(A)(6).

The (A)(6) exception allows a former public employee to be retained to "represent, assist, or act in a representative capacity for" a former employer on a matter in which he or she personally participated during public employment. The exception is available only when the former employee is retained by (a) the agency formerly served; or (b) a third party employer, if the former employer has determined that the work for the new employer will assist the former. In essence, work performed by the employee must assist and serve the interests of the former employer. The exception applies regardless of whether the former employee is engaged as an employee, consultant, or independent contractor, and as either an individual or through a private company.

Navigating the Legal Issues of the Holiday Season

The winter holidays present public schools with the challenge of recognizing the diverse beliefs of their students while avoiding the issues associated with separation of church and state. This time of year also provides a great opportunity for schools to create an atmosphere of tolerance and understanding amongst their students.

Teachers are allowed to teach about different religious traditions and cultures, if it is appropriate for their assigned curriculum. The only requirement is that school employees must not give students the idea that one set of beliefs or one particular holiday is more acceptable than the others, or that religion, in general, is preferable to non-religion. The Supreme Court has said that religion should only be studied if it is "presented objectively as a part of a secular program of education." Therefore, it can be appropriate to teach about the different aspects of the various religious holidays, including the historical and cultural components. As long as teachers and other school employees are careful not to cover just one single holiday, but rather cover various holiday traditions, there should not be a problem with including learning about the holidays in the curriculum.

Another aspect of the holiday season are student displays and performances. As with the teaching aspect, noted above, there is no reason to exclude religious songs or works of art and literature from performances and displays. So long as the entire display or performance is not dedicated to one religious belief or holiday, the school should not be found in violation of the First Amendment. However, it would not be appropriate for a school choir to perform an entire concert that was completely dedicated to Christmas music, without representing other cultures. Note that in some cases teachers may give a creative assignment and a student may choose to depict a particular religious holiday as a part of that assignment. As long as the student's completed work is within the bounds of the given assignment, there should be no problem with allowing students to express themselves through these creative assignments.

When putting out displays for the holidays, it is important to look at the context in which the symbols appear. It would not be appropriate to only display a nativity scene. However, it would be appropriate to have a display that showed an evergreen tree, candles, snowflakes, and a variety of religious symbols. Overall, if a school plans to have decorations for the holiday season, the school should be sure that if any religious pieces are displayed that all different religions are represented, along with secular pieces. Given the abundance of non-religious winter symbols, a display free of specific religious symbols is best.

It is best, when dealing with the holiday season, to be aware of what message you are sending about what is acceptable for the students to believe. If you are sending a message that only represents one set of beliefs, it will be important for you to reassess your teaching or displays to ensure that various holidays are represented and that the goal of teaching about the culture and traditions associated with the holidays is the main purpose.

Education Law Speeches/Seminars

Administrator's Academy Dates at Great Oaks Instructional Resource Center

You can enroll in an Administrator's Academy session using the form on our website or by emailing Pam Leist at pleist@erflegal.com.

December 6th, 2012—*Navigating Workers' Compensation and Unemployment Law Issues*

March 7th, 2013—*Advanced Topics in School Finance Law*

June 13th—*Special Education Legal Update*

July 11th—*Education Law Legal Updates 2012-2013*

Section 504: Diabetes Workshop

Bill Deters will join Lauren Brown, the Supervisor/Consultant for Intervention Services, School Nursing Services, and Sign Language Interpreter Services at Hamilton County ESC to discuss:

- Section 504 of the American with Disabilities Act and the school district's role in implementing the law
- Issues related to diabetes in the school setting, including the role of school nurses and other personnel in helping to meet each student's needs.

The workshop will take place at the Great Oaks Instructional Resource Center or via live webinar. The cost of either the seminar or webinar is $50 per school district (no limit to the number of participants per school district). The presentation will also be archived for anyone who cannot attend the live event.

This workshop is open to all school personnel. Registered nurses will have the opportunity to earn two contact hours , if they attend the entire event. To register or for more information, email or call Pam Leist at pleist@erflegal.com, or 513-421-2540.

Other Upcoming Presentations

Bill Deters & Pamela Leist
Brown County ESC on December 17, 2012
Legal Hot Topics

Bill Deters and Bronston McCord
NW Ohio ESC on December 18, 2012
Collective Bargaining Seminar

Jeremy Neff
Talawanda on January 8, 2013
Student Discipline

Webinar Archives

Did you miss a past webinar or would you like to view a webinar again? If so, we are happy to provide that resource to you. To obtain a link to an archived presentation, send your request to Pam Leist at pleist@erflegal.com or 513-421-2540. Archived topics include:

- Education Law Legal Update - Including SB 316
- Effective IEP Teams
- Cyberlaw
- FMLA, ADA and Other Types of Leave
- Tax Incentives
- Prior Written Notice
- Student Residency, Custody and Homeless Students
- Ohio Budget Bill/House Bill 153
- Student Discipline
- Media and Public Relations
- Gearing Up for Negotiations

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ERF Practice Teams

Construction/Real Estate

Construction Contracts, Easements, Land Purchases and Sales, Liens, Mediations, and Litigation

Team Members:
Bronston McCord
Ryan LaFlamme
Gary Stedronsky

Workers' Compensation

Administrative Hearings, Court Appeals, Collaboration with TPA's, General Advice

Team Members:
Ryan LaFlamme
Pam Leist
Erin Wessendorf-Wortman

Special Education

Due Process Claims, IEP's, Change of Placement, FAPE, IDEA, Section 504, and any other topic related to Special Education

Team Members:
Bill Deters
Pam Leist
Jeremy Neff
Erin Wessendorf-Wortman
Michael Fischer

School Finance

Taxes, School Levies, Bonds, Board of Revision

Team Members:
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