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In Brief: School Law Update

Leaders in Educational and Municipal Law

December 2013

Third Circuit Court of Appeals Spells Out Test

Recovery of Money Damages from Schools in Disability Discrimination Claims

by Aimee Rankin Zundel, Esq.

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The Third Circuit Court of Appeals recently ruled, in a case of first impression, that a plaintiff seeking to recover compensatory damages against a school district for disability discrimination under Section 504 of the Rehabilitation Act must demonstrate that the school engaged in intentional discrimination.

The case of *S.H. ex rel Durrell v. Lower Merion Sch. Dist. (3d. Cir. 2013)*, decided in September, sets forth an exacting standard for parents and students who seek damages for emotional suffering, therapeutic expenses, the cost of post-secondary education, and similar damages from school districts in the Commonwealth.

In S.H. ex rel Durrell, the student ("S.H.") was incorrectly identified as having a learning disability and received resource classroom support and an IEP for several years in accordance with that disability. As a result of an independent educational evaluation (IEE) during 10th grade, opining that S.H. had been erroneously identified as having a disability, the school district conducted its own reevaluation and exited S.H. from special education pursuant to her parent's request. S.H. proceeded in general education classes and went on to be accepted at several postsecondary institutions.

S.H. and her parent brought suit against the school district for the misidentification, alleging violations of the Individuals with Disabilities Education Act (IDEA), the Rehabilitation Act, and the Americans with Disabilities Act. They claimed S.H.'s education had been hindered by her disability designation and placement in special education classes for which no grade point average was given. S.H. had been unable to enroll in foreign language, science and other upper level courses. Plaintiffs sought compensatory damages including reimbursement for tutoring, psychotherapy and two years of college tuition, arguing that S.H.'s self-confidence had been damaged by years of improper classification as a student with a disability.

The Court held that S.H. failed to demonstrate deliberate indifference on the part of the school district, while delineating a test for whether schools have acted with the required intent to result in costly compensatory damages. Particularly compelling to the Court was the district's swift action in exiting S.H. from special education after it received the independent evaluation opining that S.H. was mistakenly identified.

As parents and students continue to have Section 504 discrimination claims at their disposal, schools will want to bear in mind the test applied by courts in such cases. To prevail on a disability discrimination claim in the school setting, a plaintiff must prove that he or she was excluded from participation in, denied the benefits of, or subject to discrimination at the school. Discriminatory intent can be inferred when a school acted with "deliberate indifference"– meaning that school personnel (1) had knowledge that a federally protected right is substantially likely to be violated, and (2) failed to act despite that knowledge. Courts routinely recognize that deliberate indifference must be a deliberate choice, rather than negligence or "bureaucratic inaction."

The U.S. District Court for the Western District of Pennsylvania has already had an opportunity to apply the S.H. ex rel Durrell case to a set of facts involving the School District of Pittsburgh. In *K.K. v. Pittsburgh City Schools (W.D. Pa., Oct. 16, 2013)*, the plaintiff alleged that the District treated her with deliberate indifference by failing to implement an educational program that was equal to, or effective as, the education provided to her nondisabled peers. K.K. suffered from gastroparesis, a gastrointestinal disorder characterized by intermittent and severe vomiting.

The condition caused K.K. to miss much school and resulted in a period of homebound instruction that K.K. alleged was insufficient to help her keep up with a rigorous and advanced course load. The school district was able to demonstrate through consistent communication to the parents and actions taken to accommodate K.K.'s disability-related needs that it did not act with deliberate indifference to K.K. K.K. v. Pittsburgh City Schools has been appealed to the Third Circuit.

Stay tuned to see whether the Court views the matter in line with their standing precedent.

CDC Issues Voluntary Guidelines on Serving Children with Food Allergies

Are They Really Voluntary?

by M. Janet Burkardt, Esquire and Aimee Rankin Zundel, Esq.

M. Janet Burkardt

On October 30th the Centers for Disease Control and Prevention of the U. S. Department of Health and Human Services ("CDC") issued a 108-page report providing voluntary guidelines for managing food allergies in schools and early care and education programs. The focus of this report is to assist schools in the implementation of food allergy management and prevention plans and practices.

Though these guidelines are voluntary, the CDC encourages schools to use them to improve or develop food allergy management plans and practices. It is estimated that between 4% and 6% of school-age children have food allergies, and that number is increasing. However, every food allergic reaction has the potential to be life threatening.

These guidelines are similar to Section 112 of the FDA Food Safety Management Act, a 2010 amendment to the Pennsylvania School Code which charged the Pennsylvania Department of Health and the Pennsylvania Department of Education with developing state guidelines for managing food allergies in schools. PDE developed these guidelines in 2011 .

Following these guidelines, schools must develop training programs and protocol to deal with food allergic reactions. School personnel should understand the effects of food allergies on children's behavior and know how to administer epinephrine in an emergency situation. Federal legislation to encourage the use of epinephrine in schools passed the Senate last month and now is on the president's desk. This legislation, known as the School Access to Emergency Epinephrine Act, gives preference in awarding certain grants to states that require schools to permit trained personnel of the school to administer epinephrine and to maintain a supply of the drug in a secure location that is easily accessible to trained personnel.

It is advised that students with food allergies be evaluated for eligibility under Section 504 of the Rehabilitation Act regardless of whether the student's needs are addressed through a health plan. Districts have been found in violation of Section 504 for failing to evaluate a student once a severe food allergy is known. Districts bear the ultimate responsibility to identify and accommodate students with food allergies, even when the parent or physician is reluctant to provide necessary documentation of the impairment.

Remember that a student's medical condition doesn't have to impact his or her ability to learn in order for the student to qualify for a Section 504 accommodation plan. If a student's medical issue substantially limits any major life activity recognized under the Americans with Disabilities Act, as amended, such as eating, sleeping, standing, reading, concentrating and thinking, then the district is obligated to evaluate for eligibility.

Although the CDC goes to great lengths to explain that its new guidelines are voluntary, we believe that there may be consequences to failing to put in place policies and procedures to properly respond to food allergies and those consequences may result in significant liability for a school. You can find the guidelines at **http://www.cdc.gov/healthyyouth/foodallergies/.** Pennsylvania's guidelines are found at **http://www.pears.ed.state.pa.us/forms/files/PDE032i.pdf.** *Districts needing more information on serving students with food allergies should contact their solicitor or special counsel.*

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