

TAKE NOTE: Special Education Updates

By Jocelyn P. Kramer, Esq.

- NEW REQUIREMENT – HOMEBOUND** – Pennsylvania’s Department of Education (PDE) now requires schools to request permission/approval from PDE prior to initiating homebound instruction for a student with a special education designation. Approval is necessary through the Special Education ‘Students @ Home’ reporting system, including for reporting students receiving Instruction Conducted in the Home.
- HEARING OFFICERS REVIEWING CODE OF STUDENT CONDUCT VIOLATIONS** – Letter to Ramirez issued by the U.S. Dept. of Education’s Office of Special Education Programs (OSEP) has clarified its position that a special education hearing officer has the authority to review whether a student violated the code of student conduct and not just the special education ramifications of the disciplinary action. This advisory letter takes a position that clearly expands a hearing officer’s traditional role and is contrary to at least one federal District Court case from Hawaii. Watch for this the next time a parent requests an expedited due process hearing to challenge a unilateral removal or a manifestation determination. The hearing officer may actually review whether there was a code of student conduct violation in the first place!
- SHIFT TO RESULTS-DRIVEN ACCOUNTABILITY SYSTEM FOR SPECIAL EDUCATION COMPLIANCE** – Although it is still in the proposal phase, OSEP is starting to use indicators of student results in its annual evaluation of states. Historically, compliance monitoring has focused only on procedural compliance (e.g. , annual review dates, evaluation timelines, child find). OSEP intends to shift that focus to include functional outcomes for students with disabilities. Many questions regarding the performance of students with disabilities are already part of the state’s annual performance report, but the results never counted when determining whether a state is meeting the requirements of the IDEA. Graduation rates, test scores and post-secondary outcomes are some of the results that will likely be used for compliance monitoring in the future.
- PENNSYLVANIA PUSHES NEW FUNDING FORMULA FOR SPECIAL EDUCATION** – On April 26, 2013 Gov. Corbett signed legislation creating a commission that is responsible for recommending a new funding formula by September 30, 2013. The current formula is based on the assumption that 16% of the student population in every district is eligible for and receiving special education services. This 20-year-old



Data-Driven Dismissals: Future of Employee Discipline Under Act 82

by Jocelyn P. Kramer, Esq.

We are all painfully aware of the looming switch to performance-based evaluations for next year’s teacher ratings. Many uncertainties remain and you will need to work closely with your solicitor and special labor counsel to anticipate future challenges to dismissals under the new system.

Beginning in 2013-2014, all classroom teachers must be evaluated using the new rating tool scheduled to be released by PDE no later than June 30, 2013. The Act defines “classroom teacher” as a professional or temporary professional who provides direct instructions to students related to a specific subject or grade level. The rating tool for classroom teachers will include 50% observation data based on the Danielson framework and 50% student performance based on multiple measures of student achievement. The 50% of student achievement data will be comprised of 15% building level data, 15% teacher-specific data, and 20% elective data. The PDE is required to publish as a regulation the rating tool for classroom teachers and related regulations to assist in implementation in the Act before the end of June. The regulations relating to teacher evaluation and the new rating tool will be published without any prior public review or comment and must be implemented by educational institutions (excluding charter schools) beginning next school year.

Act 82 left many questions unanswered, creating practical implementation problems. For example, the Act requires that all temporary professionals be rated with the new tool that includes 50% performance data. A school will not have any student achievement data available for a TPE’s first semester rating and likely will not have sufficient data to support a TPE rating for at least two years. Value added measures and the multiple measure approach assumes multiple years of data and in

H.S. Senior Suspension Challenged the District and the Court on ‘Notice’

by Robert Max Junker, Esq.

As we approach prom and graduation season, school administrators are often confronted with discipline issues that need to be dealt with quickly. A recent Commonwealth Court opinion addressed the due process protections that are afforded to a student in a discipline case, particularly when prom and graduation are involved.



Dissinger v. Manheim Township School District involved a senior who was suspended for 60 days at the end of school year which prevented him from attending graduation. The student attended a post-prom party at the high school where an assistant principal confronted him about his behavior. The student denied drinking and consented to a breathalyzer test administered by a police officer. The test indicated a .04% BAC. The assistant principal called the student’s father, informed the father that the student would be suspended at that time, and told the father to attend a morning meeting at the school.

At the morning meeting, the assistant principal informed the student and his parents that the student was suspended for 60 calendar days for violating the anti-alcohol policy. The student could take his final exams and graduate, but he was forbidden from attending classes or participating in any extracurricular activities, including the graduation ceremony. After the meeting, the assistant principal sent a letter to just the parents confirming the suspension. The letter stated that a review of the assistant principal’s decision could be obtained by submitting a request within 7 days. The parents stated they never received the letter.

However, before the end of the morning meeting, the father stated that he wanted to appeal the suspension. The school district scheduled a meeting with the assistant superintendent for two days later. There was no recording of the meeting with the assistant superintendent, but the assistant principal testified under oath. The student admitted taking two sips of vodka. The assistant superintendent affirmed the suspension. The father asked about a further appeal, and the assistant superintendent stated that he could obtain a hearing before the school board but risked receiving an even harsher penalty. The assistant superintendent issued a letter describing the 60 day suspension.

The family filed for an injunction to challenge the suspension and argued that the school district did not follow the proper procedure to suspend a student for more than 10 days. The judge refused the injunction, the student missed graduation, and the family appealed to the Commonwealth Court.

Our experienced readers have, no doubt, spotted the number of issues with the school district’s actions. The Commonwealth Court declared that there is “no air” in Title, 22, Chapter 12 of the Pennsylvania Code.

- A suspension may be given by the principal or person in charge of the school, but a student may not be suspended until the student has been informed of the reasons for the suspension and given an opportunity to respond.
- If a suspension exceeds 3 school days, the parents and student must be given the opportunity for an informal hearing.
- Written notice of the reasons for the suspension must be given to both the parents and the student, sufficient notice of the time and place of the informal hearing must be given, and the student has the right to speak, produce witnesses, and question any witnesses present at the informal hearing.
- A suspension that exceeds 10 school days is considered an expulsion requiring a formal hearing.
- Notification of charges must be sent to the parents by certified mail, at least 3 days’ notice of the time and place of the formal hearing must be given, the hearing must be recorded, and additional due process safeguards apply. These due process rights can be knowingly and voluntarily waived by the student and parents.

The Commonwealth Court made it clear that the student was challenging his suspension from school, and not merely his exclusion from the graduation ceremony. The Commonwealth Court found that the trial judge erred by not considering whether the school district followed the required suspension and expulsion process and instead focused solely on whether the student could be barred from attending the graduation ceremony. Imposing the 60 day “suspension” required the school district to provide the student with a formal hearing. Moreover, the school district did not follow the proper notice procedures, so neither the meeting with the assistant principal or the “hearing” before the assistant superintendent could be considered a valid informal hearing. Thus, the Commonwealth Court found that the school district did not follow the suspension and expulsion process, the student’s suspension was not valid, there was no waiver, and the trial court should have granted the injunction lifting the suspension.

Administrators confronted with a discipline issue that could impact prom and graduation must continue to follow the suspension and expulsion procedure contained in Chapter 12. These notice requirements, timelines, and distinctions between informal and formal hearings can be lost in the crush of making a decision in the moment that will have immediate impact on these important milestones in a student and family’s life. In the calm before the storm, administrators should review their understanding of the proper discipline procedure.

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formula is obviously flawed and results in painful inequities. The legislation pushes for a formula based on actual need and delivery and the separation of costs for special education based on level of service. We will update you after September 30.

- **DSM V WILL BRING A NEW AIVE OF REQUESTS FOR SERVICES** – The planned fifth edition of DSM V (Diagnostic and Statistical Manual of Mental Disorders) was released May 22, 2013 and is expected to bring sweeping changes for schools. Separate autism spectrum categories were combined into one Autism category that is separated into degrees of severity (mild, moderate, severe). Rule out for severe depression and post-traumatic stress disorder resulting from bereavement was eliminated. Additional diagnosis were added, including, Disruptive Mood Disregulation Disorder (DMDD), a new diagnosis that describes most teenagers! There are also changes to ADHD diagnostic criteria which may expand diagnosis and eligibility. Register to listen to Attorney Aimee Zundel 's Pennsylvania Bar Institute presentation on June 26 at the 'Autism: Fitting the Pieces Together' program in Pittsburgh (register online at <http://pbi.org/>) or contact the Law Offices of Ira Weiss to request professional development for your staff.

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Data-Driven Dismissals

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fact requires it to support reliability. Similarly, Act 82 has defined classroom teachers and wrongly assumes that teacher level data is readily available for all professionals and temporary professionals that fall into this category. Many classroom teachers teach in non-tested grades and subjects or in classes with no existing assessments or value added assessment data. These are just two of many implementation questions that have not yet been addressed. PDE has suggested that these practical problems will be addressed via regulation and accounted for in the adopted rating tool. We sure hope so!

The unanswered questions are not limited to implementation alone. What happens in the near future when its dismissal time? The new performance based system raises a broad array of employee discipline issues. A dismissal under Section 1122 for incompetency or unsatisfactory teaching performance must now be based on observation and student performance. Although a dismissal cannot be based on student performance data alone, the challenges will be endless. Arbitration may not be the venue that you want for these challenges. Many districts may want to explore bargaining an alternative system for disputed ratings. Or if you stick with the traditional dispute resolution process, then districts may need to have an expert on call to defend the statistical integrity of each individual rating. **How will your district defend these challenges?**

SPEAKING OUT!

Attorneys from the Law Offices of Ira Weiss speak at professional forums and seminars throughout the year. Listed below are upcoming and most recent meetings:

- **Join Attorneys Ira Weiss and Jocelyn Kramer** for a discussion of 'Dismissals under Act 82' at the 16th Annual Dr. Samuel Francis School Law Symposium and Special Education Workshop on June 18, 2013 at the University of Pittsburgh (to register email TriState@pitt.edu and request a registration form).
- **School Law Attorney Jocelyn Kramer** joined nearly 40 other special education attorneys and advisors at Lehigh University on May 10 at the 41st Annual Special Education Law Conference – The Continuing Pursuit of a Good IDEA. Jocelyn presented on the regular and special education challenges of educating homeless and displaced youths with co-presenter Maura McInerny, Esq. of the Education Law Center, Philadelphia.
- **Attorneys Ira Weiss, Jocelyn Kramer and Aimee Rankin Zundel** and a team of attorneys from the law firm Campbell Durrant Beatty Palombo & Miller, collaborated in presenting a "School Law Update: A Breakfast Workshop with Local Special Counsel" on May 7 at Grove City College. Subjects covered included many of the important legal challenges school districts will face in the upcoming school year in the areas of Collective Bargaining, Performance-Based Evaluations, Special Education Litigation, and School District Cyber Programs.
- **Attorney Robert Max Junker** presented at the Pennsylvania Bar Association 's 'Real Property, Probate and Trust Law Section' Annual Meeting on May 8-9 in Pittsburgh.

If you would like more information about the above forums and subject matter, please contact the Law Offices of Ira Weiss.