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EDUCATION NEWS FROM SOUTHSIDE WORKS

Maiello Brungo & Maiello

ATTORNEYS AT LAW

Digital Accessibility What Education Leaders Need To Know

Technology initiatives in our schools bring significant benefits to the educational experience. But have you stopped to consider whether these technology initiatives are accessible to all? The Internet is fundamentally designed to work for all people, regardless of hardware, software, language, culture, location, or physical or mental ability. When the Web meets this goal, it is accessible to people with a diverse range of hearing, movement, sight, and cognitive ability. Thus, the impact of one's disability may be radically changed while utilizing the Web because the Web removes barriers to communication and interaction that many people face in the physical world. However, when websites, web technologies, or web tools are badly designed, they can create barriers that exclude people from using the Web. With more learning and interaction occurring online, accessibility has become a major concern for School Districts. When these resources are found to be inaccessible to students, teachers, parents or others with disabilities, your School District may be opening itself to complaints and legal challenges alleging disability discrimination.

Marcie Lipsitt, an outspoken special-education advocate, has filed hundreds of federal complaints against School Districts when it appears their websites aren't accessible to people with vision and hearing disabilities. "I will file as long as I need to file," Lipsitt said. "I'm hoping my efforts will inspire others to file these complaints. If one person files in every School District, wow, we'd have tens of thousands of accessible School Districts." *http://www.freep.com/story/news/education/2016/07/04/michigan-woman-fights-accessible-websites-us-school-districts/86526716/ last visited on 4/5/17.*

Spurred by close to 400 complaints filed by Ms. Lipsitt against public educational entities across the country, the Office for Civil Rights ("OCR") has found itself tackling allegations that School District web sites are not accessible to those with disabilities. The complaints are rooted in a seemingly straightforward precept, but one that might often be overlooked. Specifically, a school's digital resources must be accessible to users including those who have physical, sensory, cognitive, or learning disabilities. Such accessibility applies to a school's public-facing website, so as not to discourage or prevent disabled students, parents or employees from utilizing the online resources. The complaints filed with OCR allege that the School District web sites run afoul of the Americans with Disabilities Act (ADA) and Section 504 because certain pages were not accessible to these individuals. Generally, in investigating these institutions, OCR has found the following web design issues that made the sites inaccessible or only partially accessible to disabled users: videos without closed captions; images without alternative text markup; website features or structure that was not navigable by keyword – a necessary function for people who are blind, low-vision, or have limited dexterity; and, poor color contrast for text, making it illegible for some.

While these complaints have caught many School Districts, as well as OCR, off-guard, there is a path forward, through a voluntary resolution agreement. Based on available data, most of the complaints are being resolved with voluntary resolution agreements between

Special Education Briefings

Is it any WONDER special education litigation can be exhausting for all involved? Recently, the United States Supreme Court heard a case involving Wonder the service dog. However, the issue before the Court was not whether the student was entitled to have a service dog in school. The issue involved the exhaustion rule-whether a student denied the right to bring her service dog to school must exhaust administrative remedies that cannot provide the relief that she seeks. The case began as a dispute over whether the student, who has cerebral palsy, could bring the dog, Wonder, to kindergarten with her, but it eventually became a fight over a technical question about the requirement to exhaust administrative remedies. The case implicated a split amongst the Circuit Courts of Appeals on the proper scope of exhaustion. The exhaustion rule had previously been determined to require exhaustion of the administrative process (e.g., filing for a due process hearing) when parents have a claim against School Districts with a connection to the educational services provided to the student. There are several underlying bases for requiring exhaustion: 1) in administrative proceedings a record is developed for review on appeal; 2) parents and local school districts are encouraged to work together to resolve the issues in dispute; and, the process allows for a hearing officer with expertise to decide the educational errors, if any, and appropriate remedy. In an 8-0 decision the United States Supreme Court held that when the substance of the plaintiff's suit is something other than a denial of IDEA's core guarantee – what the Act calls a "free appropriate public education ("FAPE") – exhaustion of administrative remedies is not required. The Supreme Court's decision now permits parents to pass due process and go straight to Federal Court as long as FAPE is not at issue. In the case of *Fry v. Napoleon Community Schools*, No. 15-497 __ U.S. __, (February 22, 2017) the Court reasoned that the language of IDEA's Section 1415(l) compels exhaustion when a plaintiff seeks "relief" that is "available" under the IDEA. To establish the scope of IDEA's Section 1415(l), the Court concluded that since an administrative hearing officer's decision "shall" be "based on a determination of whether the child received a FAPE "exhaustion of administrative remedies is only required when the provision of FAPE is at issue."" The *Fry* case was remanded to the 6th Circuit for the Court of Appeals to determine whether the Frys are required to file for due process. Following the Supreme Court's guidance, when a student who alleges that a School District has discriminated against her because of her disability and does not allege educational harm, she is not required to first file an administrative due process proceeding. In determining the substance of the complaint, the key is not specific words (i.e. "FAPE", "IEP") in a complaint. The history of the dispute may inform whether the plaintiff is indeed seeking relief for a denial of FAPE. If a plaintiff has previously invoked the due process proceedings, a court may consider the shift as a strategic attempt to bypass administrative proceedings. As a caution against artful pleading by attorneys, the Court indicated that prior pursuit of due process and later strategic shifts to bypass administrative proceedings may also be indicative that the actual primary concern is the denial of FAPE. This is a win for students with disabilities, but is going to make litigation over the "substance of the student's complaint" certainly more exhausting.

SCOTUS Announces New FAPE Standard

It remains to be seen whether a recent U.S. Supreme Court decision will actually change the standard for FAPE for Pennsylvania School Districts. In Pennsylvania, FAPE requires a satisfactory IEP that must provide "significant l earning" a nd c onfer " meaningful b enefit." In a unanimous decision recently announced, the Supreme Court held that the FAPE standard under IDEA requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. Chief Justice Roberts, in writing the opinion for the court, emphasized the resistance to adopt a "bright line" rule but instead focused on the individualized nature of IEPs. In the case of *Endrew F. v. Douglas County School District*, the parents had removed their autistic son from the School District, believing the annual IEPs with little change from year to year denied their son a FAPE. The parents filed suit seeking tuition reimbursement for their private school. The *Endrew F.* District Court acknowledged that the past IEPs had not revealed immense educational growth but concluded that the IEPs were sufficient to show a pattern of, at least, minimal growth. The 10th Circuit Court of Appeals affirmed, no ting th at an IE P is ad equate as lo ng as it is calculated to confer an "educational benefit [that is] m erely...more than de minimis." The United States Supreme Court granted certiorari. The parties in *Endrew F.* asked the Supreme Court to determine a bright line rule for FAPE under the IDEA. The student's parents argued for a "substantially equal opportunity" standard to children without disabilities while the Douglas County School District argued in support of the more than de minimis standard. The Supreme Court held that the IDEA requires more than de minimis but that its prior decision in *Rowley* had already rejected the "substantially equal" as an unworkable standard requiring impossible measurements and comparisons. The IDEA demands an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. The adequacy of an IEP turns on the unique circumstances of the child for whom it was created. The Supreme Court offered for children with disabilities in the regular education setting this will be typically met by enabling the disabled child to achieve passing marks and advance from grade to grade but cautioned it was not going so far to rule that advancing grade to grade is proof of FAPE. The judgment in the *Endrew F.* case was vacated and remanded to the 10th Circuit Court of Appeals to determine whether the Douglas County School District IEPs were reasonably calculated to enable the student to make progress in light of his circumstances, i.e. a child with autism. It is our opinion that the focus on the unique circumstances of the child may lead to the removal of the unattainable expectation of standards based IEPS.

If you have questions about what these cases mean for your school, or you desire tailored training and consultation to your professionals on compliance with the Court's directives, please contact the Education Law Team at Maiello Brungo & Maiello, LLP at 412.242.4400.

Digital Accessibility What Education Leaders Need To Know CONTINUED FROM COVER

the School Districts and OCR. These agreements generally consist of two parts: (1) Assurances of Nondiscrimination with a written commitment to make and maintain an accessible web presence, and (2) written Benchmarks for Measuring Accessibility by establishing a set of technical accessibility standards. The agreements typically detail the process for complying with the laws, starting with an audit of existing web content and an adoption of an official web accessibility policy. Additionally, School Districts are often required to implement an OCR-approved process to ensure new content is accessible as well as a plan for remediating content deemed inaccessible during the audit.

If OCR has yet to bring its scrutiny to your web site, there are steps that can be taken to review your site for accessibility compliance. One way to begin to identify common accessibility problems is through "WAVE," a free online tool to evaluate website accessibility. *It can be found at http://wave.webaim.org.*

Upon review and identification of any accessibility issues, School Districts should work with their IT Departments to ensure not only that the website pages are accessible, but also that proper training is given to any staff who add content to the website and that additional content is accessible.

If you have questions about the requirements for website accessibility, development of Accessibility notices and policies, require assistance with an OCR complaint investigation, or desire tailored training and consultation to your professionals on compliance with the ADA, please contact the Education Law Team at Maiello Brungo & Maiello, LLP at 412.242.4400.

Cases of Interest

In Re: Appeal of the Coatesville Area School District, No. 608 C.D. 2016: In the current economic climate, School Districts continue to seek new ways to add to their base of taxable income. A recent decision by the Pennsylvania Commonwealth Court provides guidance for Courts across the Commonwealth in dealing with tax exemption requests by charitable institutions. In the *Coatesville* case, the Chester County Court of Common Pleas affirmed the decision of the Chester County Board of Assessment to assess a property at only 28% of its assessed value. Both the School District and the Municipality appealed, arguing that the property owner did not qualify for exemption under the test set forth in *Hospital Utilization Project v. Commonwealth*, 487 A.2d 1306, or the Institutions of Purely Public Charity Act. The Commonwealth Court recognized that the trial court did not analyze any of the elements set forth in the *HUP* case or the Act. The Commonwealth Court held that a charity applying for exemption must establish that it meets all the requirements of the aforementioned case and Act, as well as proving that it merits an exemption under the relevant County Assessment Law. Maiello, Brungo & Maiello recognizes that School Districts are eager to utilize any means necessary to expand their tax bases, and our experienced tax assessment attorneys can assist School Districts in maximizing their taxable revenue.

In Re: Private Sales of Former [School Buildings] in the School District of Philadelphia, 767 C.D. 2016. On March 7, 2017, the Pennsylvania Commonwealth Court issued a ruling in the above-referenced case permitting School Districts to exercise discretion in disposing of unused real property, so long as School Districts follow the statutory requirements of the Pennsylvania Public School Code. The School District of Philadelphia appealed a trial court order denying the District's petition for approval of the private sale of five unused school buildings in the District. The School District intended to sell the five properties to a development group as a package deal. Although the agreed-upon purchase price for some of the buildings was lower than their assessed property value, the agreed-upon purchase price for two of the buildings were significantly higher than their assessed values and, in total, the agreed-upon purchase price for all five buildings exceeded the total assessed value of the real estate. The trial court initially denied the School District's petition on the grounds that it could not, in good conscience, allow the sale of some of the properties for lower than their assessed values. In holding that the trial court abused its discretion by denying the District's Petition, the Commonwealth Court found that the District provided "substantial, uncontradicted evidence that the developer's offer was a better price than could be obtained a public sale" in compliance with Section 7 – 707(3) of the School Code. Accordingly, the Commonwealth Court's decision represents a willingness to rein in a trial court which attempted to substitute its own judgment for that of the School District.

Truancy

Effective for the 2017–2018 school year, Pennsylvania School Districts will be required to comport with new regulations governing student attendance and truancy. The Pennsylvania Legislature recently passed Act 138 which marked the first substantive amendment to Pennsylvania's truancy laws, codified under Article 12 of the Pennsylvania Public School Code, in approximately two decades.

Most important among the additional definitions added to Article 12 of the School Code are the newly defined terms of "Truant" and "Habitually Truant." Under the new law, a student will be considered "truant" when the student has "incurred three or more school days of unexcused absences during the current school year." "Unexcused absence" is defined as "an absence from school which is not permitted by the provisions of Section 1329 and for which an approved explanation has not been submitted within the time period and in the manner prescribed." A student will be considered "habitually truant" when the student has six or more school days of unexcused absences during the current school year. It is important to note that the absences need not be consecutive, but simply cumulative.

Most notably, the new law also imposes new procedural requirements School Districts must follow when dealing with truant and habitually truant students. Pursuant to the new law, "when a child is truant the school shall notify in writing the person in parental relation with the child" of the child's truancy within 10 days of the child's third unexcused absence. This notice, among other requirements, may, but is not required to, include the offer of a "school attendance improvement conference." A "school attendance improvement conference" is defined under the new law as a "conference where the child's absences and reasons for the absences are examined in an effort to improve attendance, with or without additional services." The following individuals must be invited to the conference: the child; the child's person in parental relation; other individuals identified by the person in parental relation who may be a resource; appropriate school personnel; and, recommended service providers. If the child continues to incur unexcused absences after the School District has issued the mandated notice, the School District *must* offer a school attendance improvement conference to the child and the child's parent or guardian, unless a conference was previously held following the initial truancy notice. Under the law, the child's parent or guardian has no legal requirement to attend the conference; however, the conference must still occur even if the parent or guardian declines to participate or fails to attend. Notably, the School District may not take further legal action to address unexcused absences until after the date of the scheduled school attendance improvement conference. Essentially, the new law is mandating that the School District take remedial measures to improve a student's attendance prior to filing summary citations with the local Magisterial District Judge.

Maiello, Brungo & Maiello recommends that each School District examine its current attendance policies, including procedures outlined in each District's student handbook to ensure that your policy comports with the new law. Maiello, Brungo & Maiello's Education Law Team can assist with the drafting of updated attendance policies to ensure compliance with the new mandates.

Rose Tree Media Case

On March 13, 2017, the Pennsylvania Commonwealth Court decided the case of *Rose Tree Media School District v. Rose Tree Media Secretaries and Educational Support Personnel Association – ESPA, PSEA-NEA*. In a victory for the School District, the Commonwealth Court upheld the lower court's vacating of an Arbitration Award in which a Grievant was reinstated to his employment as a support staff employee following his termination for harassing another teacher. Following the Grievant's termination, the Grievant claimed that the School District lacked just cause for termination. The Arbitrator agreed with the Grievant, stating that the School District lacked just cause because it failed to comply with due process requirements. The Arbitrator determined that the School District needed to memorialize notice of the Grievant's violations to the Grievant in writing, meet with the Grievant personally for each incident that required notice, and investigate further by interviewing every party with involvement in the conflict.

In vacating the Arbitrator's Award, the trial court determined that the Award was not rationally derived from the relevant Collective Bargaining Agreement. The trial court determined that the Arbitrator's Award required the School District to engage in additional procedures not included in the Collective Bargaining Agreement. Specifically, the Court concluded that the Collective Bargaining Agreement contained no provisions requiring the School District to undergo such onerous steps as providing the Grievant written notice and a meeting for each complained of incident and interviewing every single individual related to each incident, and as such the Award was not rationally derived from the CBA. The Commonwealth Court found that the School District sufficiently afforded the Grievant notice by giving the Grievant two separate warnings for his inappropriate conduct. Additionally, the Court found that an assessment by the Arbitrator as to the depth of the investigation was not warranted as an investigation indisputably took place and interviewing every person involved was unnecessary because the Grievant admitted to three of the incidences that led to his discharge. "The Arbitrator's private notion of due process [did] not adequately explain why additional process, including requirements exceeding what Pennsylvania Courts have ever weighed in a similar context, was required for a finding of just cause."

The decision by the Commonwealth Court in *Rose Tree Media* is significant because a common defense in many grievance arbitration proceedings pertaining to suspension or termination is one in which the Grievant claims that the School District did not afford the Grievant appropriate due process. Often, a Grievant will assert that due process requires extensive investigation by the School District and written notice of every single potential offense. Significantly, this case seems to suggest that, unless the applicable CBA requires such extensive process, the School District need only conduct a reasonable investigation into the Grievant's actions, especially where the Grievant admitted to the wrongdoing which led to discipline.

Maiello, Brungo & Maiello's Education Law Team is experienced in handling personnel matters and can assist your School District in defending against labor claims. Please feel free to contact any of our team members with any questions.

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