Winter 2011
EDUCATION NEWS

SPOTLIGHT SHINES ON SCHOOL BULLYING CONCERNS

On, October 26, 2010, the U.S. Department of Education's Office for Civil Rights (OCR) took the unusual step of sending a "Dear Colleague" letter to the superintendent of every school district in the nation on the subject of bullying as it relates to federal laws. In the ten-page letter, an Assistant Secretary for Civil Rights with OCR attempts to summarize school districts' obligations under federal anti-harassment and anti-discrimination statutes. The OCR letter clarifies that while school districts may have an obligation to address bullying under state statutes, school board policies or codes of student conduct, there are also requirements under federal civil rights laws to address discrimination and harassment, and in OCR's view, a school district may fulfill its state or local obligations to address bullying but still fail to comply with its federal responsibilities.

According to OCR, bullying qualifies as unlawful harassment when it is sufficiently severe or pervasive as to interfere with or limit a student's ability to benefit from educational services, and further, school districts are responsible for addressing harassment incidents of which a responsible person knew or should have known. OCR identifies the steps a school district may need to take to remedy harassment, including the possibility of providing "additional services to the student who was harassed in order to address the effects of the harassment, particularly if the school initially delays in responding or responds inappropriately to information about harassment." The OCR then describes five hypothetical instances of school-based harassment and how the school district should respond to harassment claims based on race, ethnicity, gender, sexual orientation and disability.

OCR's "Dear Colleague" letter imposes greater responsibilities on school districts to combat bullying than any other legal guidance issued to date by any governmental authority. Namely, the OCR letter requires school districts to remedy all known instances of harassment, without regard to whether the harassment occurs on school grounds or within the school's authority to address student conduct. Further, as cited above, OCR's letter implies that compensatory services for a student who suffers harassment, which the school district did not promptly remedy, may be appropriate. In addition, the hypotheticals discussed in OCR's letter impose a significant burden on school districts to not just address particular student complaints, but also to conduct seminars with all students regarding harassing conduct. While OCR's letter does not have the force of law, it does signal how OCR intends to enforce federal statutes in complaints brought before it.

These concerns led National School Boards Association's (NSBA's) General Counsel to send a letter on December 7, 2010 to the U.S. Department of Education's General Counsel to express concern that OCR's letter misreads the law and invites "misguided litigation" against school districts. Specifically, NSBA's counsel states that the OCR letter misstates both the definition of unlawful harassment and the obligations of school districts to remedy it, as those matters are defined under applicable Supreme Court precedent. Further, where OCR's letter requires districts responding to harassment claims to declare that certain acts are unlawful discrimination or harassment, NSBA opines that this may result in unlawful disclosure of student confidential information. In addition, NSBA notes that the strict standards imposed by OCR's letter give short shrift to student First Amendment rights to free speech. NSBA's counsel suggests that OCR's letter will increase federal claims against schools by expanding the definitions of harassment and the required responses. NSBA urges OCR to reconsider the impact of its "Dear Colleague" letter and issue a clarification which acknowledges the standards imposed by the various state governments and accurately states the present state of federal legal standards.

At present, OCR has not responded to NSBA's letter or issued any subsequent guidance on the matter. We will provide periodic updates as this matter develops. In the interim, school districts must take appropriate steps to ensure that their responses to bullying and harassment meet applicable standards. The cautious approach is to make sure that reported or known instances of bullying or harassment are evaluated under the district's bullying policy and code of student conduct and under applicable federal law. It may be necessary or advisable to consult with the District's Title IX or other compliance officers to determine whether further remedial action is necessary under any federal statute. While this may seem like overkill in addressing simple student misconduct, until the OCR clarifies its position, the safest course is the best course.

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FAPE ACCORDING TO THE THIRD CIRCUIT

In two recent cases, the Third Circuit Court of Appeals found that a school district provided a free appropriate public education (FAPE) to two students who requested continued placement in private school. In both cases, the Third Circuit found that the students' individualized education plans (IEPs) were sufficient, met the requirements of the Individuals with Disability Education Act (IDEA), and therefore, the students were not entitled to compensatory private education.

In the case of *C.W. v. The Rose Tree Media School District*, the student had attended a private school for girls from elementary school until the end of her ninth grade year. Just before the end of her ninth grade year, the student, who suffered from ADHD, withdrew from private school and enrolled in the public school district. However, she did not begin attending immediately while awaiting the results of the school district's evaluation of her disability. She completed her 9th grade that year at a different private school than she had been attending.

Prior to the beginning of the subsequent school year, the school district issued its multi-disciplinary evaluation and an IEP suggesting that placement in the school district's public schools was appropriate. The parents rejected the IEP and requested a due process hearing. The student was subsequently enrolled in yet a third private school.

The hearing officer at the due process hearing found that the school district had developed an appropriate IEP. The parents appealed and the decision of the hearing officer was affirmed by the appeals panel. The student filed suit in federal court seeking an award of either tuition reimbursement or compensatory education due to an alleged violation of her procedural due process rights under the IDEA. The student's claim was not that the IEP itself was inappropriate but that the school district had caused an undue 14-month delay between the request for a due process hearing and holding the hearing. The court held that while there may have been delay by the school district in holding a due process hearing, the delay did not cause the school district to be liable for compensatory education or tuition reimbursement because it had always offered FAPE. Thus, while there was delay, there was no harm.

In *N.M. v. The School District of Philadelphia*, the student was eight years old and suffered from a pervasive development disorder which caused deficits in language skills and auditory processing. Other impairments restricted the student's ability to socialize with other students and to pay attention in class. The student spent his first two years at a private school for students with language-based learning disabilities.

In March of 2007, a full battery of tests was completed. The school district's recommendations were that the student be placed in public school and that his instructional time be split between a regular classroom and a special education learning support classroom. The parents rejected the proposed IEP, requested a due process hearing, and continued enrolling the student in a private school. The hearing officer at the due process hearing concluded that the student was not eligible for tuition reimbursement because the IEP developed by the school district provided FAPE. The appeals panel affirmed, finding that the IEP was appropriate.

The student filed an action in federal court seeking tuition reimbursement. The district court concluded that the school district had provided FAPE and that enrollment in a private school was not the least restrictive environment. The Third Circuit affirmed, stating that the IEP developed by the school district was reasonably calculated to enable the student to receive meaningful educational benefits in light of the student's intellectual potential. Specifically, the court found that the combination of special education classroom learning plus regular mainstream classroom learning would help the student address social interaction deficits. The court also found that the school district's offer to provide one-on-one support also demonstrated that the school district provided FAPE.

As these cases from the Third Circuit demonstrate, students with special needs are not automatically entitled to private school tuition reimbursement. If a school district's proposed IEP provides FAPE, even with placement in the regular education classroom, the district has adequately met its duty.

MAXIMIZE COLLEGE LETTERS OF RECOMMENDATION WITH FERPA WAIVERS

Letters of recommendation from school staff can be a key component in the college application and selection process. Not surprisingly, some parents want to see how strong the letters of recommendation are before they are issued. The Family Educational Rights and Privacy Act (FERPA) gives parents and eligible students that right. A letter of recommendation written by a school staff member is an "education record" as it directly relates to a student and is maintained by the school district. Parents may inspect education records until a student turns 18 or starts college, whichever occurs first, after which the student may inspect the educational records with limited exceptions (34 C.F.R. § 99.3).

In a November 17, 1994 guidance letter issued by the Family Policy Compliance Office (FPCO), the FPCO took the position that K-12 school districts may ask students to sign a waiver of their FERPA right to access letters of recommendation. Specifically, the FPCO stated:

> While the regulations [34 C.F.R. § 99.12] indicate that this section applies at the post secondary level, this office has previously determined that a secondary school may refuse a student or the student's parent access to any copies of letters of recommendation to which a student has waived his or her right of access which are maintained at the secondary level.

However, if a student has not signed a waiver of his or her right to access a particular confidential letter or statement, a school would be required by FERPA to provide that student access to that record.

There are several benefits to such waivers. First, teachers and guidance counselors will feel more free to write more realistic letters of recommendation. Also, with a waiver, parents will not be able to ask for advance copies of the letter and then request that it be strengthened. Waivers also benefit students in that colleges may place greater weight on "waived" letters of recommendation. Therefore, by providing a waiver, it enhances the weight of the letter of recommendation in the student's application, thereby increasing the student's chances of acceptance.

In implementing a waiver program, school districts should ask both parents and students to waive their FERPA rights of access. The parents should be asked to sign the waiver because they usually have the FERPA inspection rights during the letter writing and application process because the child is not yet 18 (34 C.F.R. § 99.4). Students should be asked to sign the waiver because they will gain FERPA access rights in the very near future (34 C.F.R. § 99.5). Please remember that FERPA regulations do not permit school districts to require students to sign waivers as a condition of receiving a letter of recommendation. However, the FPCO guidance letter states that school district employees may decline to write a letter of recommendation if the student will not waive their FERPA rights to access the letter.

The attorneys in our school law division are prepared to assist in drafting waivers of FERPA rights to implement a waiver program for college letters of recommendation if your school district desires to implement such a program.

AVOIDING LIABILITY FOR PEER-ON-PEER SEXUAL HARASSMENT

In *Brooks v. The City of Philadelphia*, the Eastern District of Pennsylvania dismissed the plaintiff's case under Title IX and Section 1983 for the school district's allegedly inappropriate responses to peer-on-peer sexual harassment. This case provides guidance in light of OCR's "Dear Colleague" letter on the harassment response obligations of school districts. The case stems from two related incidents of sexual harassment involving two kindergarten students. A kindergarten support service assistant found two male kindergarten students in the same bathroom stall during recess. When she asked why they were in the same stall, plaintiff stated that the other student had touched him "in his private area." The assistant immediately told the kindergarten teacher who then told the principal. The principal spoke with both boys and contacted their parents. The principal promised the parents that she would monitor the students and move their seats away from each other.

Two days after the first incident, another occurred. Through an interview conducted by the school counselor, the school district found that one student pulled down his pants in the bathroom and tried to rub against the other student in a sexual manner. The school administration immediately contacted the parents and the Department of Human Services and referred the perpetrator to an institute that deals with sexual issues. The victim's parents requested that the victim be moved to a different school, a request that the principal promptly processed. The victim filed suit alleging violations of Title IX and Section 1983.

The Eastern District dismissed the claims under Title IX. The court found that the plaintiff could not prove deliberate indifference necessary for a Title IX violation. To prove deliberate indifference, the plaintiff must show that the response to peer harassment was clearly unreasonable. In this matter, it is undisputed that the principal notified both sets of parents after the initial incident and attempted to keep the boys apart in the classroom and in the bathroom. Although an incident occurred two days later, the court held that it did not automatically mean that the school was deliberately indifferent. The court found that the level of intervention by the school district was appropriate under the circumstances.

With regard to the Section 1983 cause of action, plaintiff claimed that the school district's actions created a claim under the state created danger exception to the substantive due process clause of the Fourteenth Amendment. The court found that the specific harm to the specific individual was not foreseeable enough because the plaintiff failed to present any evidence that the school or anyone else was aware of any prior incidents before the ones at issue in the case. Thus, the school district had no prior knowledge of similar problems. The court found that the school administration did not act with willful disregard or deliberate indifference for the safety of the plaintiff. In order to violate due process, the actions of the school district must shock the conscience of the court. In this case, the court found that the principal and the rest of the school administration acted, at the very least, appropriately in light of the incidents that occurred. Finally, the court found that the school did not use its authority to create an opportunity for the harm to occur, which would otherwise not have existed. The school district did not do anything specific to actually cause the harm or facilitate the act. If anything, the ability of the two boys to get to the bathroom without anyone's knowledge does not show a deliberate act by the school district, but at the most, there could have been some negligence. However, mere negligence does not rise to the level of a state-created danger.

This case reinforces how important it is for a school employee who becomes aware of peer-on-peer sexual harassment to immediately report the incident to the appropriate administrator. Thereafter, the administrator must promptly inform the parents/guardians of the students involved and develop an appropriate action plan, the implementation of which must be closely supervised.

MB&M EDUCATION NEWS

Winter 2011

The MB&M School Law Team:

Alfred C. Maiello	acm@mbm-law.net
Michael L. Brungo	mlb@mbm-law.net
David Raves	dr@mbm-law.net
Falco A. Muscante	fam@mbm-law.net
R. Russell Lucas, Jr.	rrl@mbm-law.net
Donald A. Walsh, Jr.	daw@mbm-law.net
Jennifer L. Cerce	jlc@mbm-law.net
Beth Fischman	bf@mbm-law.net
Roger W. Foley, Jr.	rwf@mbm-law.net
Lawrence H. Baumiller	lhb@mbm-law.net

To speak with any of our attorneys, call 412-242-4400.

LATE YEAR CHANGES TO SCHOOL CODE HAVE IMMEDIATE IMPACT ON DISTRICTS

Effective November 17, 2010, Act 104 of 2010 implemented wide-ranging amendments to the School Code, and by doing so, imposed new requirements on school districts. School districts must update policies regarding school violence; establish programs regarding dating violence; and update medication policies to permit students to carry and administer EPI pens. For a detailed summary of Act 104 and its immediate impact on your school district, please visit the Resource Page of our website.

NO "CHILD FIND" OBLIGATIONS IN THE ABSENCE OF ACADEMIC STRUGGLES

When a student suffers from a physical health problem, it is critical that your district have an appropriate Section 504 action plan in place to deal with issues that may arise. In *Taylor v. The Altoona Area School District*, a second grade student died following a massive asthma attack that occurred in the classroom. For a full analysis about the District's action plan and the outcome of the lawsuit, visit the Resource Section of our website.

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