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SPECIAL EDUCATION NEWS

SERVICE ANIMALS IN SCHOOLS – A NEW FEDERAL RULE

By Jeffrey F. Champagne

In September 2010, the U.S. Department of Justice issued new regulations under the part of the Americans with Disabilities Act that applies to school districts and other public entities. Most of the new regulations relate to architectural and communications barriers. The regulations also address an issue of particular interest to school districts: service animals. Like most rules, this one has two key components: a definition and a command.

The Definition

Service animal means any dog that is **individually trained to do work or perform tasks for the benefit of an individual with a disability**, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals … are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the handler´s disability.

The definition goes on to provide examples of canine work that brings a dog within the definition of a service animal:

Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities **by preventing or interrupting impulsive or destructive behaviors**.

Conversely, the definition lists kinds of canine work that do not qualify a dog as a service animal:

The crime deterrent effects of an animal´s presence and **the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition**.

The Command

With that definition in mind, the regulation states that:

(a) General. Generally, a public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability.

The command includes a mildly-worded exception, as follows:

(b) Exceptions. A public entity may **ask an individual with a disability to remove a service animal** from the premises if--

(1) The animal is out of control and the animal´s handler does not take effective action to control it; or

(2) The animal is not housebroken.

The regulation also limits the dialog between a school and a family, as follows:

(f) Inquiries. A public entity shall not ask about the nature or extent of a person´s disability, but **may make two inquiries to determine whether an animal qualifies as a service animal**. A public entity may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. A public entity **shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal**. Generally, a public entity may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (e.g., the dog is observed guiding an individual who is blind or has low vision, pulling a person´s wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).

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WRONGFUL GRADUATION: WHAT ARE THE FACTORS?

By Jeffrey F. Champagne

The Issue

Parents and school districts sometimes argue over whether the district's graduation of a special education student was appropriate – or was premature. One of the circumstances in which this can occur is when the student meets the standard criteria for graduation but arguably still is not ready for independent young adulthood. When there is still a dispute after the district has graduated the student, I refer to such disputes as *wrongful graduation* cases.

Special educators approach this issue knowing at least two things. First, we know that under the IDEA, graduation is a "change in placement." This has procedural implications, including the notice requirement and the "stay put" requirement. Second, we know that some special education students graduate based on standard requirements, and others graduate "on their IEP goals." In *Doe v. Marlborough Public Schools*, a June 2010 federal court decision from Massachusetts reminds us of the possibility of having to face a *wrongful graduation* claim, and provides an analytical framework that is relatively helpful for school districts.

A Recent Case and its Standard

In the Massachusetts case, there was little question that the student met the standard requirements for graduation. Even so, the parents argued that the discontinuation of services was improper because the student had not made sufficient progress on his IEP goals. The family's attorney did not seem to challenge the adequacy of the student's senior-year IEP as written, but based the claim on the student's actual progress and readiness for adult life. (Such a limited attack on a school district is rare in Pennsylvania.) The court rejected the family's challenge in two ways. First, the court found that the student had made "sufficient" progress on most IEP goals and "limited" progress on some others. Second, and more important as a precedent, **the court ultimately concluded that the proper legal test was whether the senior-year IEP was appropriate when written, not the degree of progress that the student achieved after the IEP was written**. This is consistent with the general "no Monday-morning quarterbacking" rule (sometimes called the Fuhrmann rule) in Pennsylvania. But the use of this rule is noteworthy because the federal judge applied it to a senior-year IEP in order to decide a *wrongful graduation* claim.

Earlier in the case, the hearing officer had focused on actual progress during the senior year and the student's (or alumnus') remaining needs after the senior year. With that focus, the hearing officer had held that the cessation of services (a/k/a graduation) was improper. However, the federal judge said that the hearing officer used the wrong standard. The federal judge focused on the appropriateness of the senior-year IEP, and ruled that the school district had complied with the law. Thus, it did not violate the IDEA to graduate the student based on his attainment of standard graduation requirements.

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FOR THE BUSINESS MANAGER
POST-ISSUANCE COMPLIANCE: HOW TO LIVE WITH A BOND ISSUE

By Donna L. Kreiser

Donna L. Kreiser is a member of the Financial Services practice group of McNees Wallace & Nurick LLC. On Wednesday, September 15, 2010, she joined a panel assembled by the Pennsylvania Association of School Business Officials ("PASBO") to address the topic of Post-Issuance Compliance. More than 70 member school districts attended the presentation.

Post-issuance compliance is a process that provides a school district with a record retention and reporting system that enables the school district to identify actions that could potentially impact the school district's compliance with its existing finance documents, and could render the interest on the bonds it issues taxable.

School districts issuing tax-exempt bonds often spend weeks, or even months, working toward the successful closing of a tax-exempt bond financing. The finance process includes, among other things, detailed analysis by bond counsel to ensure that the bonds will be in compliance with federal tax law requirements. Certain closing documents executed by school districts at the time of issuance of tax-exempt bonds include covenants by issuers that tax law requirements will be complied with throughout the life of the bonds. The opinion of bond counsel rendered in connection with a tax-exempt bond issuance (opining that interest on the bonds is excluded from the gross income of bond holders) is based upon, and qualified by, the reasonable expectation of the school district that tax law requirements will be complied with throughout the time the bonds remain outstanding. In addition, school districts may be required to comply with certain disclosure requirements, or other reporting requirements as described in the bond finance documents, throughout the life of the bonds.

Because most tax-exempt bonds may remain outstanding for many years, and school districts must comply with federal tax laws, securities laws and other document requirements during the life of the bonds, it is important to have procedures in place to ensure continued compliance with the terms and provisions of such bond finance documents, even as responsible officials change. An effective post-issuance compliance program should help the school district identify matters – whether tax or otherwise – which may require further analysis.

Post-issuance compliance programs may vary, depending on such factors as the number of bond issues to be monitored, the complexity of any financing and the type of bond financing. Resources are available to assist school districts in the development of a post-issuance compliance program. For instance, the National Association of Bond Lawyers and the Government Finance Officers Association have jointly developed a checklist to assist in identifying post-issuance compliance matters. (The checklist is available at www.gfoa.org/downloads/Post Issuance Compliance.pdf.) School districts may also seek guidance in preparing a post-issuance compliance program from bond counsel or their accounting firm.

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School districts should consider a board-approved post-issuance compliance policy. School districts that have effective post-issuance compliance programs in place will more likely be able to respond to an IRS inquiry on a successful and cost-effective basis. On the other hand, failure to undertake a post-issuance compliance program may place the school district at risk of violating tax rules, which could result in the loss of the tax-exempt status of the bonds, impose liability to the IRS or bond holders and cause reputational damage. Violation of securities laws or existing document requirements could also expose any school district to unnecessary liability or potential bond document defaults.

The attorneys of McNees Wallace & Nurick LLC are available to work with school districts as they consider adopting and implementing a post-issuance compliance program. ■

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The regulation also makes clear that the animal must be under the handler's control and that the public entity is not responsible for supervising the animal. Lastly, perhaps to make us grateful when the only animals that we have to deal with are dogs, the regulation includes rules for allowing the use of **miniature horses**–if they have been individually trained to perform tasks for the benefit of the individual with a disability.

A Few Unanswered Questions

The new regulation raises at least three issues.

1. Is a school district permitted to take into account the allergic reactions of other students? The language of the regulation (which was written with all public entities and properties, not just schools, in mind) does not suggest any flexibility or balancing on this issue. It does, however, begin with the word "Generally," which implies that specific factors may come into play in particular cases.

2. How should a school district distinguish between a service animal and an emotional support dog? The regulation draws a line between: (a) dogs that assist persons with psychiatric disabilities by preventing or interrupting impulsive or destructive behaviors (in which case the public agency must permit the dog), and (b) dogs that provide emotional support, well-being, and comfort (in which case the public agency need not permit the dog). Consistent with this distinction, the federal commentary refers to "emotional support animals that do not qualify as service animals." In practice, drawing this line may be difficult and contentious. The deciding factor is likely to be whether the dog has been specifically trained to prevent or interrupt impulsive behaviors. This is because of the emphasis, in the definition section of the regulation, on the individual training of the dog. If a school district seeks to become knowledgeable about the training of the dog, the regulation permits the public agency to ask the individual about the dog's training, but prohibits the public agency from requiring documentation of such training. Thus, a school district may be forced to make a decision without having all of the existing information.

3. Can the student's right under the IDEA to be accompanied by an animal exceed their right under the ADA? We can expect that the ADA rule will be applied also under Section 504 of the Rehabilitation Act. However, the more significant issue is the relationship between this ADA rule and the special education law – the IDEA.

The federal commentary on the ADA rule does not mention the IDEA; however, the official commentary states that other statutes might provide more rights or encompass more animals. Consider a hypothetical case in which a parent wants their child with an emotional or attentional disability to be accompanied by an emotional support dog who will, according to the parent and perhaps others, positively influence the child's off-task behavior by providing comfort and continuity. In such case, a parent might argue that their child must be allowed to bring such an animal to school as a matter of what constitutes individualized appropriate education under the IDEA, even if they are not entitled to do so under the ADA or Section 504. The new ADA regulation makes it harder for a parent to succeed with such an argument, and a school district may be inclined to say that it need not accommodate an animal under the IDEA if it is not required to do so under the ADA; but it is too soon to say that the new ADA regulation answers all questions.

Conclusions

School districts now have fairly specific regulations regarding the rights of students to bring service dogs (and miniature horses) to school with them. When parents and schools have competing versions of what the animal contributes to the student's education -- resulting in different views on whether a dog is truly a service animal that the student can choose to accompany them to school -- the specific training of the animal is likely to be the deciding factor under the ADA and Section 504.

The new ADA regulation supports students with service dogs more than ever. The regulation answers some questions in this area, but not all of them. Thus, school districts need to be aware of the definition and the command in the new regulation and be prepared to interpret that regulation – subject, of course, to a parent's challenge. Because the regulation regarding service animals is not limited to students with IEPs, general school staff, not just special education staff, should be aware of the regulation. ■

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The federal judge also addressed how "stay put" is supposed to work in the graduation context. This was complicated by the fact that a hearing had not been requested until the October following graduation. Notwithstanding that *timing* issue, the court agreed with the hearing officer that, once the hearing was requested, the district was required to maintain the services that it had provided during the previous year.

The result in the Massachusetts case favored the district, and the test used by the court favors school districts in at least one sense: **the fact that a student with disabilities still has needs was not taken as proof that the graduation was inappropriate**. Under the facts of that particular case, the court found that, since the senior-year IEP was appropriate, so was the graduation.

The Lesson

One key step in planning for graduation is achieving consensus about whether a student's graduation will depend on meeting standard graduation requirements or on achieving -- or making progress on -- IEP goals. Districts should not wait until a few months prior to graduation to raise this issue for the IEP team's – including the parents' – consideration. Conversely, if a district wisely raises the issue a few years in advance and achieves consensus on the criteria for graduation, the district should not be shocked (or overly rigid) if one or more members of the IEP team changes their mind as graduation nears. Many hearing officers would say that the law does not require a parent to be consistent.

Although it did not occur in the Massachusetts case, Pennsylvania school districts should expect that *wrongful graduation* claims will be accompanied by arguments over whether the IEP goals were appropriate and whether the *transition* services specified in the IEP were appropriate. The IEP format used by most Pennsylvania school districts sets a trap for unwary school districts. This is because the so-called *transition plan* section seems to promote the listing of broad, vague adult-life aspirations that are frequently not matched by concrete goals and specially designed instruction. This can leave a school district open to the claim that, by recording the family's aspirations, the district has acknowledged the vast needs of a student without trying appropriately to meet those needs. Perhaps the best way to avoid this is not to just list the broad aspirations of the family but to stay focused, in writing, on what the school district can and should do while the student is in high school to set the student up for post-high school life. This is, of course, not the same as appearing to promise what adult life will look like for the particular student. Writing transition goals that are both reasonably optimistic and reasonably realistic can be a challenge. This challenge should be confronted thoughtfully on the transition page as well as the goal pages of the IEP.

The school district in the Massachusetts case had to face a wrongful graduation claim but did not face a claim that the transition components of the previous IEP were inappropriate when written. Pennsylvania districts should assume that, if they are confronted with a *wrongful graduation* claim, they will have to defend the previous IEP as well. Such a defense will be harder if the previous IEP was laden with broad unrealistic aspirations that can be re-characterized as needs, goals, or commitments.

Conclusion

Graduation is generally a source of pride but it sometimes engenders a sense of abandonment. Because of the less effective array of adult services for people with disabilities, school districts should not be surprised if parents of some students want to retain the entitlement-based support of school districts even when their child satisfies the standard requirements for graduation.

Under the IDEA, graduation can be challenged. The Massachusetts case provides a standard -- i.e., if the senior-year IEP was OK, so was the graduation -- that is favorable to school districts. Even so, the possibility of a *wrongful graduation* claim should cause Pennsylvania school districts to be careful in the writing of *transition* pages in high school students' IEPs and the development of their IEP goals. ■

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