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U.S. Supreme Court Declined Hearing Special Education Case

In January, the United States Supreme Court declined to hear an appeal of *Compton Unified School District v. Addison*. *Compton* was originally brought in California claiming the school district violated the child find requirement of IDEA.

When the student involved in this case was in 11th grade, her mother requested an individualized education plan for her. After evaluations were completed, the district determined that the student was eligible for special education services for a learning disability.

The mother argued that her daughter should have been evaluated sooner, under the child find requirement. The year prior, her daughter's teachers voiced concerns over the fact that the student's work was "gibberish and incomprehensible" and that she was failing all of her classes. At that point the school district referred the student to a mental health counselor, who subsequently recommended that the student be evaluated for learning disabilities. The district did not follow that recommendation and the student was moved into 11th grade.

After her daughter was identified in the 11th grade, the mother filed a due process claim against the school district for violating IDEA's child-find requirement. The impartial hearing officer agreed with the mother and ordered the school to provide 150 hours of compensatory tutoring for the student's lost educational opportunities.

On appeal, the school district argued that the child-find provision only covers a school district's refusal to act to identify children and not its mere failure to act. When deciding whether to take this case, the Supreme Court asked for the U.S. Solicitor's opinion. He stated that the school district's argument was not valid and the Court should decline to hear the case. The Court followed that recommendation and the district must comply with the administrative judge ruling.

How This Affects Your District:

School districts cannot escape liability on the child-find requirement of IDEA by simply failing to identify a child. In this case, the district was on notice that the student was not performing well in her classes and then was told by a mental health counselor that the student should be evaluated for learning disabilities. Rather than following the recommendation of the mental health professional, the district did nothing and ended up having to provide compensatory tutoring.

When it is evident that a student has a disability, then an evaluation should be done. If, however, there is a question as to whether a student has a disability, districts have two choices. The first choice would be to evaluate the student and the second would be to deny an evaluation and send the parent prior written notice of that denial. The most important part of the second option is to send the prior written notice. If districts follow this general advice, then problems like the one discussed in the case above should not develop.

Governor Kasich signs HB 116, the "Jessica Logan Act"

The "Jessica Logan Act" amends Ohio Revised Code sections 3313.666, 3313.667, 3319.073, and 3333.31. The thrust of the Act is the mandatory addition of electronic means of harassment, intimidation and bullying to school district policies regarding harassment.

O.R.C. § 3313.666 lays out the definition of harassment, intimidation, or bullying. Districts are now required to alter their anti-harassment policies in order to include the new definition. This new definition states: "Harassment, intimidation, or bullying means…any intentional written, verbal, electronic, or physical act that a student has exhibited toward another student more than once and the behavior (1) causes mental or physical harm to the other student, and (2) is sufficiently severe, persistent, or pervasive that it creates an intimidating, threatening, or abusive educational environment for the other student." The only change here is the addition of "electronic acts." This section of the Act goes on to define an "electronic act" as any act committed through the use of a cell phone, pager, personal communication device, or other electronic communication device.

All boards of education are required to have a policy that prohibits harassment, intimidation, and bullying. Therefore, all of the changes in this Act apply to your current board policies. In addition to adding electronic acts into the definition of bullying, each board policy needs to expressly provide for the possibility of suspension when a student is found responsible for using an electronic act to intimidate, harass, or bully another student. Further, the policy must now provide a strategy for protecting the victim, or other person, from any new harassment and a means of anonymously reporting harassment.

In addition to protecting victims or other reporting persons from retaliation, boards need to provide in their policies a prohibition against students deliberately filing a false report and the repercussions of deliberately filing a false report. This would not be meant to punish students for filing a good faith report that turned out to be untrue, but rather would help deter students from deliberately reporting misconduct in order to get another person in trouble, while knowing the report is false.

Throughout the Act, at any place where "parents or guardians" were formerly identified, now the code will read "custodial parent or guardian." For example, prior to the signing of this Act it was required that each board policy include a statement that parents or guardians of any student involved in a prohibited incident be notified and given access to any written reports regarding the prohibited incident. Now the requirement changes to only having to notify the custodial parent or guardian. Additionally, the requirement that the policy be available to parents or guardians changes to only require the policy be available to the custodial parents or guardian.

In addition to changing the policies surrounding harassment, this Act requires students to be instructed annually on the board policy with a written or verbal discussion of the consequences of violating the board policy. This instruction needs to be age-appropriate and the implementation will depend on the extent to which state or federal funds have been appropriated to the district for such instruction. Also, each year, a written statement that describes the harassment policy and consequences need to be sent to the custodial parent or guardian. That statement can be sent with report cards or by electronic delivery.

Overall, the Act does not change much of what districts are already doing, especially when compared to the originally proposed Bill. However, it does put at the forefront the idea that electronic bullying is occurring and schools need to be aware of how that type of bullying or harassment may be affecting students and the school culture. Districts and the State Board have six months to update their policies on bullying in order to comply with the new statutory language.

If you have any questions regarding how to go about changing your policies, please contact us.

OEA Letters Regarding Bargaining For Evaluations

Some of you may be receiving letters from OEA stating that you must continue to bargain your evaluations policy. Based on HB 153, it is our opinion that you do not have to bargain your evaluations policy from this point forward.

If you need help drafting a response letter to OEA, please do not hesitate to contact us.

U.S. Supreme Court Turns Away Student Internet Speech Cases

In mid-January the U.S. Supreme Court turned away the appeal of three cases dealing with student online speech. Two of the cases dealt with students making fake MySpace profiles of administrators at their respective schools. One of the cases dealt with online speech directed at another student.

The cases dealing with students using the internet to ridicule administrators were *Blue Mountain v. Snyder* and *Layshock v. Hermitage School District*. Both of these cases were appealed to the Supreme Court from the 3rd Circuit Court of Appeals.

In *Blue Mountain*, the 3rd Circuit ruled that a student who posted a MySpace parody of her principal, depicting him as a sex addict and pedophile, could not be punished for that conduct. The Court stated that the depiction was so outrageous that no reasonable person would take it seriously. Further, the speech occurred off-campus and did not substantially disrupt the mission of the school.

In *Layshock*, a student made a MySpace profile of his principal which made allegations about the principal smoking marijuana, taking steroids, and drinking excessively. Again, the 3rd Circuit ruled that since the profile was created off school grounds and there was no substantial disruption, the student could not be punished at school for these actions.

The last case the Supreme Court declined to hear was *Kowalski v. Berkeley County Schools*. This case involved a high school student creating a MySpace page that alleged that another student had herpes. Because of that and other comments, the school concluded that the student's website was in violation of school policies prohibiting harassment, bullying, and intimidation. As a result, she was suspended for five days and given a "social suspension" of 90 days. The student sued and the 4th Circuit Court of Appeals upheld the discipline.

The 4th Circuit commented that "school administrators are becoming increasingly alarmed by the phenomenon" of harassment and bullying and when speech has a "sufficient nexus with school, the Constitution is not written to hinder school administrators' good faith efforts to address the problem." Essentially, the Court was saying that with the advent of technology comes issues with students using the technology to harass other students, and administrators should not be hindered from reasonably addressing that issue.

How This Affects Your District:

The fact that the Supreme Court declined to hear these cases might mean that they are satisfied with the outcomes. While none of these cases are binding authority in Ohio, the decisions lead to the conclusion that school districts will be given more leverage in dealing with the discipline of students who are targeting other students in their online activities. On the other hand, where the ridicule is directed at school officials, the courts are implying that disciplinary action is generally not called for where a direct threat is not involved. It is important to note that a school has much greater power to discipline such activities when they occur at or otherwise reach school.

Further, when implementing disciplinary procedures, districts should be reasonable in what types and how much discipline is doled out for online harassment. In other cases, courts have generally held that where students are guilty of harassing other students, online or not, they are reluctant to uphold overly harsh punishment. Whether a punishment is overly harsh is specific to the facts of each situation, but if there is any question about whether a punishment might be overly harsh then districts should feel free to contact us so that reasonable disciplinary action can be decided upon. Reasonableness and following board policy should be the main ideas when deciding how to discipline students who violate harassment policies.

Overall, there is still no clear line delineating when a school does or does not have permission to discipline a student for off-campus speech. However, it seems that districts are given more leeway when the off-campus speech is affecting a student and not an administrator. After all, the standard is where there will be a substantial disruption and harassment aimed at other students is generally more likely to cause a substantial disruption than harassment aimed at adults.

Jon Peterson Special Education Voucher Rules Near Finalization

On January 10 the State Board of Education approved rules for the new Jon Peterson special education voucher program. A hearing on the final proposed rules was held by the Joint Committee on Agency Rule Review ("JCARR") on January 23, and JCARR's jurisdiction over the rules ends on February 11. Barring an unanticipated and highly unlikely withdrawal of the rules by the State Board of Education, the rules will become effective at the end of JCARR's jurisdiction.

The Peterson vouchers were created in House Bill 153 and should be available during the 2012-2013 school year. The vouchers are available for qualified special education children. Essentially, any child who qualifies for special education services, has an IEP, is not receiving a different voucher, and is not formally disputing the contents of his or her IEP is qualified. Once a scholarship has been awarded, the child is withdrawn from the district of residence and an amount of money that varies based upon disability category is made available to provide for the child's education through an alternative public provider(s) or approved private provider(s).

Districts of residence are still required to annually develop IEPs for students on Peterson vouchers. The districts also continue to be responsible for special education evaluations. Wording in the statutes creating the Peterson vouchers created some confusion regarding the responsibility for transportation. However, the rules indicate that districts have the same transportation requirements that they do for any child who is parentally placed in a private school (i.e. generally, if transportation would have been provided for the child to attend the public school, then transportation must be provided if the travel time by school transportation from the public school that the child is entitled to attend to the alternative provider is 30 minutes or less). Because "special transportation" is an element of a free appropriate public education ("FAPE"), and the district of residence is not required to provide FAPE to a student on a Peterson voucher, districts of residence are not required to provide special transportation to students on Peterson vouchers who do not otherwise qualify for transportation.

The general nature of the Peterson scholarships is unchanged from the time they were first proposed. At most, five percent of the students with disabilities in Ohio will be provided with vouchers. To pay for the vouchers, ODE will deduct funding from the district of residence. In addition to the specific rules discussed above, some other rules are of particular interest. For example, the rules allow the parents and alternate providers to unilaterally "modify" the services set forth in a child's IEP (despite the fact that it is the district of residence's responsibility to develop the IEP).

Regarding applications, the rules allow a child to apply for a voucher before the child is even identified as having a disability. A district must conduct an initial evaluation if the child is applying for a Peterson voucher and the district suspects that the child has a disability. It will be very important for districts to deny evaluations and/or identification of children that they do not suspect of having disabilities, because once a child is identified he or she generally cannot be denied the opportunity to apply for a Peterson voucher. That being said, students are not eligible for the Peterson voucher if they are not in compliance with compulsory attendance laws. While students cannot receive both the Peterson voucher and another state scholarship, the rules specifically allow a child who is receiving a different scholarship to apply for the Peterson voucher and to relinquish the other scholarship if a Peterson voucher is awarded.

Numerous parts of the rules are geared toward facilitating the award of the maximum number of Peterson vouchers. For example, the rules allow the alternate providers to apply on behalf of children. Presumably this rule will be used to facilitate the acquisition of vouchers by children whose parents would not otherwise have applied. Also, while students are required to participate in state testing, if the failure to take a state test is the fault of the alternate provider then the student remains eligible for the Peterson voucher. If not enough students apply to use the maximum number of Peterson vouchers, ODE is authorized to provide additional opportunities to apply until all of the vouchers are awarded. If there are more applicants than available vouchers, a waiting list will be established and the vouchers will be made available to new students if they are terminated for existing recipients. Notably, the rules allow the vouchers to be used with alternate providers that discriminate based on religion.

Ennis, Roberts and Fischer will provide additional information about the Peterson vouchers as the rules become finalized and the program begins to be implemented.

Education Law Speeches/Seminars

Ennis, Roberts & Fischer regularly conducts seminars concerning education law topics of interest to school administrators and staff.
Popular topics covered include:

Cyber law
School sports law
IDEA and Special Education Issues
Employee Misconduct

Bill Deters and Gary Stedronsky
ERF Webinar on February 8, 2012
Everything School Districts Need to Know About Tax Incentives

Erin Wessendorf-Wortman
Reading Community City Schools on February 9, 2012
A Workshop on Suspensions and Expulsions

Jeremy Neff
Butler County ESC on February 10, 2012
504 Instructions for Guidance Counselors

Bill Deters
OASBO Regional Payroll and Benefits Seminar on February 21, 2012
Employee Personnel Files and Public Records

Bronston McCord
Ohio Valley OASBO on February 22, 2012
Collective Bargaining After Implementation of HB 153

Erin Wessendorf-Wortman and Jeremy Neff
Brown County ESC on February 27, 2012
504 and the ADA

Bill Deters
OSBA on March 23, 2012
Special Education Discipline Process: Obstacles and Opportunities

Administrator's Academy Dates at Great Oaks Instructional Resource Center

March 22, 2012 — *New Teacher Evaluation Procedures*

June 14, 2012 — *Special Education Update*

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