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POTENTIAL ISSUES TO WATCH IN THE 2007-2008 SCHOOL YEAR

Overview

Each June I devote the final edition of my commentary series to identifying legal and policy issues that local public school boards and administrators might encounter next year. Following this tradition and based on my review of court decisions from the recent past, the paragraphs below contain examples of potential policy and legal issue areas to watch in 2007-2008. The five areas selected for discussion are: *special education, school safety and security, personnel, religion, and student assignment to schools and classes.*

Special Education: Parent Rights under IDEA (2004)

In my March (2007) commentary, "*The Winkelman Case: Pro Se Parents in Court,*" I predicted that the United States Supreme Court would not grant parents a right under IDEA 2004 to represent themselves (*pro se*) in a federal court without the assistance of a lawyer. My prediction was not correct. On May 21, 2007, the high court, by a vote of 7 to 2, held just the opposite. In an opinion written by Justice Anthony Kennedy, the Sixth Circuit of Appeals was reversed and the case was remanded. Joined by Chief Justice Roberts, and Justices Stevens, Souter, Ginsburg, Breyer, and Alito, Justice Kennedy wrote that "parents enjoy rights under IDEA; and they are, as a result, entitled to prosecute claims on their own behalf...." Thus, the Court was willing to permit the parents to move forward *pro se* in a federal court to seek reimbursement for their child's private school expenses. Justices Scalia, joined by Justice Thomas, concurred and dissented in part. One concern expressed dealt with allowing parents to move forward in court without the help of legal counsel on issues related to their child's FAPE. *Winkelman v. Parma City School District* (2007)

In 2007-2008, public school officials and administrators can expect to experience an increase in legal and policy issues involving parental rights and legal representation of children covered under IDEA (2004). However, while *Winkelman* (2007) made clear that parents have enforceable rights under IDEA (2004), rights separate from their child's rights under the law, the decision does not negate the Supreme Court's earlier decision in *Arlington Central School District v. Murphy* (2006), a case also involving *pro se* parents. In *Murphy* parents had requested reimbursement for the educational consultant who helped them throughout the administrative and legal processes. Decided last year, the high court held that IDEA (2004) does not authorize recovery of costs

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and fees of non-lawyer educational consultants/experts. *Murphy* must be read in tandem with to the Supreme Court's earlier decision in *Schaffer v. Weast* (2005), where the Court held that the *burden of proof* (in this case parents challenged the appropriateness of their child's IEP) "lies on the party seeking relief."

School Safety and Security: Responsibility and Liability

Concerns for the safety and security of students and school staff will remain a top priority in educational institutions from pre-schools through universities. The tragic shootings at Virginia Tech, coupled with continuing threats of foreign terrorist acts, potential harm to children by sexual predators, growing evidence of organized youth gang activity in communities, and increased incidents of student-on-student harassment will cause school officials to tighten all existing security efforts and implement new ones. Add to these serious concerns the threat of episodes of violent weather and the safety and security responsibilities of school officials and building administrators will continue to escalate in 2007-2008.

The good news is that the standard of analysis applied in a duty/risk analysis will remain one that looks for *deliberate indifference*. Applied to public school matters, this standard of analysis dictates that liability will attach only where school officials: (1) knew (i.e., had actual notice) of risk, (2) acted in a deliberately indifferent manner, and (3) injury to staff and/or students resulted directly (i.e., proximate cause) from that *deliberately indifferent act*. Some experts have used the phrases "being willfully blind" and "reckless lack of concern" to describe acts of *deliberate indifference*. Other experts have equated *deliberate indifference* to "gross negligence." As a New York court reminds us, liability does not attach where "sudden and unforeseen events" were the proximate cause of injury to a student under the supervision of public school personnel. *Swan v. Town of Brookhaven* (N.Y. 2006)

Personnel: Classroom Teachers

In 2007-2008, policy and legal issues will continue to spring-up in matters involving school system personnel. This past year, courts across the country continued to stress the importance of: (1) establishing and implementing *fundamentally fair* personnel policies and procedures, (2) linking supervisor evaluations and employment decisions directly to *actual work performance*, and (3) establishing a *rational basis* (supported by substantive evidence) for making all employment decisions.

While courts will continue to exercise an attitude of judicial restraint in personnel decision-making, two areas will nonetheless remain ripe for potential litigation and must be watched in 2007-2008. Specifically, the two likely areas are (1) classroom *teacher evaluation*, and (2) allegations of *sexual harassment*.

Classroom Teacher Evaluation. In 2007-2008 the rule regarding evaluation and non-renewal of non-tenured classroom teachers will not change. Unless a state statute or collective bargaining provision to the contrary exists, the non-renewal of teachers on limited contracts (e.g., annual, probationary, emergency) does not need to be based on evaluations of on-the-job performance. However, because limited contract teachers (as well as all other employees) are not without protections against acts of discrimination, and allegations of hostile work environment and/or retaliation are always possible, school officials will be wise to maintain basic, minimal productivity profiles on all limited contract personnel.

In this era of accountability it is technologically possible to establish a direct link between individual classroom teachers and the academic progress and achievement of each student in their classes. School systems across the

country are beginning to track student academic progress and achievement back to individual grade levels, classrooms, and the teachers in those classrooms.

School officials and administrators are reminded, however, that because the substantive and procedural due process rights of tenured and continuing contract teachers will remain in place, student academic progress and achievement testing data must be integrated into the overall work-related record of performance established and documented for each teacher. Student test data must not serve as the sole criterion on which to base summative judgments of effectiveness and productivity. To do otherwise would invite legal difficulties.

Sexual Harassment. Next year, the rules regarding sexual harassment in the workplace will remain the same. Sexual harassment (both *quid pro quo* and *hostile environment*) must not be tolerated. School system policy must continue to require that (1) all reported allegations of sexual harassment will be proactively addressed and immediately investigated, and (2) where it is established that such behavior exists, the course of action taken will be swift and punishments handed out to perpetrators will be firm and consistent. In my opinion allegations of employee-on-employee, employee-on-student, and student-on-student harassment hold the most potential for producing legal and policy issues in 2007-2008.

Religion: Free Exercise and Expression

Of all the possible areas where potential legal and policy issues associated with religion in public schools need to be watched, two stand out. The areas most fertile for controversy are: (1) the desire of some employees and students to *express their personal religious beliefs* either through what they vocalize in class or through what they wear to school (e.g., slogan buttons and insignias, items of jewelry, clothing and other attire, hair styles, T-shirt messages), and (2) the *curriculum*, where some parents and outside advocate groups will (on religious grounds) focus attention on the continuing evolution/intelligent design debate, the appropriateness of textbooks and class materials, and on student class projects and assignments, especially those that involve health related and/or family life oriented topics. Challenges to school holidays, holiday celebrations, and recognition of student initiated interest clubs also bear watching.

Student Assignment to Schools and Classes

As of this writing, the school law community is anxiously awaiting decisions from the United States Supreme Court in two cases involving student school assignment plans. Argued last September (2006), the cases are *Meredith v. Jefferson County School Board* (6th Cir. 2005) and *Parents Involved in Community Schools v. Seattle School District No.1* (9th Cir. 2005). In these cases plaintiff parents characterized local public school system student assignment plans as establishing “unconstitutional quotas.” Because the high court will deal with such concepts as “racial diversity” and “racially integrated environment,” the decisions in these pending cases will have serious implications for local public school systems. The Court is expected to hand down its decisions this month.

Policy Implications

My purpose in writing this final commentary was to identify some potential policy and legal issue areas to be aware of and watch during the 2007-2008 school year. The reader will note that I did not include a discussion of potential issues associated with the federal *No Child Left Behind Act* (2002). I did not include it because the *NCLB* is currently undergoing reauthorization. It would be hard to predict potential issues without seeing the final statutory changes and new federal regulations.

Recognizing that the summer months provide opportunities to forecast and plan for next year, I hope that the discussions contained in this final commentary, and the previous nine commentaries in this year's *CEPI Education Law Newsletter* series, prove helpful to policy-makers and administrators in their efforts to provide and maintain a safe, secure, and disruption-free educational environment where teachers can teach and students can learn.

Resources Cited

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