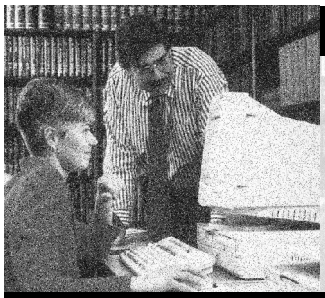

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

School Law Matters

Latest legal developments and practical guidance for school officials & administrators September 2006

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U.S. Supreme Court Rules Parents Are NOT Entitled to Reimbursement for Expert Witness Fees in IDEA Cases

As we reported earlier this year in *School Law Matters*, the U.S. Supreme Court granted review in a case to determine whether parents are entitled to reimbursement for expert witness fees when they succeed in a legal claim under the Individuals With Disabilities Education Act ("IDEA"). On June 26, 2006, the Court decided that those fees are **not** "costs" recoverable from a school district. (*Arlington CSD v. Murphy*, __ U.S. __, 2006 WL 1725053 (2006).

While IDEA provides for the awarding of attorney's fees to parents who successfully prosecute a claim against a district, IDEA is silent regarding the awarding of expert witness fees.

In the *Arlington* case, the parents sought recovery of fees of $29,250 for the services of an educational consultant. The federal District Court concluded that these fees were compensable under IDEA. The U.S. Court of Appeals for the Second Circuit then affirmed the District Court's decision, concluding that prohibiting recovery of expert witness fees for prevailing parents would frustrate the purposes of IDEA. However, the Second Circuit's decision was at odds with several other circuits that ruled that the statutory language of IDEA does not specifically authorize the awarding of such fees.

The U.S. Supreme Court agreed to hear the case, at least in part, to resolve this split of authority.

The bottom line is ...

The U.S. Supreme Court has ruled that non-attorney expert fees for services rendered to prevailing parents in IDEA actions are not "costs" recoverable from a school district under IDEA's fee-shifting provision.

The Supreme Court ruled that the IDEA (specifically Section 1415(i)(3)(B)) does not authorize prevailing parents to recover expert fees. The Court noted that while Congress has broad power under the U.S. Constitution to set the terms on which it disburses federal money to school districts, any conditions it attaches to a district's acceptance of such funds must be set out "unambiguously." In other words, districts are bound **only** by those conditions that they accept "voluntarily and knowingly." They cannot knowingly accept conditions of which they are "unaware" or which they are "unable to ascertain." Thus, the question for the Court became whether the IDEA furnished clear notice regarding expert fees.

The Court reasoned that while Section 1415(i)(3)(B) provides for an award of "reasonable attorneys' fees," it does not even hint that acceptance of IDEA funds makes a district responsible for reimbursing prevailing parents for the services of experts. "Costs" is a term of art in the legal profession that does **not** generally include expert fees. The Court noted that the use of the term "costs" rather than "expenses" in the law strongly suggests that Section 1415(i)(3)(B) was not meant to be an open-ended provision making school districts liable for all expenses associated with an IDEA case.

Since expert fees were not "unambiguously" set out in the statute, school districts could not be bound by it.

If you have any questions about this case, please feel free to contact our office at 315-437-7600.

Threatened Student Witnesses Need Not Testify in Person in Long-Term Suspension Hearing, Federal Court Rules

A recent Court decision has carved out a narrow exception to the rule that students facing long-term suspensions have the right to cross examine witnesses against them. (*Finkle v. Board of Education of Syosset Central School District*, 386 F.Supp.2d 119 (E.D.N.Y., 2005), *aff'd* 2006 WL 1236145 (2d Cir., 2006).) In the *Finkle* case, the Second Circuit Court of Appeals upheld a lower court ruling which states that when student witnesses are potential targets for violence, a school may accept their written statements as evidence rather than having them testify in person at the superintendent's hearing.

In *Finkle*, a student was suspended for 30 days for sexual harassment and threatening conduct based on a short story he wrote for his sixth grade English class and then read to other students. The sixth-grader was the main character of the story. In it, he goes on a killing spree, stabbing and dismembering his fellow classmates. The story also involved explicit sexual situations including one particularly troubling passage involving the main character walking in on a female classmate while she was having sex with another student and chopping her head off with an axe.

At the superintendent's hearing, no students testified in person as to being threatened or harassed. Rather, the District-appointed hearing officer received into evidence written statements by unidentified students regarding the fact that they felt threatened and harassed. The sixth-grader was found guilty of the charges against him and was suspended for 30 days.

The student's parents sued the school district claiming, among other things, that the Superintendent's hearing was not procedurally proper because the student's attorney was not given the opportunity to cross-examine the students who provided the written statements. The district court ruled (and the Second Circuit Court of Appeals affirmed) that:

> It is true that New York Education law provides Plaintiff with the "right to question witnesses against [him] and to present witnesses and other evidence on his behalf." N.Y. Educ. Law §3214 (3)(c). In this case, however, the School's interest in protecting the identities of the students outweighed any interest in cross-examination of them the Plaintiff may have had. Overall, Plaintiff was afforded the procedural protections to satisfy his due process rights; he was given a hearing, given sufficient notice of the hearing, and permitted to present a defense of his behavior with counsel.… The School District reasonably considered Plaintiff to be potentially violent, and by not disclosing the names of the students, the School District was protecting them from possible retaliation by Plaintiff. *Id.* at 127.

School Districts should bear in mind that this is a narrow exception to the broader rule that before a student can be suspended for more than five days, he or she has the right to a fair hearing which includes the right to cross-examine witnesses against him/her. In other words, unless the School District can prove that it has an interest in protecting a student's identity based on a reasonable fear of potential violence, the School District would most likely have to present student witnesses at the Superintendent's hearing to testify in person and to undergo cross examination.

If you have any questions regarding this case or its implications, please feel free to contact us at (315) 437-7600.

Leaves of Absence for Military Spouses

Under a recently enacted New York law, employers of 20 or more must allow their employees up to 10 days of unpaid leave when their spouses are on leave from the military (i.e., U.S. armed forces, national guard or reserves). However, this only applies while the spouse is deployed during a period of military conflict to a combat theater or zone of operations. Employers are also prohibited from retaliating against an employee for requesting or obtaining such leave. The law does not prevent an employer from providing more leave for military spouses. Moreover, it does not affect an employee's rights with respect to any other employee benefit provided by law (e.g., FMLA).

New FOIL Law Makes It Easier to Get Attorneys Fees

Governor Pataki has signed into law a significant amendment to the State Freedom of Information Law (FOIL) The new law **repeals** a prior law that allowed record seekers to recover attorneys fees **only** in cases in which the records sought were of "clearly significant interest to the general public." Under the **new** law, a record seeker may recover attorneys fees in any case, whenever he/she can demonstrate that "the agency had no reasonable basis for denying access." Unfortunately, this change will likely encourage record seekers to rush to court if they perceive that their FOIL rights have been violated.

Residency Determinations Made Easier in Court-Ordered Custody Cases

In a departure from earlier rulings, the Commissioner of Education has now held that school districts must honor court-issued custody or guardianship orders and admit students as residents, provided they are living with the court-appointed guardian in the district. In *Appeal of D.R.*, 45 Ed. Dept. Rep. ___, Decision No. 15,412, dated May 26, 2006, the Petitioner was awarded custody of her niece, G.R., by the Nassau County Family Court. The court order also allowed G.R.'s mother access to records and information about the health, education and welfare of her daughter and allotted her visiting rights for "parenting time." Based on those rights the mother retained, the school district refused to admit G.R., claiming her legal residence was with her mother in New York City. D.R. appealed the district's decision, arguing G.R. had been living with her since the custody order was issued and she was solely responsible for G.R.'s well-being.

The Commissioner held that G.R. was a resident of the district and thus entitled to attend its schools.

He further stated that simply because a parent retained visiting rights under a court order, that does not negate a child's residence with the guardian.

According to the Commissioner, courts may examine whether a proposed guardianship change is bona fide or merely a ruse. He commented that at the time a custody order is sought, it may be about obtaining residency in a preferred district, but generally other factors exist which cause a child to live with a third party. A court examining the custody issue has the proper authority to determine the best interests of the child.

The Commissioner held it is not appropriate for his office to "look behind" a court decision to transfer custody or to issue letters of guardianship to determine if a custody transfer is genuine and will no longer do so. He expressly overruled all prior decisions in which his office looked behind a court order. Any objections must be raised before the court in which the custody proceeding was heard. The Commissioner was careful to note that this ruling does not change the analysis districts must engage in when there is no custody order, nor does it address situations where evidence indicates a child is not residing with the court-appointed guardian. In those situation, the traditional residency tests would be employed.

State Court Rules Compulsory Education Statute Requires Students Turning Sixteen During the Summer to Attend School in the Fall

Education Law Section 3205(1)(c) requires students to remain in school until the last day of the school year in which a student becomes 16 years old (or 17 years old in districts where board policy sets the compulsory education age at 17). Education Law Section 2(15) defines the school year as running from July 1 of each year through June 30 of the following year.

However, our courts and the Commissioner have recognized that the traditional instructional year runs from September through June. (*See Schneps v. Nyquist*, 58 A.D.2d 151 [2nd Dept., 1977]. Because of this discrepency, questions have frequently arisen as to whether students who turn 16 in July or August or at any time before the school year begins in September must remain in school through the end of the following instructional term.

In *Matter of Kiesha BB*, ___ A.D.2d ___, 815 N.Y.S.2d 800 (3rd Dept., 2006), the Appellate Division, Third Department answered that question in the affirmative, upholding a Family Court determination adjudicating Kiesha BB as a Person in Need of Supervision ("PINS") due to her failure to attend school in September and October after she turned 16 in August.

If you have any questions regarding this case or similar situations you may be facing, please feel free to contact our office at (315) 437-7600.

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Strip Search for Marijuana Held Unconstitutional

A federal appeals court ruled recently that school officials violated a student's Fourth Amendment right to freedom from unreasonable search and seizure by subjecting her to a strip search after receiving a tip that she planned to bring marijuana to a class picnic. *Phaneuf v. Fraikin*, 2006 WL 1367369 (2nd Cir., 2006). Before departing for the picnic, students were to have their bags checked for security reasons. One of the students reported to a teacher that Kelly Phaneuf told classmates that she had marijuana and planned to hide it in her pants during the bag check. The school Principal (Ms. Cipriano) called Kelly's mother and asked her to come and conduct the search. Meanwhile, Ms. Cipriano searched Kelly's bag, finding cigarettes and a lighter, both violations of school rules, but no drugs. Kelly's mother arrived and searched Kelly, but found no drugs.

Kelly subsequently sued, arguing that school officials lacked the "reasonable suspicion" necessary to justify the search. The Second Circuit Court of Appeals agreed, noting that, "What may constitute reasonable suspicion for a search of a locker or even a pocket or pocketbook may fall well short of reasonableness for a nude search" and that, "as the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness."

The court found that the information relied on by school officials to justify the search failed to meet this Fourth Amendment standard. The reliability and trustworthiness of the student tip was questionable because the principal took no steps to investigate or substantiate the allegation. The court also noted that Kelly's past disciplinary record did not include any drug-related offenses. The court found a teacher's and principal's statements that Kelly's denials of drug possession were "suspicious" were baseless. Finally, the court found that while Kelly's possession of the other contraband did make it ***somewhat*** more likely that she possessed marijuana, it was ***insufficient*** to create a heightened level of suspicion as would justify such a highly intrusive search.

Remember, courts routinely strike down such highly intrusive searches. Accordingly, we strongly recommend avoiding them entirely. However, if extreme circumstances appear to warrant such a search, do so only after close consultation with your school attorney.

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