



School Law Matters

Latest legal developments and practical guidance for school officials and administrators November 2003

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Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. provides comprehensive legal representation to school districts/BOCES throughout Upstate New York in all aspects of education law, employment law and labor relations.

Legal Waiver Signed by Parent of Injured Student Upheld

In the April issue of *School Law Matters*, we reported on the *Merav v. City of Newton* case. While this case was decided in Massachusetts, it was significant for schools around the country because the trial court's decision enforced a waiver signed by a parent, which absolved the school district of liability if his daughter was injured while participating in a school-related activity. This ruling was a significant break from a long line of state court cases which tend to ignore these waiver forms. As with most trial court decisions, the *Merav* decision was subject to appeal. However, the decision was upheld recently by the highest court in Massachusetts. This is further evidence that judicial opinion may be shifting on this topic.

In this case, 16-year-old Merav Sharon was injured while participating in a cheerleading practice at Newton North High School. Merav fell from a teammate's shoulders while rehearsing a pyramid formation cheer and sustained a serious compound fracture to her left arm that required surgery. A few years later, when she reached 18, Merav filed suit against the city of Newton, alleging negligence and the negligent hiring and

retention of the cheerleading coach in charge when she was injured.

However, during the course of the litigation, it was discovered that Merav and her father signed a "Parental Consent, Release from Liability and Indemnity Agreement" approximately three months prior to the injury. The relevant part of the release reads as follows:

The bottom line is ...

Schools should make sure that their releases for extracurricular activities: (1) are clearly labeled as releases; (2) are signed by the student and parent(s); (3) clearly explain the risks involved in the activity; and (4) are written in easy-to-understand language.

[I] the undersigned [father] . . . of Merav Sharon, a minor, do hereby consent to [her] participation in voluntary athletic programs and do forever RELEASE, acquit, discharge, and covenant to hold harmless the City of Newton . . . from any and all actions, causes of action, [and] claims . . . on account of, or in any way growing out of, directly or indirectly, all known and unknown personal injuries or property damage which [I] may now or hereafter

have as the parent . . . of said minor, and also all claims or right of action for damages which said minor has or hereafter may acquire, either before or after [she] has reached [her] majority resulting . . . from [her] participation in the Newton Public Schools Physical Education Department's athletic programs

The Massachusetts high court noted that:

To hold that releases of the type in question here are unenforceable would expose public schools, who offer many of the extracurricular sports opportunities available to children, to financial costs and risks that will inevitably lead to the reduction of those programs. It would also create the anomaly of a minor who participates in a program sponsored and managed by a non-profit organization not having a cause of action for negligence that she would have had had she participated in the same program sponsored as an extracurricular activity by the local public school. This distinction

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Legal Waiver Signed by Parent of Injured Student Upheld (cont'd)

seems unwarranted, inevitably destructive to school-sponsored programs, and contrary to public interest.

This case also provides schools with some guidance on how waivers should be written in order to increase the likelihood that they will be enforced. The Massachusetts high court described the release in this case as follows:

[It] was clearly labeled as ... [a release] and was filled out and signed by Merav and her father for the purpose of ensuring that she would be permitted to participate in an ongoing extracurricular activity. These are not cir-

cumstances likely to mislead a person of ordinary intelligence as to whether a limitation of liability might be included in the type of document being executed. There is no dispute that Merav and her father had ample opportunity to review and understand the release. Their failure to do so does not avoid its effects as a matter of law.

Following this guidance, schools should make sure that all their releases for extracurricular activities: (1) are clearly labeled as releases; (2) are signed by the student and parents; (3) clearly explain the risks involved in the activity; and (4) are written in easy-to-understand language.

Please note: *This case was decided under Massachusetts law, which favors the enforcement of releases. New York courts, by contrast, have held that releases which insulate a defendant from liability for its own negligence are disfavored under the law. Moreover, New York courts have ruled that minors are not bound by releases signed by parents. In our view, releases are nevertheless useful in that they put students and parents on notice regarding potential dangers inherent in extracurricular activities, and may be used to show that they have assumed the risks of participating in these activities. In addition, releases may prove to be beneficial in the event that New York courts decide to follow Massachusetts' example.*

Education, Defense Departments Remind Schools About Allowing Military Recruiters Access to Student Information

On October 11, 2003, the U.S. Department of Education and Department of Defense reminded high schools about student information disclosure requirements in recent legislation designed to help military recruiters gain access to information about students.

In a "dear colleague" letter from U.S. Secretary of Education Rod Paige and Defense Secretary Donald Rumsfeld, school district officials were reminded that the No Child Left Behind Act of 2001 and the National Defense Authorization Act for Fiscal Year 2002 requires high schools to provide military recruiters (upon their request) the names, addresses and phone numbers of juniors and seniors.

Schools must notify parents at the beginning of the school year of their in-

tention to designate certain "directory information" about students, including names, addresses and phone numbers. While they have yet to be enforced, the laws do include penalties for districts that fail to comply. Among those is a potential loss of Education Department funding. Parents may "opt out," or object, to the information being released to recruiters without their prior written consent.

Accompanying the letter from Paige and Rumsfeld was guidance for schools and the military on implementing the new laws, as well as a model "directory information" notice that may be adopted by schools.

If you have questions about — or need copies of — this information, please contact our office at 315-437-7600.

Ban on Confederate Flag Display Upheld

The U.S. Supreme Court has held a high school principal's ban on Confederate flag symbols on school grounds did **not** violate students' right to free speech. Two students sued the district after they were suspended; one for wearing a t-shirt displaying a Confederate battle flag and the other for flying the flag from the antenna of his truck. School officials presented evidence in the case of racial tensions existing at the school, including testimony about fights which appeared to be racially motivated in the months leading up to the actions underlying the case. The Court stated that "one only needs to consult the evening news to understand the concern school administrators had regarding the description, hurt feelings, emotional trauma and outright violence which the display of such symbols involved in this case could provoke". (*Scott v. Sch. Bd. of Alachua County*, 10/6/03).

Student Residency: Family Court Can Choose District When Divorced Parents Can't Agree

Where divorced, joint-custodial parents cannot agree on the residency of their children, the Commissioner has ruled that the Family Court can designate the schools that the children will attend. In *Appeal of T.K. (Bethlehem Central School District)*, the father lived inside the Bethlehem School District and the mother lived outside. While the parents had joint custody of the children, the divorce decree awarded primary physical custody to the mother. When the parents were unable to agree on which school district their children should attend, the Family Court ordered that the children attend one of the Bethlehem elementary schools. But Bethlehem's Superintendent determined, after reviewing the facts of the

case, that the children resided with their mother and, therefore, were not entitled to attend Bethlehem schools tuition free.

The Commissioner found that since the record established that the parents had been awarded joint custody and the children's time was "essentially divided" between the parents' homes, the parents' had the right to choose the children's residence. But because the parents were unable to agree on the selection of schools, that determination was left to the Family Court. Accordingly, the Commissioner concluded that Bethlehem's Superintendent had no basis for concluding that the children were not residents, and he ordered that

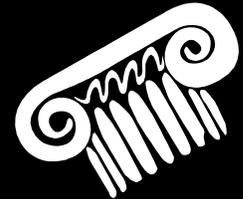
the children be allowed to attend without payment of tuition. (*Appeal of T.K.*, Decision No. 14,935 [August 22, 2003].)

Watch your mail for registration details.

FERRARA LAW FIRM SCHOOL LAW BRIEFING

WHAT SUPERINTENDENTS & ADMINISTRATORS NEED TO KNOW ABOUT ...

- ◆ Dealing with the Public and the Media During a School Crisis
- ◆ Employee Discipline: Investigating Internet Misuse and Sexual Abuse Cases
- ◆ Tenure Areas and Seniority Rights



FALL SESSION 2003

Date: Thursday, December 11, 2003
 Time: 9:00 a.m. to 11:00 a.m.
 Location: Wyndham Hotel, 6301 Route 298, East Syracuse, NY (just off Carrier Circle)

Reminder: Non-Custodial Parents Have Rights Under FERPA

Assume that a student's parents are divorced. Can the non-custodial parent authorize the release of the student's records to a third party?

This issue is governed by the provisions of the Family Educational Rights and Privacy Act ("FERPA") and the regulations developed thereunder. The starting point for the analysis is the FERPA regulations which presume that each parent has total and complete access to all rights specified within the regulations unless there is a court order or other legally binding documents "that specifically revokes these rights." As a practical matter, it is

quite rare that a divorce decree or other court document specifically precludes a parent from having access to records and making determinations with regard to student records; certainly it could exist, but it is unusual.

Accordingly, unless the custodial parent produces a court document which precludes the non-custodial parent from having access to records or making decisions with respect to the records, the District is obliged under FERPA to honor any records request made by either parent.

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Foreign Exchange Admissions: Districts May Choose One Sponsoring Group

The Commissioner has ruled that a school district may limit the admission of foreign exchange students to those sponsored by one organization. In this case, the district had a policy of recognizing only the American Field Service (“AFS”) program. The petitioners were district residents who sought to host a foreign exchange student sponsored by Academic Year in the USA (“AYUSA”). They requested that the Board revise this policy to provide for the acceptance of a student sponsored by AYUSA. The matter was considered by the Board’s policy committee and then by the Board itself. The Board’s president then notified the petitioners that the Board had declined to change its policy, stating that it “prefers to keep the process as simple as possible and en-

gage only one group in order to place and monitor foreign exchange students”.

In their Appeal, the Petitioners argued that the Board’s policy was discriminatory and improper. In his decision, however, the Commissioner concluded that under Education Law Section 1709(3) and (13) and Education Law Section 3202(2), the Board may prescribe the terms and conditions under which it decides to admit non-resident students, including foreign exchange students.

In this case, the Commissioner ruled that the Board has presented reasonable and rational bases for its policy limiting admission of foreign exchange students to those sponsored

by one organization. The Board president stated that in August 2002, respondent codified in a written policy its 20-year practice of accepting only those foreign exchange students sponsored by AFS. He also stated that the district had established a strong working relationship with AFS officials and developed confidence in AFS’s ability to ensure that students conducted themselves appropriately. He further noted that it was more efficient and effective to deal with one organization. In addition, he expressed the Board’s concern that recognizing AYUSA could lead to requests to recognize more organizations and could result in an increase in the population of exchange students who do not pay tuition.

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