School Law Matters

June 2007

A Newsletter from the Law Firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

Route to: Board ❑ Personnel ❑ Instruction ❑ PPS ❑ Business ❑ Other: _____

Avoiding Constitutional Complications in Negligence Cases

Consider these examples: 1) A student becomes ill on a voluntary school trip. Chaperones fail to take the student to a hospital and he later passes away. 2) A student from another school district tells school personnel that he is considering suicide. The school principal takes the student home, leaves him there unsupervised and the student follows through on his threat.

In both of these tragic situations, school boards and administrators can expect that the students' parents will commence a lawsuit against the district for negligence. And if mistakes were made, they can expect the district will be held financially responsible for them.

But what school officials may ***not*** expect is an additional claim that these incidents violated the students' rights under the U.S. Constitution.

Constitutional Claims on the Rise

Increasingly, we are seeing constitutional claims brought against school districts (and individual school officials) for matters that are normally categorized as negligence cases. This is important to note because if such a constitutional claim is successful, the plaintiffs are also entitled to have their often substantial attorneys' fees paid by the school district. Under our legal system, plaintiffs generally do not have this option with tort claims like negligence. Ordinarily they must pay their attorneys either "out-of-pocket" or out of a portion of what they recover as a result of their lawsuit. Thus, it is easy to see why a plaintiff's attorney would want to include constitutional claims in any lawsuit brought against a school district.

Here is how the constitutional argument is made in wrongful death situations like those described above. The "Due Process Clause" of the Fourteenth Amendment of the U.S. Constitution says that the government (including school districts) will not deprive any individual of "life, liberty or property" without due process of law. Attorneys for aggrieved parents will argue that when a student dies and the school had some means to prevent it, their action (or inaction) resulted in a deprivation of the student's life without due process. These claims are often referred to as ***"substantive due process"*** claims because they deal with the substance (i.e., life, liberty and property) rather than the procedural aspects (i.e., notice and an opportunity to be heard) of the Due Process Clause.

Claims like these have resulted in a body of case law and legal principles of which school boards and administrators should be aware. Specifically, the courts have held that there are two doctrines under which a school district (or individual school officials) may be held liable for substantive due process violations: (1) the ***"special relationship doctrine",*** which exists when this state assumes control over an individual sufficient to trigger an affirmative duty to provide protection to that individual; or (2) the ***"danger creation theory"*** which provides that a state actor may also be liable for an individual's safety if it created the danger that harmed the individual. Two cases which may help illustrate these legal principles are *Lee v. Pine Bluff (Ark.) Sch. Dist.,* 472 F3d. 1026 (8th Cir., 2007) and *Armijo v. Wagon Mound Public Schools* 159 F.3d 1253 (10th Cir., 1998).

"Special Relationship Doctrine"

In *Lee v. Pine Bluff (Ark.) Sch. Dist.*, a high school band member named Courtney Fisher traveled with the band to a competition in Atlanta, Georgia. Before the trip, his mother signed a form provided by the school district consenting to the band director's "secure[ing] treatment at the best medical center facility available if any injury [to the student] does occur."

Courtney became ill during the trip. He was so ill, in fact, that the band director kept him out of the competition. He spent the entire trip in his hotel room, unable to eat, and vomiting repeatedly. No one contacted his family or sought medical attention for him.

When the student returned home two days later, his mother immediately took Courtney to the regional medical center. He was subsequently transferred to a children's hospital in Little Rock, Arkansas, where he suffered cardiac arrest and died. His death was attributed to undiagnosed diabetes.

His mother sued the district, asserting negligence based on Arkansas state law, and that the band director and

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school district had violated her son's "substantive due process" rights. The district court ***dismissed the constitutional claim***, and the Eighth Circuit appeals court upheld the dismissal applying the "special relationship doctrine".

The court said that the Fourteenth Amendment due process clause does not "guarantee certain minimal levels of safety and security" or an affirmative right to government aid. The court noted that the only instances where the state entity (in this case a school district) would be responsible for a person's safety or security would be where the state (district) has rendered a person unable to care for himself, through incarceration or institutionalization.

Despite the school district's pledge on its parental consent form to "secure treatment at the best medical center facility available if any injury does occur", the court held that public schools do not "have such a degree of control over children as to give rise to a duty to protect," especially when the student was participating in a voluntary activity.

"Danger Creation Theory"

In 1998, the U.S. Court of Appeals, Tenth Circuit, ruled ***in favor*** of the aggrieved parents in *Armijo v. Wagon Mound Public Schools* 159 F.3d 1253 (10th Cir. 1998) using the "danger creation theory". This case dealt with a 16-year-old special education student who exhibited low self-esteem and who confided in a School Aide and a Counselor that "maybe [he'd] be better off dead." Both the Aide and the Counselor knew that the student had access to firearms. One day, the High School Principal verbally reprimanded the student for harassing an elementary student. While in the presence of the Principal and the Counselor, the student threatened the teacher who reported the incident, as well as the teacher's child and property. The Principal immediately suspended the student on an emergency basis, considering him to be at risk for committing violence. Without contacting the student's parents, the Principal directed the Counselor to drive the student home immediately, which he did. This was not in accordance with the school's stated policy for temporary suspensions which required that the parents be notified before a student could be sent home for an out-of-school suspension. The Counselor dropped the student off at his home without attempting to ascertain whether the student's parents were home. The student's parents returned later that day and found that their son had committed suicide.

The student's parents filed a lawsuit against the Principal and the Counselor, individually, under the federal Civil Rights statute (42 U.S.C. Section 1983). The court found that no "special relationship" existed between the student and school sufficient to trigger an affirmative duty on the part of the school officials to protect the student. However, the court held that the actions of the Principal and Counselor created a risk of danger to the student sufficient to overcome their qualified immunity.

In making its decision, the court used the following six-part test: (1) the student was a member of a ***limited and specifically definable group*** – special education students with suicide tendencies; (2) the Principal and the Counselor's conduct put the student at ***substantial risk of serious, immediate and proximate harm*** by suspending him from school, which caused him to become distraught and to threaten violence, and then taking him home and leaving him alone with access to firearms; (3) they had some ***knowledge*** that the student was suicidal and distraught, was unable to care for himself, was home alone, and had access to firearms; (4) by taking this action, knowing of the student's vulnerability and risks of being left alone at home, the principal and counselor ***acted recklessly and in conscious disregard of the risk*** of suicide; (5) such conduct, if true, when viewed in total, is ***shocking to the conscience***; and (6) the Principal and counselor ***increased the risk of harm*** to the student.

Lessons to be Learned

It should be noted that the *Lee v. Pine Bluff* decision was not rendered in a court with jurisdiction over New York. It is possible that a New York court could have reached a different conclusion, especially given the fact that the District appeared to create some special duty to care for the students by stating on the consent form that school officials would "secure" medical attention for ill students. In addition, school officials should note that (using the court's logic) the outcome of the *Lee* case may have been different if the band trip had been mandatory as opposed to voluntary.

While *Armijo v. Wagon Mound* was also decided outside of New York, it has been cited favorably by New York courts in reaching decisions affecting local governmental entities, like school districts. (See, e.g., *Citizens Accord, Inc. v. The Town of Rochester*, 2000 WL 504132 (N.D.N.Y.).)

Bearing these concerns in mind, there are some practical things that school districts can do to help limit their liability exposure in similar situations, beyond simply exercising reasonable care in protecting students. First, avoid the possibility of creating a "special relationship doctrine" situation by keeping parental consent forms free of statements like the one in the *Lee* case. Second, when field trips or overnight trips are truly voluntary, make sure to notify parents of that fact prior to the trips. Third, school officials should carefully follow their district's policies in disciplining students with special needs. Moreover, they should always notify parents when a student has expressed suicidal thoughts, regardless of whether they are expressed to an aide, counselor, school psychologist, etc.

If you have any questions, about these cases or their implications, please contact us at 315-437-7600.

Changes for Medicaid Billings

The State Education Department (SED) recently issued new guidance on Medicaid billings under the School Supportive Health Services Program (SSHSP). The guidance is in response to a federal audit of numerous school districts statewide which revealed significant Medicaid overpayments. The State of New York is in the process of negotiating with the federal government to resolve the overpayment. In the meantime, new guidelines have been issued to limit Medicaid overpayments, disallowances and potential liabilities on behalf of individual school districts.

- Speech services may not be billed unless those services are provided by a licensed speech pathologist or provided under the direct supervision of a qualified speech pathologist. Any individuals working under the direction of a qualified speech pathologist must be given contact information to enable them to directly contact the supervising speech pathologist as needed during treatment. The federal government has interpreted, "under the direction of" to mean that a federally qualified speech pathologist who is directing speech services must supervise each beneficiary's evaluation. The speech pathologist must spend as much time as necessary to directly supervise the services. School districts must maintain documentation detailing the qualified speech pathologist's supervisory services and ongoing involvement in the treatment.

- Transportation may not be billed unless the provider can clearly document the child's attendance on the vehicle for eligible services on a specific day being billed. Essentially, a bus log must be completed by the bus driver or by another person at the school to mark off as the student disembarks the bus daily.

- Counseling services may not be billed unless provided by a professional whose credentials allow the same service outside of the school. Unless the provider is duly licensed, this would preclude Medicaid claims and reimbursement for counseling services provided by certified school counselors or certified school psychologists.

School Districts are cautioned that failure to follow this new guidance may result in all Medicaid claims for services being disallowed and may also subject individual school districts to potential liability under the Federal False Claims Act. Unfortunately, since a resolution of the federal audit is still pending, school districts are also being advised to maintain documentation for services that are not currently being billed since those records may be required for future reimbursement if the guidance changes.

If you have any questions, contact Colleen Heinrich, Esq. at 315-437-7600 or cwheinrich@ferrarafirm.com.

It's Time to Protect Your Tax Base, Again

July 30 is typically the last day for real property owners to file tax certiorari proceedings against school districts. In these proceedings (also known as Article 7 Proceedings) the property owner seeks a reduction in his/her real property taxes, which may impact the school district's real property tax revenues.

There are very rigid time limitations and service requirements for property owners in these matters. If the property owner fails to adhere to these limitations, their cases will often be dismissed by the courts.

We recommend that our school district clients verify the timeliness of the property owners' filings and intervene in the larger proceedings to ensure that their tax base is protected. With smaller proceedings, we recommend calculating the school district's exposure and placing that amount in reserve accounts to protect future budget shortfalls.

Over the past several years, we have taken an active role in the defense of the larger proceedings and worked with town attorneys, or as lead counsel, to protect our client school district's interests. You should be aware that typically a school district has 66% of the exposure in a tax certiorari proceeding and the town/city and county have the remaining 34% of tax dollars at risk. As school districts may have the most to lose in a proceeding, we recommend that school districts take steps to ensure they have a seat at the settlement table.

If you would like our office to assist you in analyzing your school district's exposure in pending tax certiorari proceedings, please contact Joseph Shields of our office at 315-437-7600 or jshields@ferrarafirm.com.

SCHOOL LAW MATTERS is published by **Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., 5010 Campuswood Drive, East Syracuse, New York, 13057, 315-437-7600, www.ferrarafirm.com.**

Short-Term Suspensions: Notice and Informal Conferences Are Required

The Commissioner has issued a number of decisions over the past few years admonishing districts to **strictly** comply with the notice and informal conference requirements of Education Law Section 3214(3)(b) and Section 100.2 (l) of the Commissioner's Regulations when they impose student suspensions of five days or less.

In recent decisions, the Commissioner has again reminded districts of the following points:

- A short-term student suspension letter issued by a school district must inform a parent that he/she may request an opportunity to question complaining witnesses. (*Appeal of M.S.*, 44 Ed. Dept. Rep. 478, and cases cited therein.)

- Oral communication with parents regarding a suspension is not a substitute for the required written notification. (*Appeal of R.J. and D.J.*, 44 Ed. Dept. Rep. 191.

- Holding an informal conference with the principal does not excuse the requirement for written notification to students and their parents and/or guardians explaining their rights to the conference and the opportunity to question complaining witnesses. (*Appeal of R.J. and D.J.*, *supra*.)

- The parental conference must be conducted by the principal and not by another administrator since the statute is explicit that any informal conference must be "with the principal." (*Appeal of V.R. and C.R.*, 43 Ed. Dept. Rep. 99, and cases cited therein.)

- Both the Education Law and the Commissioner's Regulations require that the principal and the complaining witnesses be present when requested by the parents. It is insufficient merely to provide an opportunity to speak to the principal without the complaining witnesses present, or an opportunity to speak to the complaining witnesses without the principal present. (*Appeal of V.R. and C.R., supra*.)

- Where student or faculty witnesses are available, they should be present at the conference when requested by the parents. Even if no student witnesses are available, the parents should have an opportunity to question District employee witnesses who have first-hand knowledge. If the opportunity is not afforded to a parent, the student suspension may be annulled. (*Appeal of a Student Suspected of Having a Disability*, 45 Ed. Dept. Rep. 483.)

If you have any questions on these or any other matters related to student discipline, please contact our office at 315-437-7600.

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.
5010 Campuswood Drive
East Syracuse, New York 13057