The Report Card

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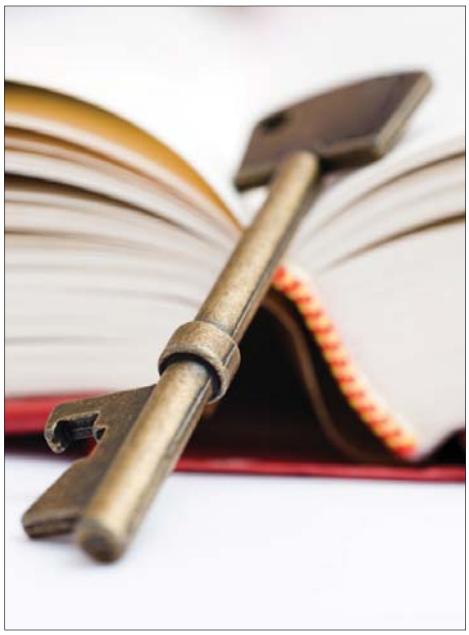
Deliberate Indifference – Knowledge Is Key

Beginning in the summer and continuing through the first few months of the 2003-2004 school year, a sergeant instructor in a JROTC program had several sexual contacts with a high school junior on and off school premises. When the student's mother learned of the sexual abuse she notified her daughter's guidance counselor and an account of the events was reported up the chain of command to the superintendent, who took prompt action. The sergeant admitted his wrongdoing when confronted and eventually pled guilty to aggravated criminal sexual abuse and official misconduct. After the story was released to the public, two other female students revealed that they too were sexually assaulted by the sergeant. The parent who made the initial report of sexual abuse, filed a Title IX claim against the school district for sexual harassment and a Section 1983 claim to hold the JROTC supervisor individually liable for the sergeant's misconduct.



The U.S. Court of Appeals for the Seventh Circuit confirmed that central to the outcome of the Title IX claim was whether school officials with authority to take corrective action to halt the sexual abuse had actual knowledge of the sexual misconduct and responded with deliberate indifference. The court answered this question in the negative. The record showed that no one at the school, including the JROTC supervisor, knew about the sergeant's sexual misconduct until the mother reported it to the guidance counselor. The court also held that the JROTC supervisor's statement that "this incident has happened before, and it just in time goes away" was directed at sexual misconduct committed by the preceding JROTC supervisor who was recommended for nonrenewal following his indiscretions. As a result, the statement was deemed unrelated to the sergeant's conduct and not an admission sufficient to establish that the district had actual notice of misconduct.

Because the JROTC supervisor lacked knowledge of the sergeant's past sexual indiscretions, plaintiff's Section 1983 claim

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also failed. School districts should be aware that the Section 1983 claim was dismissed in the lower court, but received reconsideration on appeal to the Seventh Circuit because of a change in law. Between these decisions the U.S. Supreme Court decided *Fitzgerald v. Barnstable School Committee*, 129 S.Ct. 788 (2009), which overturned well-established precedent in the Seventh Circuit holding that Title IX was meant to provide an exclusive remedy for teacher-on-student and student-on-student sexual harassment, and thus precluded Section 1983 relief. A plaintiff alleging a Title IX claim can now use the same facts to support a Section 1983 claim.

Driver's Education Fees – No Brakes on Waivers

The Illinois School Code requires any school districts operating grades 9 through 12 to offer a driver's education course to students at a fee not to exceed $50. On the other hand, the school code allows districts to request a waiver to charge students driver's education fees in excess of $50. Township High School District 214 (Illinois) submitted to the Illinois State Board of Education (ISBE) a request for a waiver of the school code to raise driver's education fees from $50 to $350 to defray estimated per student costs of $993. The ISBE reviewed the request for completeness and they forwarded it to the Illinois General Assembly, which approved it. A student refused to pay the increased costs and sued to challenge the constitutionality of the ability to waive the school code and the ISBE's role in the waiver process.

She first argued that the district's request for a waiver of the school code violated the Illinois Constitution's free education clause. The court held that when the constitution's framers talked about tuition-free education in public schools through the secondary level, they were "speaking of book fees, book rentals, and PE equipment." The court categorized the provision of books and PE (physical education) equipment as education services, which are provided to students tuition-free, and distinguished these services from noneducation services and supplies, for which reasonable charges may be assessed. The student also argued that the ISBE should have denied the district's waiver request because the district planned to use the fees to cover staffing costs, a direct violation of state regulations prohibiting the use of fees for driver's education courses to pay for teacher salaries. The court concluded that the ISBE's limited role in this waiver process was to review applications for completeness. As a result the ISBE lacked authority to deny the request for any unrelated reason. *Sherman v. Township High School District 214*, 2010 WL 3834544 (Ill. App. 1st Dist.)

Special Education FAPE – IEP Sufficiency Evaluated Prospectively

Marlborough Public Schools (Massachusetts) stopped delivering special education services to a 19-year old student with disabilities after it unilaterally graduated the student. The student's parents challenged the decision to terminate services as a deprivation of a Free Appropriate Public Education (FAPE). In its defense, the district argued that once the student became eligible for graduation the district could graduate him from high school without any further inquiries. This defense failed because like Illinois, Massachusetts law does not mandate graduation for a special education student who has accumulated sufficient credits to satisfy graduation requirements.

The district did prevail on its remaining arguments that the student was provided with a FAPE because he had made sufficient progress towards his individualized education plan (IEP) goals and his IEP was reasonably calculated to provide him with an educational benefit. When evaluating the legal significance of the student's actual education progress, the court was careful to point out that the "absence of progress toward the IEP goals per se does not make an IEP inadequate," even though "actual educational progress can demonstrate that an IEP provides a FAPE." This rule places the proper focus of the FAPE analysis on the nature of the IEP at the time of its formation and prevents retrospective analysis of the IEP in light of results gathered after the IEP was developed. *Doe v. Marlborough Public Schools*, 2010 WL 2682433 (D. Mass).

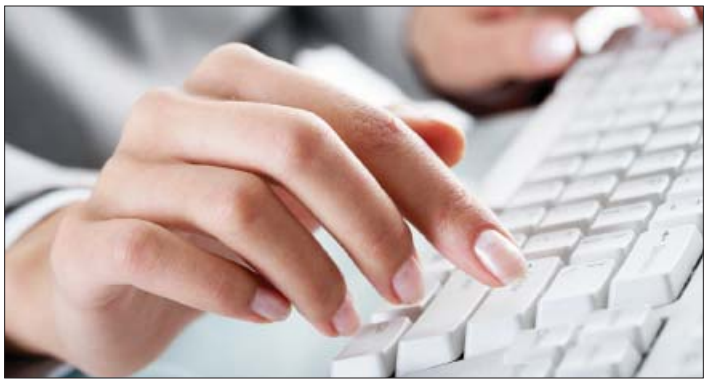
Eminent Domain – Still a Vital Tool

In 1971, the Community High School District 99 (Illinois) board of education leased property to a park district for a one-year term that automatically renewed each year. In 2005, the Village of Woodridge filed an eminent domain action to condemn the property and seize its ownership. The district contested the condemnation as unlawful, arguing that the village's proposed use of the property, to expand village facilities, was not authorized by the municipal code (Code). The court disagreed, holding that the village's plan to develop land was authorized under the plain language of the Code, which allows condemnation to "improve . . . public grounds."

The district also argued that the condemnation materially interfered with an already existing use of the property, a recognized defense under the Code. In support of this position, the district offered that it was holding the property for a future use and as an investment. The court refused to recognize these alleged existing uses out of concern that they would render the Code meaningless. The endless number of potential future uses and investment purposes that a property owner could assert would effectively require a municipality to receive consent from the property owner before a condemnation could occur. This outcome would be contrary to the legislature's intent. *Village of Woodridge v. Board of Education of Community High School District 99*, 933 N.E.2d 392, 342 Ill. Dec. 806 (1st Dist. 2010).

Litigation Holds – No Place for Meager Effort

The Bremen High School District (Illinois) was sanctioned for breaching its duty to issue a litigation hold and preserve documents in a race discrimination claim filed by a veteran secretary who believed she was treated less favorably than her white counterparts. The judge held that the district was under a duty to preserve documents relevant to plaintiff's claims when it received notice of her Equal Employment Opportunity Commission charges. The district breached this duty by failing to instruct its employees who had dealings with plaintiff to preserve e-mails so that they could be reviewed for possible relevance to plaintiff. Instead, the district instructed only three employees, with no legal support, to search their e-mail to identify relevant documents. This attempt to preserve documents was deemed reckless and grossly negligent in light of the fact that these employees were personally interested in the case and had the ability to permanently delete e-mails.



The court admonished the school and its counsel for taking insufficient steps to safeguard electronic information. Plaintiff's motion for sanctions and other injunctive relief was granted because plaintiff faced harm from the potential permanent destruction of evidence. Defendant was (1) precluded from arguing that the absence of discriminatory statements from the period when documents could have been permanently deleted was evidence that no such statements were made, and (2) assessed the costs and fees of plaintiff's preparation of the motion for sanctions. Plaintiff was also permitted to depose witnesses concerning the e-mails that were eventually produced in response to the motion for sanctions. *Jones v. Bremen High School District 228*, 2010 WL 2106640 (N.D. Ill.)

Legislative Update

Protecting Students

The Illinois Human Rights Act's prohibition against sexual harassment in higher education now applies to elementary and secondary education and, in particular, addresses sexual harassment of students by school employees. P.A. 96-1319 (effective July 27, 2010).

School districts are required to create and implement a policy on bullying. A statewide School Bullying Task Force has been created to explore the causes and consequences of bullying in schools; identify effective practices that reduce the incidence of bullying; and highlight effective prevention programs, and training and technical assistance opportunities for schools on this problem. P.A. 96-0952 (effective June 28, 2010).

The Abused and Neglected Child Reporting Act was amended to require mandated reporters to report suspected abuse, neglect or exploitation of an "adult student with disabilities," defined as a 18 to 21 years old who has an IEP. The definition of "abuse and neglect" was expanded to include the abuse and neglect of 18 to 21 year old residents of child care facilities licensed by the Illinois Department of Child and Family Services. P.A. 96-1441 (Effective August 20, 2010).

There are new offenses for which a person may be prohibited from obtaining a school bus driver permit: solicitation of murder for hire, luring a minor, human trafficking, any of various sex offender offenses, any of various offenses relating to juvenile prostitution or child pornography, any of various offenses relating to possession of controlled substances or cannabis, any of various offenses relating to aggravated battery, or any of various offenses relating to illegal possession of firearms. P.A. 96-1182 (effective July 22, 2010).

Programming / Instruction

All sex education courses that discuss sexual intercourse shall teach students about the dangers associated with drug and alcohol consumption during pregnancy. P.A. 96-1082 (effective July 16, 2010).

Schools are now allowed to purchase electronic textbooks. P.A. 96-1403 (effective July 29, 2010).

Pending funding availability, the Illinois State Board of Education is required to establish a program for three-year competitive grants to schools to facilitate the enrollment, attendance and success of homeless children. P.A. 96-1229 (effective January 1, 2011).

Funding and Spending

Public school districts or other eligible entities can match funds in early childhood construction grants up to a maximum of 10 percent of the grant amount. P.A. 96-1402 (effective July 1, 2010).

Unfunded mandates are prohibited. School districts may therefore refuse to comply with Illinois School Code mandates or Illinois State Board of Education mandates that do not have a separate appropriation of funds, or for which the appropriation of funding is less than the legitimate costs of compliance. School districts must petition the regional superintendent of schools for an exemption before discontinuing or modifying a mandate. P.A. 96-1441 (August 20, 2010).

Provisions concerning the account of expenditures for programs in transitional bilingual education have been amended to provide that at least 60 percent of bilingual funding must be used for instructional costs. P.A. 96-1170 (effective January 1, 2011).

The Illinois Youth Development Council was created to oversee and coordinate the state funds currently invested to support positive youth development programs and activities. P.A. 96-1303 (effective July 27, 2010).

Pending funding availability, the Illinois State Board of Education can fund local gifted education programs through a request for proposals process. P.A. 96-1152 (effective July 21, 2010).

Teacher Training

School social workers are required to attend the same in-service workshops as teachers regarding the instruction on the identification of the warning signs of suicidal behavior in teenagers. P.A. 96-0951 (effective June 28, 2010).