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HAPPY HOLIDAYS!!!

A NEWSLETTER FOR CONNECTICUT EDUCATORS
FREDERICK L. DORSEY, EDITOR

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SPECIAL EDUCATION UPDATE

BY FREDERICK L. DORSEY

Second Circuit: Failure to Specify School Location Is Not IDEA Violation

The federal appeals court for our jurisdiction, the Second Circuit, has issued a decision rejecting the argument that an IEP's failure to name a specific school placement renders it procedurally deficient. In *T.Y. v. New York City Dep't of Educ.*, the school district developed an IEP for a student with autism that did not name the specific public school that he would be attending.

When the student's parents were later notified of the specific school placement, they objected to the location and eventually made a unilateral placement of the student in a private school. The parents then sought reimbursement for this placement by way of a due process hearing, arguing that because the IEP as drafted had failed to set forth a

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The Firm is pleased to announce that...

Daniel P. Murphy, Esq., a former partner of the Firm, has accepted the position of Director of the Division of Legal and Governmental Affairs of the Connecticut State Department of Education. The Firm wishes Dan well in his new position, in which he will oversee legal operations for the Department, including the management of its staff attorneys and supervision of both litigation and compliance matters.

UPCOMING SEMINARS

February 2010 **Conducting Effective Municipal Meetings Under FOIA**

Attorney Ashley E. Baron is on the faculty for this seminar in Naugatuck, Connecticut.

March 2010 **Legal Update on Special Education Law**

Attorney Frederick L. Dorsey is on the faculty for this presentation in West Hartford, Connecticut for students training for administrator's certification program.

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specific school placement, the district had not allowed the parents meaningful participation in the development of their child's educational program. After losing this argument at the hearing, the parents appealed the decision to the U.S. District Court, which affirmed, and then to the Second Circuit.

"A school district's failure to list in an IEP a specific location for the child's school and classroom does not constitute a procedural violation of IDEA."

The court found that IDEA's "meaningful participation" requirement does not give parents the right to engage in discussion over the specific location of services, beyond what is necessary to define the type of educational environment that allows for the delivery of appropriate services. In most cases, this would limit "location" discussions to whether the student can be educated in the district or must instead receive an outside placement. For this reason, a school district's failure to list in an IEP a specific location for the child's school and classroom does not constitute a procedural violation of IDEA.

IDEA's Statute of Limitations Applied to 504 Claims

The U.S. Court of Appeals for the Third Circuit, which has jurisdiction over Delaware, New Jersey and Pennsylvania, has held that the two-year limitations period for bringing claims under IDEA also applies to parallel actions under Section 504 of the Rehabilitation Act. The decision, *P.P. ex rel. Michael P. v. West Chester Area School Dist.*, resulted from the U.S. District Court's application of a state statute of limitations for personal injury claims to the parents' Section 504 claims, since Section 504 does not include its own limitations period.

On appeal, the Third Circuit held first that courts may apply the limitations period from federal rather than state law, when the federal law in question is better analogized to the law at issue in the case. Next, the court found that IDEA is more closely related to Section 504 than the state personal injury statute that was applied by the lower court. In support of its holding, the court noted that a parent who fails to meet the two-year deadline for bringing an action under IDEA should not be allowed to make the identical claim under Section 504 using a different limitations period. However, as with IDEA, the two-year period would not apply in cases in which a school district misrepresents that it has resolved the underlying problem, or withholds information it is required to provide to the parent.

Notably, the two-year statute of limitations for IDEA claims did not apply until July 1, 2005, though Connecticut has had such a limitation in its state regulations since July 1, 2000. The Third Circuit did not opine on the appropriate statute of limitations to apply in the case of any claims that accrued prior to that time.

U.S. Education Department Issues Guidance for Assessing LEA Compliance with IDEA Maintenance of Efforts Requirements

In an October 21, 2009 letter to state education agencies, U.S. Secretary of Education Arne Duncan has recommended that school district performance indicators be taken into account when determining whether the district has met the IDEA's "maintenance of efforts" requirements. However, Secretary Duncan's letter does not alter prior guidance issued by the Department's Office of Special Education Programs ("OSEP"), which clarifies that States need not consider performance indicators, such as standardized assessment scores and graduation rates, when determining a school district's compliance with IDEA and resulting eligibility for Part B funding.

"Maintenance of efforts" or "MOE" refers to the obligation of school districts to fully comply with IDEA program requirements before using local funds from its special education budget for general education purposes. Specifically, IDEA requires that Part B funds be used only to pay the excess costs of providing special education and related services to children with disabilities, and to supplement, and not supplant, state, local and other federal funds. In addition, Part B awards generally may not be used to reduce the level of state and local special education expenditures below that of the prior year.

State departments of education are responsible for evaluating local school districts for eligibility for Part B funding, by comparing budgeted and actual expenditures as well as ensuring that the districts are meeting substantive IDEA requirements, *e.g.*, child find, triennial evaluations, and transition planning. In conducting such evaluations, however, some states have additionally looked at the districts' performance in areas that

are not directly regulated by IDEA, but are considered indicators of success in carrying out special education programs, such as the number of disabled students who graduate from high school. Connecticut's State Department of Education does not currently include performance indicators in its LEA ratings, although it has stated that this may be a possibility in the future. Districts found in compliance with MOE may transfer to their general education budgets local special education funds in an amount equaling half of any increase in federal funds. As a note of caution, districts should consider that this year's increase in federal funding is due in part to the American Recovery and Reinvestment Act of 2009, a temporary boost that may not justify severe reductions to MOE requirements.

Reminder: Parental Notification of Physical Restraint and Seclusion Laws

By now, all school districts should be using the parental notification form concerning physical restraint and seclusion issued by the Connecticut State Department of Education. Districts must provide this notice at the first PPT meeting held after a student is referred to special education, or at the first PPT meeting held after October 1, 2009 for a student who is already eligible for special education. In addition, parents must receive this notice at the first PPT meeting at which the use of seclusion is to be included in the student's IEP. The form is available on the State's website at http://www.sde.ct.gov/sde/lib/sde/pdf/pressroom/parental_notification_tri_fold.pdf.

"The April 1 deadline for nonrenewals makes it essential to start looking at teacher evaluations in order to finalize staffing decisions for next year."

Finalize Teacher Nonrenewal Decisions Well in Advance of April 1

By Frederick L. Dorsey

It is time once again to consider budget planning and staffing decisions for the next school year. Under the Teacher Tenure Act (C.G.S. §10-151), the board may nonrenew the contract of a **nontenured** teacher if written notice is provided by April 1 that the teacher's employment will not continue beyond the end of the current school year. A board may nonrenew such teachers for any reason, unlike the process of termination, which requires one of six specific reasons provided by statute for the teacher's dismissal. Because the nonrenewal process is procedurally easier and more cost-efficient, gives teachers fewer appeal rights, and carries less of a stigma on the teacher's record, this is the preferred method for involuntarily ending the employment of nontenured certified staff. It also has the added benefit of giving the employee ample time to seek a new position for the upcoming school year.

The April 1 deadline for nonrenewals makes it essential to start looking at teacher evaluations in order to finalize staffing decisions for next year. Upon achieving tenure, a teacher may no longer be nonrenewed, leaving termination as the only option for involuntarily ending the teacher's employment. For this reason, it is especially important to make the nonrenewal decision well before April 1 of the teacher's final year as a nontenured employee. While a board may nonrenew a nontenured teacher for failure to meet district performance standards, the board may not use mere poor performance as a basis for terminating a teacher, whether tenured or nontenured, without proving that the teacher was actually inefficient or incompetent.

Another use of the nonrenewal process is to conduct layoffs for budgetary reasons, and then hire the employees back upon confirming that sufficient funds will be restored to the budget for their salaries. While unpleasant, this process is sometimes necessary for the board to ensure that it is not overcommitting its financial resources, and also requires adherence to the April 1 nonrenewal deadline.

Whether you are making difficult budget decisions or sorting through teacher evaluations, it is important to keep the April 1 deadline in mind and use the intervening time to resolve any questions about teacher tenure status and the procedures for nonrenewal notices. Please contact our education counsel for specific guidance on these issues.

Student Discipline Issues to Watch for in 2010

By Nicholas J. Grello

Reminder: In-School Suspension Law to Take Effect July 1, 2010

Public Act No. 09-6, which largely concerns the state's 2010-11 education budget as well as school construction projects, extended for a second time the requirements of 2007 legislation that essentially re-

quires that all suspensions of students must be in-school suspensions, with narrow exceptions. Under the new law, districts will be allowed to impose out-of-school suspensions only when the student's behavior poses such a danger to people or property, or is so disruptive of the educational process, that the suspension must be served outside of school. In addition, the definition of "in-school suspension" will expand the maximum allowable period of suspension from 5 days to 10 days. The new requirements are now scheduled to take effect on July 1, 2010.

Connecticut Supreme Court Finds that BB Guns Are Firearms

In its November 10, 2009 decision, *State v. Grant*, the Connecticut Supreme Court held that a BB gun used in an attempted robbery constituted a "firearm" for the purposes of state criminal statute that imposes a five-year sentence for a defendant who uses a firearm, or who is armed with and threatens the use of a firearm, in the commission of certain felonies. The defense argued that the BB gun was not a firearm because it did not discharge a shot by gunpowder. The court rejected this argument, finding that the plain language of the statute defines a firearm as "any sawed-off shotgun, machine gun, rifle, shotgun, pistol, revolver, or other weapon, whether loaded or unloaded, **from which a shot may be discharged**." Noting that this law could have been written in a way that limited the definition of firearm to weapons that use gunpowder, the court considered the legislature's failure to do so "strong evidence" that it had not intended to exclude BB guns from this list.

Will this decision make it easier for school districts to suspend and/or expel students for the commission of crimes involving the use or threatened use of a BB gun? The expulsion statute, C.G.S. §10-233d, excuses the board of education from offering an alternative educational opportunity to students between the ages of 16 and 18 who are expelled for conduct that endangers others if, among other things, the conduct involved the possession at school or at a school-sponsored activity of a firearm, as defined by federal statute, or a deadly weapon, dangerous instrument or martial arts weapon, as defined by C.G.S. §53a-3—the same criminal statute that was at issue in *Grant*.

Possession of such weapons on school grounds or at school-sponsored activities, as well as their use off school grounds in the commission of certain crimes, are also grounds for mandatory expulsion proceedings. The difference between *Grant* and cases brought under the expulsion law is that *Grant* utilized the definition of "firearm" set forth in C.G.S. §53a-3, while the expulsion cases use a separate definition of this term under federal law. Specifically, the expulsion statute defines a "firearm" as that term is used in 18 U.S.C. §921: "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm."

The language of the expulsion statute has been construed to include BB guns—air guns that fire tiny metal pellets—under the definition of a dangerous instrument: "any instrument, article or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury. . . ." In fact, the definition of deadly weapon set forth in C.G.S. §53a-3 could also be interpreted to include BB guns, should it be found at the expulsion hearing that the student used or possessed "any weapon, whether loaded or unloaded, from which a shot may be discharged." Notably, this section of the Connecticut statute defining a "deadly weapon" is similar to the statute's definition of "firearm" that was considered by the court in *Grant*. The relative dangerousness of the student's use or possession of the BB gun may become a more significant factor when seeking the expulsion of a student for conduct that occurs off school grounds, as it is more difficult to expel students for off-campus behavior because the district must prove that the off-campus behavior caused a serious disruption to the educational process.

The Supreme Court decision has no impact on the fact that the expulsion statute expressly rejects Connecticut's definition of a firearm in favor of the federal version. However, the court's finding that a BB gun meets the state's definition of a firearm as a "weapon, whether loaded or unloaded, from which a shot may be discharged," supports the position that a BB gun can also be defined as a "deadly weapon" under the same state law, as this language is identical to that used to define a deadly weapon.

School administrators seeking to expel students for weapons-related misconduct should demonstrate at the hearing that the weapon at issue fell into as many of the above definitions as possible, while indicating that meeting any one of the definitions is sufficient to support an expulsion. It is also wise, whether the conduct happened on or off school grounds, to present evidence about the dangerousness of the student's possession or use of the weapon, including whether a crime was committed, attempted or discussed, as well as the impact on other students and the school environment.

Boards May Not Expel Students Returning from Juvenile Detention

A small but important change to the expulsion statute took effect this year and requires boards of education to readmit students who have been placed in juvenile detention for at least one year for criminal conduct that constitutes possible grounds for expulsion from school. In other words, a school district may not wait for a student to return from detention and then expel the student for the same offense, if the period of detention served by the student has been for one year or more, and if the time was served in a juvenile detention center, the Connecticut Juvenile Training School, or any other residential placement. This requirement appears as new subsection (l) of C.G.S. §10-233d, the student expulsion statute.

FAILURE TO RETRIEVE E-MAILS CONCERNING STUDENT DID NOT VIOLATE FERPA

BY MELANIE E. DUNN

A school district did not violate the Family Educational Rights and Privacy Act (FERPA) by failing to provide a student's parents with every e-mail that the district's staff members had ever sent or received about the student. In *S.A. by L.A. and M.A. v. Tulare County Office of Educ.*, the U.S. District Court for the Eastern District of California found instead that the district fulfilled the parents' request for their child's education records by furnishing them with hard copies of the e-mails that were maintained in the student's permanent file.

FERPA defines "education records" as those records that contain personally identifiable information about a student and are maintained by the district. A record that is not maintained by the district is therefore not subject to a parent's request for a copy of his or her child's education records.

In this case, the court rejected the parents' argument that e-mails found solely in individual user in-boxes are "maintained" by the district as contemplated by FERPA. Districts should note that this issue has not been addressed in our jurisdiction, nor does this opinion impact the requirements of Connecticut's FOI law.

U.S. DEPARTMENT OF EDUCATION ISSUES H1N1 GUIDANCE

BY MATTHEW K. CURTIN

The U.S. Department of Education recently issued a guidance document concerning the H1N1 virus that addresses operational flexibility, distribution of flu vaccines at school facilities, and waivers from federal education requirements that may be available to school districts and post-secondary institutions when responding to an outbreak at school. The guidance also discusses H1N1 implications under the Family and Educational Rights and Privacy Act as well as legal issues pertaining to the prolonged closure of school. Additional advice and information related to the H1N1 virus is accessible at the Education Department's website or at www.flu.gov.

RACE TO THE TOP

BY MELANIE E. DUNN

The Obama Administration has invested $4.35 billion in a school reform package, also known as the Race to the Top fund, which allows states to enter a highly competitive application process in order to receive a grant. The statewide application must demonstrate a commitment to several aspects of school reform, including teacher and administrator accountability, support for struggling schools, an emphasis on science and math departments, and a willingness to explore alternatives to traditional public education such as charter schools. Connecticut's application for Round 1 of the process, which will request "upwards of $150 million over three years" according to a November 10, 2009 press release by the State Department of Education, is due on January 19, 2010.

E-NEWSLETTER

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