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EDUCATION & SPECIAL EDUCATION LAW REPORT

July 18, 2001

RECENT UNITED STATES SUPREME COURT DECISIONS

Christian Club Can Meet at School

In a 6-3 decision the United States Supreme Court has held that a public school in New York violated a private Christian organization's free speech rights when it excluded the organization from meeting after hours at the school. Good News Club v. Milford Central School, – U.S. – (June 11, 2001). The Court also concluded that permitting the Good News Club to meet on the school's premises would not violate the Establishment Clause.

The Milford Central School had enacted a policy authorizing district residents to use its building after school for, among other things, (1) instruction in education, learning, or the arts and (2) social, civic, recreational, and entertainment uses pertaining to the community welfare. Two residents submitted a request to the school to hold weekly after-school meetings at the school of the Good News Club, a private Christian organization that is affiliated with the Child Evangelism Fellowship, a Christian missionary group.

The Supreme Court reversed the Second Circuit Court of Appeals' opinion that had held Milford's policy was constitutional because the Club's subject matter was religious in nature and its activities fell outside the bounds of pure moral and character development. The Supreme Court conversely held that by denying the Good News Club access to the school's limited public forum on the ground that the Club was religious in nature, Milford discriminated against the Club because of its religious viewpoint in violation of the Free Speech Clause. It the eyes of the Court, there is no difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons.

The Court also held that allowing the Club to meet in the school did not violate the Establishment Clause. Because the meetings were to be held after school hours, were not sponsored by the school, and were open to any student who obtained parental consent, not just to Club members, there was no realistic danger that the community would think that the district was endorsing religion. The Court rejected Milford's argument that students would feel coerced to join the Club. The Court emphasized that the parents of the community, not the children themselves, decided whether or not the children will attend the Club meetings. In dissent, Justice Souter wrote that the Club's activities "blur the line between public classroom instruction and private religious indoctrination, leaving a reasonable elementary school pupil unable to appreciate that the former instruction is the business of the school while the latter evangelism is not."

Court Allows School T-Shirt Ban To Stand

In March, 2001the United States Supreme Court, without comment, turned down an Ohio student's appeal in a case concerning the student's right to wear a controversial T-shirt to school. Boroff v. Van Wert City Board of Education, 121 S.Ct. 1355 (March 19, 2001). The student argued that school officials could not keep him from wearing T-shirts depicting Marilyn Manson, a "shock-rock" star who took his stage name from Marilyn Monroe and Charles Manson. While this case has generated a fair amount of publicity, Massachusetts school departments, however, need to recognize that because of state statutes the outcome of this case might be much different if it were brought in a Massachusetts court.

In the Ohio case, Nicholas Boroff, a senior at Van Wert High School in Van Wert, Ohio, came to school in August of 1997 wearing a Marilyn Manson T-shirt which depicted a three-faced Jesus on the front of the shirt and the back of the shirt said "believe" with the letters "lie" highlighted. A school administrator told Boroff to turn the shirt inside-out, go home and change, or leave the school and be considered truant because the shirt was offensive.

Boroff sued, claiming that his First Amendment and Due Process rights were violated. A federal judge ruled for the school district and the 6th U.S. Circuit Court of Appeals affirmed. The appeals court stated that school officials could ban the shirts because they were determined to be "vulgar, offensive, and contrary to the educational mission of the school." Further, under federal law, public schools can prohibit students from wearing shirts that are offensive, even if they are not obscene and have not caused a substantial disruption of the school program.

By comparison, Massachusetts has a "freedom of expression" statute, G.L. c.71, §82 which the state Supreme Judicial Court ("SJC") has interpreted as granting greater rights to students than does the United States Constitution. The 1996 case Pyle v. School Committee of South Hadley, 423 Mass. 283, 667 N.E. 2d 869 (1996), involved the wearing of "vulgar" tee-shirts by students. In that case, the SJC found that "absent a showing of disruption within the school" the right of expression created by G.L. c.71, §82 does not contain an exception "for arguably vulgar, lewd, or offensive language". Massachusetts educators, therefore, cannot rely on Boroff as might educators in other jurisdictions.

SJC Finds "Administrative" Search of Student Violated U.S. Constitution

The Massachusetts Supreme Judicial Court has ruled that the search of a student by a school administrator where the search is premised solely on that student's violation of a school rule, and unrelated to the possession of contraband or the threat of violence, is unreasonable, and therefore barred by the Fourth Amendment to the United States Constitution.

In the case of Commonwealth v. Damian D, -- Mass. –, (August, 2001), the Court's decision explained that a high school administrator had suspended a student and scheduled a disciplinary hearing after the student had been found missing class and leaving the school building without permission. The student did not attend the hearing, but subsequently appeared at school. At that time, the assistant headmaster conducted what she described as an "administrative search" of the student which included a verbal inquiry as to whether the student had any contraband, instruction to empty his pockets, and a "pat down" of the student's pant legs.

After the administrator had not found anything, she instructed the student to remove his shoes. Inside one of his shoes was a pair of folded socks. The assistant headmaster removed and unfolded the socks and found a small bag of marijuana concealed within them. Thereafter, the student was arrested and charged criminally. In the course of the criminal proceeding the student sought to suppress the marijuana arguing the search was not legal.

In reviewing the case, the Court summarized the "reasonableness'' standard for school searches as set forth by New Jersey v. T.L.O., 469 U.S. 325 (1985), and Commonwealth v. Carey, 407 Mass. 528, 531 (1990). In finding the search in this case unreasonable the Court determined the search was not justified at its inception given the nature of the student's infraction, i.e. his cutting class. Additionally, the search was not limited in its execution to the circumstances which justified the intrusion in the first place. Particularly, the Court found school officials had no evidence that suggested the student was in possession of any contraband when they searched him, or that he had violated any law or any school rule other than truancy. There was no testimony at the motion hearing that the student's physical appearance or conduct suggested his use or possession of contraband, or that school officials had received information from any source that the student was in possession of or had ever been in possession of contraband in school.

The school district had argued that the search was justified because the student had violated school rules. However, the Court directed school districts to limit student searches to those occasions when the school administrator has reasonable grounds to believe that the search will yield evidence that the student has violated or is violating either the law or the rules of the school. "A violation of school rules, standing alone, may or may not provide reasonable grounds for such a search."

SJC Finds Student Homework and Similar Student Work Not Part of a "Student Record" Under Massachusetts Regulations

The State Supreme Judicial Court has found that homework, class assignments and similar student work product does not come within the meaning of "student record" as defined by Massachusetts Student Record regulations. The Court's decision in Commonwealth v. Buccella, – Mass. – (July, 2001), suggests that in certain instances, this type of work may be released by school staff without the prior consent of the student or parent.

In this case, the defendant student was charged with violating the civil rights of one of his teachers and two counts of malicious destruction of property over $250.00, all arising out of graffiti on school property that contained obscenities and racial slurs. According to the decision, during the first two months of the 1997-1998 fall semester racial slurs were written on the blackboard of a teacher's classroom, and the high school was vandalized with obscene words written on the corridor walls. The student was considered a suspect in these incidents because during the final months of the prior school year, he had engaged in what were described as numerous attempts to disrupt the teacher's work in the classroom. The student's disruptive behavior had included racial slurs directed at the teacher, making "rude guttural sounds whenever she entered the room," and calling her "Tituba," a reference to a black slave in "The Crucible." Despite warnings, reprimands, and a suspension, the defendant's harassment of the teacher had not stopped.

The Court's decision states that although others may have had access to the school in connection with the first incident of 1997-1998, the school's vice principal informed the police that the student had been seen by members of the faculty in the corridor at the time of the second incident. As part of the investigation, the vice principal provided the police with samples of school work papers written by the student, along with two other student samples.

Handwriting analyses were conducted by an independent expert, who confirmed that the student was the likely author of the graffiti on the walls and that he was also the likely author of the racial slurs on the blackboard. Based on the handwriting analyses, the statements of faculty members, and the student's history of offensive behavior directed toward the teacher, complaints were issued for malicious destruction of property and violation of civil rights. The Commonwealth also sought hand writing samples. In response, the student filed a motion to suppress the handwriting analyses and samples, claiming that his school papers containing the samples had been illegally obtained. A lower court judge granted the student's motion and denied the Commonwealth's motion.

On appeal, the Supreme Judicial Court reversed the lower court rulings. It conducted an extensive review as to whether the material turned over to the police were "student records" within the meaning of the state regulations, such that it required either the prior consent of the student or his parent, or it required a court order or subpoena. None of these steps had been taken by the school. The Court found that "student record" as defined in the regulations does not include homework, written class work, classroom tests, or quizzes, "and such work are not protected by the confidentiality provisions of the regulations".

However, the Court also found that a student may reasonably expect that papers handed in to public school teachers will be used solely for educational purposes and not disclosed outside the educational setting. Thus, while such records are not literally privileged, the student had a reasonable expectation of privacy with respect to his school papers, notwithstanding the fact that he had turned them over to his teachers.

The Court then went on to review whether the action by the school district in turning over the material constituted a "search", and whether the search satisfied current legal requirements. In applying the standard set forth in New Jersey v. T.L.O., 469 U.S. 325 (1985), the Court found the "search" conducted here by school staff "easily" met the standard of reasonableness, since it was reasonable to suspect the student in connection with the crimes, and the inspection of papers he had turned in to school teachers was a ‘‘minimal intrusion". The Court also found the "scope of the search" reasonable given the school district’s obligation to prevent further racial harassment of a faculty member and further physical damage to the public school premises.

N.B. *Although the Court’s decision may be interpreted as granting school authorities additional latitude when dealing with student record matters, it would be advisable to thoroughly review any student record request made by a third party to determine whether the requirements of state and federal student record regulations apply.*

Local High School Student’s Posting of Derogatory Flyers About Ex-Girlfriend in Hallways Constituted a Threat

In a decision which further clarifies what may constitute a “threat” in the school setting, the Massachusetts Supreme Judicial Court upheld the conviction of an individual for accosting or annoying a person of the opposite sex with offensive and disorderly acts or language. G.L. c.272, §53. The case is Commonwealth v. Chou, 433 Mass. 229 (2001).

In October, 1998, the defendant produced a number of "missing person" flyers identifying and describing a young woman he had dated for approximately three weeks. The young woman, a high school student, "had broken up" with the defendant some weeks before. Determined to "get back" at her, the defendant sneaked into her school one night and hung several flyers at various locations.

The word "MISSING" was printed in large type across the top of the flyer beneath which was the young woman's name; a large photograph of her filled the right-hand corner of the flyer. Her "Race" was listed as "White Slut." The description of the victim included numerous sexually derogatory statements. The victim's guidance counselor was so concerned that the police were contacted when the flyer was brought to her attention.

The defendant did not contest the Commonwealth's evidence that he made or hung the flyers. The victim testified that she was very upset by the language on the flyer, and felt violated by its display at her school. She was also afraid, as the defendant had threatened to hit her at least once during their brief relationship, and he had telephoned her in anger about the breakup a few weeks before he posted the flyers. After the incident the victim suffered from nightmares in which the defendant chased her with a gun. The defendant challenged his conviction on grounds including that his actions were not threatening so as to come within the meaning of the criminal statute and were protected by the First Amendment.

As to whether the Defendant's actions were "threatening", the Court found, that sexually explicit language, when directed at particular individuals in settings in which such communications are inappropriate and likely to cause severe distress, may be inherently threatening. Moreover, language properly may be understood and treated as a threat even in the absence of an explicit statement of an intention to harm the victim as long as circumstances support the victim's fearful or apprehensive response.

Sexually explicit and aggressive language directed at and received by an identified victim may be threatening, notwithstanding the lack of evidence that the threat will be immediately followed by actual violence or the use of physical force. Here, the sexually charged language appeared in a poster identifying the victim as "missing." Objectively, a reasonable person could, as the victim and her guidance counselor did, legitimately fear that the flyer was a veiled threat that the named victim would indeed become a "missing person" or that some sexually violent harm would befall her, particularly where the defendant had threatened to hit her during their brief relationship and had telephoned her to express his anger about their breakup.

In addition, the fact that the defendant sneaked into her school at night in order to post the flyers could have greatly contributed to the victim's fear by eroding her reasonable expectation of safety at school. The evidence was sufficient to support a finding that the defendant's language was threatening and therefore disorderly under the accosting or annoying provision of §53.

The Court also found the Defendant's actions were not protected by the First Amendment. The Court explained that the regulation of threatening speech has been held not to violate the First Amendment where the speech harasses or is a "true threat." The Court described a "true threat" as "words that are intended to place the target of the threat in fear, whether the threat is veiled or explicit."

In this case, the Court found the defendant's language "had no expressive purpose but was instead intended to 'get back' at the victim by placing her in fear that she might suffer some sexual harm or wind up among the 'missing'." Because his language was a true threat, it was not

protected by the First Amendment, and it was language which could support a conviction under the criminal statute in question.

SJC Finds Drawing By a Student Constitutes a Threat to Teacher

In a January 2001 decision, Commonwealth v. Milo M., 433 Mass. 149 (2001), the Massachusetts Supreme Judicial Court held that student drawings may constitute threats to teachers. Significantly, the SJC also took "judicial notice of the actual and potential violence in public schools" in upholding a decision of the Worcester Division of the Juvenile Court Department. That decision had found a twelve year old juvenile to be delinquent by threatening his teacher in violation of G.L. c. 275, § 2.

On October 27, 1998, the student was sitting at a desk outside his classroom, awaiting a visit from the principal who was to see him about certain issues that occurred the previous day. While sitting in the hallway, the student drew a picture of himself shooting his teacher as she stood with her hands clasped, crying and pleading, "Please don't kill me." Directly to the right of the teacher figure was another figure whose head was falling off to the right. Both figures were labeled with the student's name and the teacher's name. Another teacher at the school confiscated the picture and showed it to the student's teacher. The student left his desk in the hallway, entered the classroom, got another piece of paper from his classroom, returned to his hall desk and began drawing another picture.

Soon thereafter, the student entered the classroom. While standing near the doorway, the student held up his second picture and defiantly asked, "Do you want this one too?" The second drawing depicted the student aiming a gun at his teacher, who was kneeling with her hands clasped and appeared to have urinated herself, presumably to show her fear of being shot. The word "Bang" is written inside a box drawn under the gun's barrel and both figures are again labeled with the student's name above the figure with the gun and his teacher's name above the victim.

Although the teacher could not see the second drawing from her desk, after seeing the first drawing and "from his posture, [and] the look on his face," she realized how angry her student was. She instructed the student to give the second drawing to another student, who handed it to the teacher. While the student returned to his desk in the hallway, the teacher saw the second drawing and became "apprehensive" and "afraid for her safety." The student was suspended immediately for these incidents for three days and was sent home. However, teachers saw the student loitering near his teacher's car later that day.

The Worcester Division of the Juvenile Court Department issued a complaint, charging the student with violating G.L. c. 275, §2 by threatening his teacher. At trial, the judge found the student delinquent on the basis of the second drawing, and the student appealed. The SJC transferred the case on its own motion.

The elements of a threat include the "expression of intention to inflict a crime on another and an ability to do so in circumstances that would justify apprehension on the part of the recipient of the threat." The SJC concluded that the Juvenile Court judge applied this standard correctly by finding "it was reasonable to fear that the [juvenile] had the intention and ability to carry out the threat."

Additionally, the SJC also found that there was sufficient evidence that the student's actions constituted a threat. The student's intention to carry out the threat was evidenced by the content of the drawings, the fact that the two pictures both depicted himself committing a violent act upon his teacher, and his demeanor and defiant manner towards his teacher when he offered her the second drawing. The student's ability to carry out the threat could have been inferred from his demeanor, his disciplinary history, and the fact that he was loitering near his teacher's car the same day.

These factors, in addition to the present-day reality that "violent episodes are matters of common knowledge, particularly within the teaching community," made the teacher's fear that her student could carry out the threat reasonable and justifiable. Lastly, the SJC concluded that the student's First Amendment rights were not violated because threats do not receive First Amendment protections.

Parents Not Entitled To Attorney's Fees In Case Concerning Home-Schooling Of Their Children

The Massachusetts Supreme Judicial Court affirmed a Superior Court ruling that denied two families' motions for attorney's fees. Brunelle v. Lynn Public Schools, 433 Mass. 179 (2001). Previously, the SJC had held pursuant to G. L. c. 76, §1, (3) that the families had the right to educate their children at home without agreeing or allowing to home visits by school officials. Brunelle I, 428 Mass. 512 (1998).

After winning the right to home-school their children without home visits from school officials, the Brunelle and Pustell families filed a motion for attorney's fees in the amount of $29,215, pursuant to the Massachusetts Civil Rights Act ("Act"), G. L. c. 12, §11I. This motion was denied by the Superior Court.

To establish a claim under the Act, plaintiffs must prove that (1) their exercise or enjoyment of rights secured by the Constitution or laws of either the United States or of the Commonwealth, (2) have been interfered with, or attempted to be interfered with, and (3) that the interference or attempted interference was by threats, intimidation, or coercion. Here, the school committee's refusal to approve the plaintiffs' home schooling plan clearly interfered with their right to educate their children at home, as secured by G. L. c. 76, §1.

However, the court ruled that the natural effect of the school committee's actions did not coerce the plaintiffs in the exercise of their rights. Notwithstanding the school committee's initiation of the charges against the Brunelles, the plaintiffs continued to home school their children during the pendency of the action, free from intrusive visits from school department officials. Also, the school committee did not use physical force to interfere with the parents' right to educate their children at home and did not employ an unwarranted heavy-handed use of police power. Finally, the repercussions faced by the plaintiffs under the charges were "de minimis" and thus, did not serve to coerce, threaten, or intimidate them.

Because the natural effect of the school committee's actions was not to intimidate or coerce the plaintiffs in the exercise of their right to educate their children at home, the plaintiffs did not satisfy the elements of a Civil Rights Act claim. Therefore, their claim for attorney's fees failed.

State Courts Rule on School Labor & Employment Cases

Transfer Clause in Teacher Union Collective Bargaining Agreement Found to be Inconsistent with Education Reform Act of 1993

In a June 1, 2001 opinion, the Massachusetts Appeals Court has held that provisions of a teacher union's collective bargaining agreement that make transfers subject solely to the approval or recommendation of the Superintendent of Schools is inconsistent with the Education Reform Act, since the agreement does not recognize the prior approval rights of the principal of the school to which transfer is sought. Peabody School Committee v. Peabody Federation of Teachers, Local 1289, – Mass. App.Ct. – (2001).

Three Peabody teachers requested to be transferred to vacancies in other Peabody schools. After the Superintendent rejected these requests, the three teachers brought grievances based the collective bargaining agreement. Three arbitrators independently heard the grievances and ordered the school committee to transfer the teachers to the requested positions, ruling in each case that the failure to transfer was not based upon just cause, and, therefore, violated terms of the collective bargaining agreement.

The school committee appealed these rulings, arguing that the arbitrators' rulings encroach upon the exclusive managerial powers of the principals of the schools to which transfers were requested, as well as upon the powers of the Superintendent. The Appeals Court agreed and vacated the arbitral awards because they were based upon a clause in the contract that was inconsistent with the Education Reform Act. The Court found provisions of a collective bargaining agreement that make transfers subject solely to the approval or recommendation of the Superintendent and do not recognize the prior approval rights of the principal of the school to which transfer is sought are inconsistent with the Education Reform Act.

Principals Not Entitled To Professional Teacher Status Protections

In the case of Downing v. City of Lowell, 50 Mass.App.Ct.779 (2001), the Appeals Court upheld the school committee's actions involving the termination of a building principal. In 1963, the plaintiff began employment as a teacher in the Lowell public schools where he achieved tenure and was subsequently appointed by the superintendent to the position of principal.

The last contract between the parties, signed June 29, 1994, covered the period from July 1, 1994, through June 30, 1995. The agreement provided that the plaintiff could be terminated for cause under G. L. c. 71, §41.

On April 11, 1995, the superintendent sent a ten-page letter to the plaintiff notifying him of the decision to dismiss him for cause. This decision was revoked and on the following day the superintendent sent the plaintiff a second letter notifying him of the non-renewal of his contract effective at the close of the 1995 school year. The plaintiff demanded arbitration on the basis that the non-renewal letter was equivalent to dismissal, or, that he had been a principal for more than three years he was entitled to the protections of G. L. c. 71, §41.

The plaintiff filed a complaint in the Superior Court seeking a declaratory judgment that he was entitled to arbitration. After the Superior Court granted summary judgment for Lowell, the plaintiff appealed.

The Appeals Court upheld the decision for Lowell turning back the plaintiff's arguments. The plaintiff's primary assertion was that principals who have served as teachers for more than three consecutive years should be afforded the same protections as those offered to professional teachers. Since principals are not included in the language of §41, the plaintiff argued the protections of the statute are applicable to contractual employees who have incidentally achieved professional-teacher status prior to or concurrent with their role as principals or other positions that are not defined as "teachers." The Court relied on the language of the Education Reform Act of 1993 to dismiss the plaintiff's assertion. The Court pointed to provisions of the Act which excluded and differentiated principals in this regard. These included the statutory provision that principals may not be represented in collective bargaining or be included in collective bargaining units.

Also, although teachers, once they achieve professional teacher status, can only be dismissed for just cause, principals are employed pursuant to employment contracts. The Court also noted that with the addition of responsibilities under the Act, "[p]rincipals became integral members of the management team of the school district and could no longer be considered 'superior teachers' as they were under the previous cases".

Teacher Allowed to "Bump" Across Bargaining Units Within School Department

Judith Ballotte had taught for many years at Worcester's Career Education Center which is one of three schools within the Worcester Vocational School Department. Ms. Ballotte belonged to a separate bargaining unit from that to which the teachers at the other two vocational schools belonged.

Ms. Ballotte was laid off in late June of 1995 when the Center faced cutbacks in Federal funding. When she was not rehired by the Worcester or allowed to "bump" into a comparable position at one of the other two schools within the vocational department, she brought suit against the city of Worcester.

At trial, Ballotte was awarded damages and both parties appealed that decision. Ballotte claimed that she should have been awarded reinstatement and full back pay or an equivalent remedy as required by statute; the school department claimed that the trial court erred in granting jurisdiction and in determining that Ballotte could have "bumped" into another bargaining unit and was, therefore, entitled to damages.

The Appeals Court in Ballotte v. City of Worcester, 51 Mass.App.Ct. 728 (2001) first found that the Superior Court was correct in assuming jurisdiction. While the fact that Ballotte was laid off for budget-related and not performance-based reasons may have meant that she was not entitled to arbitration under M.G.L. c. 71 §42, nothing in that statute prevented her from bringing a claim in Superior Court.

Additionally, the court held that the trial court was not in error in determining that Ballotte should have been allowed to bump into a position at another school within the vocational school department. The school department had disputed Ms. Ballotte's right to bump a teacher that was in a different bargaining unit. The bargaining agreement at issue here provides a right for a laid-off teacher to bump a teacher without professional teacher status within the same bargaining unit for whose position the laid-off teacher was currently certified.

The Appeals Court, however, found that G.L. c. 71 §42, provides for broader bumping rights, and is not limited by a collective bargaining agreement that may limit the right to bump only within one's own bargaining unit. The court held that in circumstances where the terms of the collective bargaining agreement are contrary to the statute "the collective bargaining agreement . . . must yield to the statute." Consequently, the court upheld the trial court's decision, but remanded the case for a further findings and a more detailed explanation of the damage award.

Superior Court Erred in Not Finding That Reinstatement of Teacher Who Used Physical Force on Students Violated Public Policy

During one week of May 1996, James Geller, a sixth grade teacher and twenty-five year employee of Beverly School District, was involved in three different incidents where he used physical force against his students. None of these situations involved force used in self-defense or defense of other students, but "as a means of getting the students' attention." The district, after hearings, dismissed Geller and Geller grieved the dismissal. The arbitrator reinstated Geller; the district appealed the decision in Superior Court, where it was affirmed.

The Appeals Court in School District of Beverly v. Geller, 50 Mass.App.Ct. 290 (2000) noted that judicial power to review arbitration awards is extremely narrow; however, one clear

category of reviewable awards is when the award offends public policy. Arbitration decisions that reinstate employees can be overturned if the decision "violates a public policy which exists because the nature of the job itself makes the employee's conduct an immediate threat to the general public." The court noted the irony in that among Geller's many responsibilities as teacher was the duty of trying to identify abused children by being on the lookout for behaviors similar to those in which he himself engaged. Ultimately, the court found that the arbitrator's reinstatement of Geller offended public policy and was, therefore, beyond the scope of the arbitrator's authority. Consequently, the court reversed the Superior Court decision and vacated the arbitration award.

Transfer Clause In Teacher Union Contract Superseded By Education Reform Act

A Superior Court ruling has vacated three arbitration awards ordering the Lowell School Committee to transfer certain teachers who requested transfers, pursuant to a collective bargaining agreement, because the article dealing with transfers conflicted with, and was superseded by, the Education Reform Act. Lowell School Committee v. United Teachers of Lowell, Local 495, 2001 Mass. Super. LEXIS 10 (2001). The Court confirmed the three awards to the extent that they ordered School Committee to stop refusing to follow the CBA's grievance process.

The collective bargaining agreement covered teacher transfers and included a dispute resolution process. Guided by an earlier decision by a Massachusetts Appeals Court, School Committee of Lowell v. Local 159, Service Employees International Union, 42 Mass. App. Ct. 690 (1997), the Superior Court concluded that the authority and discretion conferred on school principals by the Education Reform Act applied to transfers just as it does to new hires. Consequently, if an arbitrator based an order to transfer a teacher on a CBA article that usurped power from the principal or superintendent in making a transfer decision, that award must be vacated.

The arbitrators interpreted the Lowell teachers' CBA article on transfers as limiting the superintendent's authority in making transfer decisions. In particular, the CBA article on transfers mandated that the superintendent consider seniority and other qualifications in making transfer decisions, which did not allow the superintendent enough discretion to fill teaching positions. For example, if there were two similarly qualified applicants for transfer and one had seniority, the superintendent must grant the more senior teacher's transfer request even if the superintendent had other reasons for wanting to transfer the more junior teacher. Because the arbitrators' orders to transfer the teachers were based on an article in the CBA that was superseded by the Education Reform Act, and because it improperly limited the discretion of the superintendent, the orders to transfer the teachers were vacated.

However, the arbitrators' orders were confirmed to the extent they required the School Committee to obey the grievance procedures of the CBA when addressing alleged violations of the article on transfer requests contained in the CBA. When the teachers appealed their transfer denials, the School Committee refused to proceed to "Level Four" of the grievance procedure that consisted of a referral to the School Committee, which must meet with the union's grievance committee. Two of the three arbitrators ordered that the School Committee cease and desist its practice of refusing to proceed to Level Four of the grievance procedure and in the future abide by its contractual obligations to do so. These orders were confirmed by the Superior Court.

City Found at Fault for Negligent Hiring

In 1995, the City of Boston hired Pedro Rosario to supervise the Boston Youth Clean-Up Crew summer program. Before hiring Rosario, the City did not complete a background or criminal records check. Had a background check been done, the City would have discovered that Rosario had served 32 months in prison after being convicted of rape and assault in 1991. Rosario's criminal record also showed arrests for rape, kidnapping, assault and battery, and assault with intent to murder, and a conviction for assault and battery with a dangerous weapon.

Dashawna Brimage, a 16 year old employed by the Boston Youth Clean-Up Crew, was placed under Rosario's supervision at West End House in Brighton. Rosario allegedly raped and sexually assaulted Brimage. As a result, Brimage brought suit against the City of Boston, individual City employees and the Mayor in Brimage v. City of Boston, Suffolk Superior Court Docket No. 97-1912. She alleged sexual harassment, civil rights violations, negligent and intentional infliction of emotional distress, and negligent hiring and supervision of Rosario. The City then filed a motion for summary judgment.

On the issue of negligent hiring and supervision, the court found that M.G.L. c.258, § 10(j), the so-called statutory public duty rule, barred recovery for negligent supervision. The court explained that what Brimage claimed, failure to supervise, was really a failure to prevent Rosario from being in the position to harm Brimage. However, the court found that the statutory public duty rule did not bar the negligent hiring claim and the City acted affirmatively to create a situation where a sexual predator was supervising adolescents. Consequently, a jury could conclude that the City participated in "risk-creating conduct" which contributed to the circumstances that resulted in the harm to Brimage.

This case should be distinguished from that of Brum v. Town of Dartmouth, 428 Mass. 684 (1999) where the SJC determined the school department and town could not be liable for the death of a student who was attacked and killed in school. In Brum the SJC found the school department and town could not be found liable for failing to prevent the student's death as they did not originally cause the circumstances which led to the student's death.

Superior Court Dismisses School Nurse Action Seeking Equal Pay

A justice of the Suffolk Superior Court dismissed a law suit filed by several school nurses and the Massachusetts School Nurse Organization, Inc. who sought a declaration that they are entitled to be placed on the same salary schedule as all other education professionals. Greenbaum v. Massachusetts Department of Education, et al., Suffolk Superior Court Docket No. 00-3348-F (January 29, 2001).

The nurses argued that since they are considered "professional educators" required to be certified, they are entitled to receive equal pay for equal education and years of service as classroom teachers in their respective school districts, including all step increases and "lane changes." They alleged most Massachusetts school districts pay nurses on a different and lower pay scale than classroom teachers.

In reviewing the nurses' request, the court found that General Laws c.71, §38G does not address the issue of compensation. Additionally, the nurses had not alleged that the Department of Education has taken, or failed to take, any particular action contemplated by §38G which has resulted, or will result, in harm to them. As a result the court ruled "there appears to be no order that this Court may enter thereunder that would give the nurses the relief they request." The court also held that even though nurses are considered "educators" under the statute, and must be qualified to hold their position, the applicable regulations establish significantly different certification criteria, and, "give no indication that there is only one category of 'professional educator' all of whom must be paid on an equal scale".

<u>RECENT COURT AND ADMINISTRATIVE DECISIONS IN SPECIAL EDUCATION</u>

Special Needs Student Suspended From School Must Exhaust Administrative Remedies Before Seeking Injunctive Relief

The United States Federal District Court of Massachusetts has held that the Individuals with Disabilities in Education Act (IDEA) requires recourse to administrative remedies when plaintiffs seek relief that is available under IDEA, even if they bring suit pursuant to a different statute. <u>Demers v. Leominster School Department</u>, 96 F. Supp.2d 55 (D. Mass 2000).

The Plaintiff, a 15 year-old eighth grade student at Northwest School in Leominster, Massachusetts, is classified as a special needs student pursuant to M.G.L. c. 71B. On April 5, 2000, he was told to leave his English class because he was talking. The student left class and went next door to his math teacher's class. After explaining to his math teacher what had happened, the math teacher told the student to draw a picture showing how he felt about being kicked out of class. The student drew the school surrounded by explosives and the Superintendent of School with a gun to his head.

Two days later, the student was suspended for two days by the Principal. At a meeting on April 11th with the student, his father, the Principal, the Student Personnel Director, and members of Michael's special education team, it was decided that the student would remain in school on the condition that he receive a psychiatric evaluation. The student refused to go with his father to a psychiatric evaluation.

On May 1, the Principal held an emergency meeting with the student's special education Team, and decided to exclude the student from school for the remainder of the school year because he posed a safety risk to himself and others. The school offered to place the student in a alternative school.

The student filed an action in U.S. District Court alleging violations of his state and federal constitutional rights. The student filed a motion for a preliminary injunction directing defendants to re-admit him into his regular class program at Northwest School, refrain from violating his First Amendment rights, and refrain from requiring him to meet with a psychiatrist as a condition to his continued school enrollment. The school district filed a cross motion for a preliminary injunction ordering that the student be excluded from Northwest School and that the student's parents participate in the intake process for three identified special education programs to address the student's behavioral and therapeutic needs.

Because the relief sought by both parties is available under IDEA, the U.S. District Court denied both motions. The court held that both parties must first seek their requested relief in an administrative proceeding provided for under the IDEA. As a special needs student, the student is entitled to the benefits provided by the IDEA, which requires state and local educational agencies who receive federal assistance for the education of children with disabilities to establish particular procedural safeguards with respect to the provision of a "free appropriate public

education" for those children. IDEA requires recourse to the requisite due process hearing when plaintiffs seek relief that is available under IDEA, even if they bring suit under a different statute.

BSEA Orders Massachusetts Department of Mental Retardation, Not Local School District, To Provide Residential Services to Nineteen Year Old Student

The Bureau of Special Education Appeals ("BSEA") has found that the Massachusetts Department of Mental Retardation (DMR), and not Medford Public Schools, should provide residential services to a nineteen year old special education student. In Re: Medford Public Schools, BSEA #01-3941 (May 31, 2000). The student, who has significant cognitive limitations, impaired judgment regarding her interactions with others, and a diagnosis of mild mental retardation, had been attending a day school in Concord, Massachusetts. After an altercation with a sibling and suicidal ideations, she was admitted to the psychiatric unit of a hospital, where she continued to reside at the time of the hearing of this case.

After unsuccessful attempts to involve DMR and the Department of Mental Health, the school district requested a hearing before the BSEA seeking to join the agencies. The BSEA found that the student no longer needed to be hospitalized and that a continued stay in the psychiatric unit placed her in immediate risk of emotional, physical, and educational harm and denied her freedom from confinement. Because the student was in need of appropriate residential services, including adult supervision, and returning home to her family would be both unsafe and inappropriate, she could not be discharged from the hospital, even though she was no longer in need of treatment.

Medford took the position that the residential services needed by the student were not educationally related and, therefore, not mandated under state and federal special education law. The student agreed that she needs residential services and argued that both Medford Public Schools and DMR were legally responsible for providing such services. DMR did not dispute the student's need for such services or her eligibility for them, but claimed that they are not obligated to provide residential services to her because she is between the ages of eighteen and twenty-two, still in school, and entitled to receive a public education. DMR argued that Medford should provide the services.

The BSEA found that because many of the services the student needed, such as assistance in the development of socialization skills and training with adult daily living skills, could be effectively provided during the day, Medford did not have the responsibility to provide a residential educational placement. Additionally, the Hearing Officer applied DMR's own regulatory standards governing the prioritization of its services and ordered DMR to provide appropriate residential services to the student immediately.

State Regulations Governing The Physical Restraint of Students Now In Effect

On April 2, 2001, Department of Education Regulations providing for the restraint of students became effective. The Regulations require that:

- Education programs must develop written procedures for the implementation of restraints. These procedures must be reviewed annually, provided to school staff and made available to parents of enrolled students.

- The procedures must include provisions for: (a) methods for preventing student violence, self-injurious behavior, and suicide; (b) a school policy regarding restraint that provides a description and explanation of the school's or program's method of physical restraint, a description of the school's or program's training requirements, reporting requirements and follow-up procedures, and a procedure for receiving and investigating complaints regarding restraint practices.

- Training for all staff on the school's restraint policy is to occur within the first month of each school year and, for employees hired after the school year begins, within a month of their employment.

- In-depth staff training in the use of physical restraint at the beginning of each school year, for the program staff that are authorized to serve as a school-wide resource to assist in ensuring proper administration of physical restraint. The Department of Education recommends that such training be at least sixteen (16) hours in length.

The regulations state that physical restraint may be used only in circumstances where:

- Non-physical interventions would not be effective; and
- The student's behavior poses a threat of imminent, serious, physical harm to self and/or others; and,
- Shall be limited to the use of such reasonable force as is necessary to protect a student or another member of the school community from assault or imminent, serious, physical harm.

Physical restraint is prohibited in the following circumstances:

- As a means of punishment; or
- As a response to property destruction, disruption of school order, a student's refusal to comply with a school rule or staff directive, or verbal threats that do not constitute a threat of imminent, serious, physical harm.

Please contact this office for an entire set of the regulations. They can also be found at the Massachusetts Department of Education website at www.doe.mass.edu/lawregs/.

LEGISLATION

New Legislation: Ban on Cell Phone Use While Operating a School Bus

The Legislature has prohibited the use of mobile telephones by school bus operators. Chapter 90, Section 7B of the General Laws has been amended to read:

> No person shall operate a moving school bus while using a mobile telephone except in the case of an emergency. For the purpose of this paragraph, an emergency shall mean that the operator of the school bus needs to communicate with another to report any of the following: (a) that the school bus is disabled; (b) that medical attention or assistance is required for a passenger on the bus; (c) that police intervention is necessary for the personal safety of a passenger or to otherwise ensure the safety of the passengers; and (d) the presence of a disabled vehicle or an accident in the roadway.