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My LinkedIn Profile

Why another newsletter?

Dear Friends and Clients,

I know that you receive a number of newsletters on a monthly, weekly, or even daily basis. Not all of them are useful, and many are redundant. So you may ask why I am adding this newsletter to that regular flow of information. The purpose of the newsletter is to keep you informed, on a monthly basis, about legal trends in the education arena—particularly in regulatory and litigation matters—that affect the charter schools and post-secondary institutions that you lead. It's a substantive newsletter, not a collection of headlines and hyperlinks. I have picked these issues out of many others because you are likely dealing with them now or will be encountering them soon.

It has been great to re-connect with many of you since joining Snell & Wilmer. I knew many of you while in private practice before, and I met many of you while I was at Great Hearts. Now that I am settled in, I am excited about my role in building an excellent Education Law practice and continuing to serve so many clients who work day in and day out to improve the lives of children and young adults. This newsletter is meant to help you in that endeavor.

So please take a look. If it is not useful to you, tell me what information would be useful or just say, "Unsubscribe." And if you ever have questions about it, or want more information about something in it, please let me know. You can contact me at atmartin@swlaw.com or 602-382-6267.

Best,
Aaron

> "The truth is that great charter schools are restless institutions, committed to continuous improvement. They are demanding yet caring institutions. And they are filled with a sense of urgency about the challenges that remain in boosting achievement and preparing students to succeed in life."
>
> – Former Secretary of Education Arne Duncan, in "The Myth of the 'Miracle School'"

Arizona Office of Administrative Hearings

"Placement" v. "Location" remains a central issue

The Arizona Office of Administrative Hearings (OAH) continued its work through the summer and issued three special-education decisions on May 16, July 29, and August 16. Two of the cases centered on the distinction between "placement" and "location" in a student's individualized education program (IEP).

Under the Individuals with Disabilities Education Act (IDEA), "'[e]ducational placement' refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school." *Deer Valley Unified Sch. Dist. v. L.P.*, 942 F. Supp. 2d 880, 887 (D. Ariz. 2013). In contrast, "[t]he location of services in the context of an IEP generally refers to the type of environment that is the appropriate place for provision of the service." *Id.* Although the IEP team determines the student's placement, the location is an administrative decision. *Id.*

This is a frequently recurring issue for local education agencies (LEA) that have students with IEPs. And as OAH has become more familiar with the issue, the administrative law judges' (ALJ) rulings have been clearer and more consistent regarding the rights of the LEA to choose a location so long as it is appropriate and meets the requirements of the student's IEP.

In two of the three cases this summer, the ALJ determined that the school's decision to change location, but not educational placement, was consistent with the requirements of the IDEA. In matter 16C-DP-047-ADE (decided May 16, 2016), the Yuma Union High School District filed a due process complaint to confirm that moving a student from San Luis High School to Vista Alternative High School was an appropriate change in location.[1] The student was categorized under "Other Health Impairment and Emotional Disability" and the school sought to move him after he had been involved with "harassment, fighting, sexual harassment, assault, bullying, inappropriate language, and insubordination." Because the school feared for the student and other's safety, it proposed moving him to Vista Alternative High School as an Interim Alternative Educational Setting (IAES).[2] The ALJ determined that Yuma Union's decision to change location met the requirements of the IDEA because the student would be receiving the same services under his IEP, he would be educated with non-disabled peers to the same extent, he would have the same extra-curricular opportunities, and because Vista Alternative High School was the same placement option on the continuum of alternative placements.

The second case involving the "location" v. "placement" issue was decided on July 29, 2016 and I am told it is being appealed.[3] This time, the parents filed a due process complaint against Gilbert Unified School District alleging that a proposed change in location to a specialized program in the district—which also meant an increase in the minutes for certain services—was an improper change in educational "placement." In the course of a five-day hearing, the ALJ considered whether the school's decision to change student's location was also a change in

placement.

Ultimately, the ALJ determined that the parents failed to produce evidence that the student would be educated in a way that made the new location a change in "placement." The ALJ went on to conclude that the change was a change in location only, and that the new location was appropriate to meet the needs stated in the student's IEP.

Evaluations and IEPs

The August 16, 2016 decision from the OAH involved a parent's due-process complaint alleging that the Sedona-Oak Creek Unified School District did not properly include goals and objectives for skills identified by a Assessment of Basic Language and Learning Skills (ABLLS-R) test. The parents argued in the course of a two-day hearing that the student was denied a free appropriate public education (FAPE) because his IEP did not contain goals and objectives for *all* the skill areas identified in the ABLLS-R test.

The ALJ correctly noted that schools "must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information" that will inform the development of an IEP. The assessment must be comprehensive enough so that the student "is assessed in all areas related to the suspected disability" and to identify all the student's needs for special education and related services.

But that does not mean that everything in the assessment will make it into an IEP. Rather, the IEP team determines measurable goals and objectives to "meet the child's needs" and to allow the student to make progress in the general education curriculum, as well as meeting other educational needs that are the result of the student's disability. The ALJ concluded that the school complied with the requirements of the IDEA despite the parents' misunderstanding about the differences between an evaluation and IEP.

[1] The full texts of these decisions are available at the Arizona Department of Education website: http://www.azed.gov/disputeresolution/due-process-hearing-decisions/
[2] A school may place a student in an IAES for up to 45 days, often for severe behavior issues or for drugs, weapons, or serious bodily injury.
[3] A party who disagrees with the decision of the ALJ has 35 days to appeal the final decision to an appropriate court. No appeal has been filed yet, so we do not know the basis for the parents' disagreement with the ruling.

Special education case to be decided by the U.S. Supreme Court

Should parents be required to exhaust their administrative remedies?

A case involving the IDEA, the Americans with Disabilities Act (ADA), and Section 504 has reached the United States Supreme Court. The central issue in the case, *Fry v. Napoleon*

Community Schools, is whether parents have to exhaust their administrative remedies in pursuing relief under Section 504 and the ADA when they could obtain similar relief under the IDEA or when the issue falls under the purview of the IDEA.

The student in the case has a service dog that she sought to bring to school. Under her IEP, she was already assigned a one-on-one human aide, and the school refused her request to bring a service animal to school. Eventually, the school allowed her to bring the dog for a test period, but then decided it would not allow her to bring the dog after the period was over.

The parents filed a complaint with the Office for Civil Rights (OCR), which determined that the school violated the ADA by refusing to allow the service dog to accompany the student to school. The parents then moved her to another school that would allow the dog and filed a federal lawsuit under the ADA and Section 504.

In the district court, the school challenged the lawsuit because the parents did not exhaust their administrative remedies under the IDEA. Before filing a lawsuit, the IDEA requires parents to go through certain administrative processes—things like mediation, filing a due-process complaint, etc.—that provide a less formal, and less costly, means of resolving such disputes. And the IDEA requires this exhaustion for any claim that could be filed under the IDEA even if, as here, the claim could also be raised under another statute.

The district court and Sixth Circuit Court of Appeals agreed with the school and held that the parents had to, and failed to, exhaust their administrative remedies. The Supreme Court accepted the case at the end of June and the parties are briefing the case now.

If the Supreme Court sides with the parents in this case, parents with students on an IEP could bypass the procedures outlined in the IDEA and just go straight to federal court. That would eliminate the possibility of resolving issues amicably and at a relative low cost to the school in favor of a litigious approach requiring the school to hire counsel to defend it in court.

Because this case has such far-reaching consequences, we are gathering a group of schools from around the country to file an amicus brief supporting the school's position. An amicus brief is a "friend of the court" brief—a pleading meant to give the Court some insight into how its decision may impact schools in a practical way or from a policy perspective. The parents have had five groups file amicus briefs supporting them.

If you would like to join the other schools that are planning to file an amicus brief, please contact me.

Transgender lawsuit reaches the Supreme Court

Case turns on textbook issue of administrative law

On August 29, 2016, the Gloucester County School District filed its Petition for Certiorari in the United States Supreme Court asking the Court to hear its dispute with a transgender student over whether the student should be allowed to use the bathroom of her choice. Although the mainstream media makes the debate about transgender students seem very dramatic, the issue before the Supreme Court is a textbook issue of administrative law.

The question is whether a federal agency's interpretation of a statute should be given deference by federal courts. The Department of Education stated in a May 13, 2016 "Dear Colleague" letter that under Title IX, discrimination on the basis of "sex" should be read to "include gender identity" such that schools "must generally treat transgender students consistent with their gender identity." The school district is arguing that the Department of Education exceeded its authority and misinterpreted what it believes is unambiguous statutory language in Title IX. 20 U.S.C. § 1681(a).

The transgender student's attorneys have 30 days from August 29 to file a response. After that, the Court will consider whether to take the case, and may also ask the federal government to weigh in on whether the case is worthy of the Court's consideration. It is likely that the Court will decide whether to take the case sometime this fall.

This will continue to be a hot issue for some time. Many states have sued the federal government over the interpretation of Title IX above and a district court judge in Texas recently enjoined the administration from enforcing the Department of Education's interpretation against schools. That decision was based on the administration's failure to go through the proper procedure under the Administrative Procedure Act as well as the judge's determination that the agency misinterpreted the language of Title IX.

In other parts of the country, parents of non-transgender students have sued school districts that allow transgender students to use the bathroom of their choice. These parents argue that their students are subject to invasions of privacy as a result of the schools' choices. Those cases are still in their preliminary stages, but I will keep you updated in future newsletters about them.

NLRB rules that charter schools are not public schools

Allows school employees to unionize

The National Labor Relations Board (NLRB) issued two decisions on August 24, 2016 related to charter schools in Pennsylvania and New York. The question in the cases was whether the schools were exempt from the National Labor Relations Act (Act), which allows for employees to unionize and engage in collective bargaining if their employers meet certain size and monetary thresholds. The Act contains an exception for "government entities or wholly owned government corporations," and the cases discussed whether charter schools were "government entities" under the Act.

In both cases, *Pennsylvania Virtual Charter School* and *Hyde Leadership Charter School*, union officials sought to K–12 teachers and some school administrative staff. The schools argued that they were "political subdivisions" of the Commonwealth of Pennsylvania and the State of New York, which would exempt them from coverage under the Act. Using the rationale of a prior case, *Hawkins County*, the NLRB determined in both instances that the schools were not political subdivisions because each school "was neither created directly by the state so as to constitute a department or administrative arm of the government nor is it administered by individuals who are responsible to public officials or the general electorate."

The NLRB explained in *Hyde* that although the Board does not assert jurisdiction over public schools established by local or state governments, it would assert jurisdiction over a charter school because "Hyde was not established by a state or local government, and is not itself a public school." It continued, New York "state law does not *mandate* the establishment of charter schools as a means of fulfilling 'the state's obligation to provide public education' in the same manner that it mandates the establishment of public schools." Because of that, the "relationship between the State of New York and its charter schools resembles that of contractors providing services to the government, over which the Board routinely asserts jurisdiction.

NLRB strikes again

Private university graduate students are actually "employees"

In another decision from the NLRB, *Columbia University*, issued on August 23, 2016, the Board overturned a 2004 decision that classified graduate students as "students," saying that the prior decision "deprived an entire category of workers the protections of the Act without a convincing justification."

The change from being a "student" to an "employee" will have significant effects, most of all in changing the way that graduate students and faculty interact. The normal ways that students and professors interact—attending lectures, writing papers, receiving grades—are changed when students become employees. Students who attempt to unionize and then receive a laborious assignment or a poor grade could conceivably challenge those actions as being motivated by an anti-union sentiment. Will the NLRB be reviewing grades to ensure that they match the quality of academic work a student produces?

The NLRB's decision raises more questions than it

In Arizona, a charter school is "a public school established by contract with the state board of education, the state board for charter schools, a university under the jurisdiction of the Arizona board of regents, a community college district or a group of community college districts." A.R.S. § 15-101(4). Arizona's charter schools have been determined to be "political subdivisions" under the Attorney General's Opinion regarding Open Meeting law, but were determined not to be political subdivisions for purposes of federal funding in an Arizona case. *See Salt River Pima-Maricopa Indian Cmty. Sch. V. Ariz.*, 23 P.3d 103, 108 (Ariz. 2001). Arizona charter schools were also found not to be a "state actor" for purposes of a federal civil-rights statute in a Ninth Circuit case. *See Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806 (9th Cir. 2010).

It is uncertain whether Arizona schools would be determined to be covered under the Act if school employees tried to unionize. I will be watching the national trend and reporting back as these types of cases develop.

answers, particularly because the relationship between students and teachers was, we thought, well understood. Now that relationship has changed, and a host of labor laws and considerations come into play when a school must evaluate particular student activities.

Questions?

Comments?

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