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Inside This Issue:

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SPECIAL NEEDS STUDENT AWARDED $400,000 FOR SCHOOL BUS ASSAULT

In delivering a student's IEP, school districts typically focus their training and information disclosure on instructional personnel and aides. A recent federal court decision from the Eastern District of Pennsylvania demonstrates, however, that a district must consider the implications of contact that disabled students have with non-instructional personnel, as well.

In *Enright v. Springfield School District*, the court denied the Springfield School District's motion to set aside a jury verdict of $400,000 awarded to a female student and her family following an incident occurring on a district-owned school bus. The Plaintiff, Cassia Enright, had been diagnosed with Asperger's Syndrome and ADHD and was 7 at the time of the occurrence, with a social age of 5. She was transported with two older male students: J.W., a 17 year old with a history of disruptive and aggressive behavior who had been diagnosed with Oppositional Defiant Disorder, and T.P., a 14 year old attending a school for treatment of dyslexia. No other students or aides were present on the bus apart from the driver. An incident occurred in which one of the boys took Cassia's umbrella, rubbed it against his body, made inappropriate noises, exposed himself to Cassia, asked her to touch him, grabbed her by the hair and threatened to kill her older brother if she told anyone about the incident, among other acts. The driver did not intervene. Cassia was traumatized by the incident and she and her parents brought suit alleging violations of Federal law, the ADA, Section 504 and the IDEA.

In reviewing the verdict, the Court agreed with the family that the district had failed to train the bus driver to address issues related to the conduct and needs of disabled students, as the only training the driver received was the standard instruction administered by PennDOT, and found it was the district's policy not to give bus drivers any information about the disabilities or special needs of any of the children being transported. Further, the Court noted that bus drivers were not instructed to separate older children from younger children, and the district had a policy of allowing mixed-age transportation.

The Court found that the district had affirmatively decided to transport Cassia with older boys, one of whom the district knew had a history of inappropriate behavior. On these facts, the Court found the District was deliberately indifferent to Cassia's safety and that the harm she suffered was a direct result of the district's actions. With regard to Cassia's IDEA claim, the Court agreed that a violation had been proven because the district unilaterally changed the transportation portions of her IEP and didn't provide her with an individual aide, as it did for another student in a similar situation.

This case demonstrates that districts must do more than insure that instructional and classroom staff be aware of and responsible for implementing a student's IEP. Non-instructional personnel who may come into regular contact with disabled students, including bus drivers, should be properly trained to address issues that may arise in the course of their duties as a result of a student's disabilities. This could also include providing information about a student's needs and disabilities to non-instructional staff who are specifically identified as having a legitimate educational interest under FERPA. Further, school districts should make sure that there are no aspects of operations, including transportation arrangements, which may be undermining the goals of any particular student's IEP.

HOMESCHOOLING LAW CHALLENGE REJECTED BY THIRD CIRCUIT

The March 2008 edition of MB&M's Education News reported on state-wide litigation involving a claim that the School Code's provisions regarding oversight of homeschooling families violated the federal constitutional and state religious liberty rights of the families. As reported, the U.S. Western District Court granted summary judgment for the school districts, and held that there was no First or Fourteenth Amendment violation or violation of the Pennsylvania Religious Freedom Protection Act (RFPA).

The families appealed to the Third Circuit Court of Appeals. In August, the Third Circuit affirmed the lower court's findings that the compulsory education and portfolio submission and review portions of the School Code did not violate any rights protected by the Federal Constitution. The Court specifically held that the School Code did not infringe the family's religious liberties by imposing requirements on homeschooling parents and students.

The Third Circuit transferred to the state courts the question of whether or not the School Code provisions violate the Pennsylvania RFPA. Pennsylvania's RFPA statute has not yet been interpreted by any state appellate court. Since the case raises a new question of state law, the Third Circuit found that it was more appropriate for the state court to consider the issue.

Counsel for the homeschooling families has indicated intent to seek review by the U.S. Supreme Court. This matter is thus far from concluded, and we will continue to provide updates in future editions of MB&M's Education News. To review the full opinion of the Third Circuit Court, please visit www.mbm-law.net.

FERPA TRUMPS HIPAA IN IMMUNIZATION DISCLOSURE

As a new school year begins, your District may receive a request from your County Health Department for specific information on students with missing immunizations. Although the requested information, including the student's grade, birthdate, name, address and telephone number, may otherwise be considered directory information which may be disclosed, when specifically requested for those students with missing immunizations, it raises HIPAA and FERPA privacy concerns. HIPAA's privacy rules permit disclosure of protected health information (PHI) for public health activities and purposes including "a public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability." Under HIPAA, a public health authority is defined as "an agency or authority of …, a state, …, a political subdivision of a state …, that is responsible for public health matters as part of its official mandate." Arguably, a County Health Department falls into this category. Therefore, to the extent the County Health Department is authorized by law to collect or receive information for public health purposes as specified in the public health exception, HIPAA permits the District to disclose PHI to the County Health Department without parental authorization or consent.

However, this is not the end of the analysis. HIPAA cannot be viewed in isolation, but rather must be read in conjunction with the applicable provisions of the Family Educational Rights and Privacy Act (FERPA). The HIPAA privacy rules specifically provide that PHI does not include individually identifiable health information contained in education records covered by FERPA. A student's health records, including immunization records, maintained by the School District would generally be "education records" subject to FERPA because they are (1) directly related to a student; (2) maintained by an educational institution or a party acting for the agency or institution; and (3) not excluded from the definition as treatment or sole possession records, or on some other basis. 20 U.S.C. § 1232g(a)(4)(a). Therefore, individual student immunization records are considered education records under FERPA and are not subject to the HIPAA privacy rule. Accordingly, HIPAA neither authorizes nor permits the disclosure of these records.

To determine whether disclosure without consent is permitted under FERPA, the immunization records must fall within one of FERPA's statutory exceptions. However, there is no exception in FERPA which permits a school district to disclose general health or other immunization records to a state or county health department. The closest exception under FERPA permits a school district to disclose personally identifiable, non-directory information to appropriate officials in connection with a health or safety emergency. The United States Department of Education, Family Policy Compliance Office, has strictly interpreted this provision by limiting its application to a specific situation which presents imminent danger to students or other members of the community, or that requires an immediate need for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals.

By its February 25, 2004 opinion letter, the Compliance Office clarified the "health or safety emergency" exception under FERPA in relation to immunization records. It determined that the general release of personally identifiable information is not permissible. However, on a case by case basis where there may be an outbreak of contagious diseases, the release of the requested information would be permissible. Therefore, in the absence of consent from the student's parent, any information which would identify a specific student's immunization status, although otherwise

considered directory information, cannot be provided to County Health Departments under FERPA. The release of this information without the parent's consent could only occur under the "health or safety emergency" exception in situations involving an outbreak of disease where the individual student without immunization would be at risk.

If you have other questions regarding FERPA compliance, you may contact any of our school law attorneys for further guidance.

RETIREMENT BENEFITS MAY END WHERE MEDICARE BENEFITS BEGIN, COURTS DECIDE

On March 24, 2008, the U.S. Supreme Court declined to review the decision rendered by the Third Circuit Court of Appeals in *American Association of Retired Persons v. Equal Employment Opportunity Commission*, 49 F.3d 558. By ending this litigation, the Court concluded the protracted legal battle over whether employers, including school districts, can offer retirement incentives which are tied to an employee attaining Medicare eligibility without violating the Age Discrimination in Employment Act (ADEA). This is welcome news for school districts which had been left in limbo for some time regarding offering certain retirement packages.

It had long been the practice of certain employers, including school districts, to offer retirement incentives to employees which would provide them with health care or other benefits until such time as the employee reached the age of Medicare eligibility. Because employees who could elect to participate in such incentives varied in age and the amount of benefits to which they would be entitled would differ based on how close they were to reaching the age of Medicare eligibility, some took the position that this kind of retirement incentive violated the ADEA. In *Erie County Retirement Ass'n v. County of Erie*, the Third Circuit Court of Appeals agreed with that contention and held that retirement incentives which used Medicare eligibility as a cut-off for benefits could be violative of the ADEA. This ruling had an immediate impact on the provision of retirement incentives including health care.

In response to the *Erie County* case, the federal administrative agency charged with enforcing the ADEA, the Equal Employment Opportunity Commission (EEOC) prepared a regulation which would exempt these kinds of retirement incentives from the ADEA. The American Association of Retired Persons (AARP) filed suit in the Eastern District of Pennsylvania federal court and contended that the EEOC's regulation was impermissible because the issue had already been addressed in the statute as interpreted by the court in *Erie County*. The District Court initially agreed, but then reversed itself following a U.S. Supreme Court decision which broadened the circumstances where administrative agencies can issue regulations.

The Third Circuit affirmed the District Court and found that the EEOC was within its authority when it adopted a regulation which exempted retirement programs from the ADEA which "alter, reduce or eliminate employer-sponsored retiree health benefits when retirees become eligible for Medicare or a State-sponsored retiree health benefits program." The Court stated that the EEOC was able to demonstrate that its regulation was a "reasonable, necessary and proper exercise of its… authority, as over time it will likely benefit all retirees." The Court noted that various groups, including several labor and industrial groups, had filed friend of the court briefs in support of the EEOC's regulation because the contrary interpretation set forth in the *Erie County* case and advanced by the AARP had diminished the number and kind of retirement incentives offered by employers, who were afraid of running afoul of the ADEA. The Court also found that the EEOC's regulation was not arbitrary or capricious as the intended impact would be to encourage employers to offer post-retirement health care coverage to large groups of retiring employees who would not otherwise receive it.

Thus, one very large stumbling block placed in the way of school districts and other employers who may wish to offer retirement incentives has been removed by the federal courts, and the state of the law prior to the *Erie County* decision in 2000 has been restored. School districts considering retirement incentives for employee groups may once again design these incentives to provide health care coverage until Medicare eligibility or similar fixed date without regard to whether this will provide a different level of benefits to retirees based on their age.

PENNSYLVANIA APPLICATION FOR NCLBA PILOT PROGRAM REJECTED

The March 2008 edition of MB&M's Education News discussed the U.S. Department of Education's pilot program for states to propose innovative ways to implement the No Child Left Behind Act. Since then, the Pennsylvania Department of Education submitted a proposal for a differentiated accountability format which would apply variable outcomes to school districts by reference to how many and which AYP targets were not achieved. PDE was notified that its proposal was rejected by the Department. It is unclear at the present whether another application will be submitted, or whether Pennsylvania will participate in the pilot program at all. We will update this matter in future editions of the MB&M's Education News if further information is forthcoming.

MB&M Education News

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MB&M Special Counsel Services

Challenging legal issues constantly confront School Districts. As an ongoing service to Western Pennsylvania School Districts, MB&M's Education News will feature recent developments in one of the many specialized areas of the law including:

- Special Education: The law of special education is constantly evolving. Our attorneys have the experience to apply the law's intricacies to the specific situations facing your District.
- Construction: Multi-million dollar construction projects require the legal experience to protect this major District investment. Our attorneys have both the legal experience and architectural background to protect your District's interests.
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As special counsel in these areas and others, we interact with your Solicitor, Administration and Board with the goal of providing a positive resolution to issues which may be unfamiliar or burdensome to the District. For more information regarding any of these specialized areas of practice, please contact Alfred C. Maiello or Michael L. Brungo at 412.242.4400.

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Inside This Issue:

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Insert Page