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Legal Insights

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Illinois Supreme Court revises its July 2006 opinion and expands the definition of willful and wanton tort immunity exclusion

by Ericka J. Thomas

In our Summer 2006 *Legal Insights for School Districts*, we summarized the Illinois Supreme Court's July 2006 decision in *Murray v. Chicago Youth Center*. In that case, the Court ruled upon the definition of "willful and wanton" conduct in the area of tort immunity. In an unusual action, the Illinois Supreme Court recently reversed last summer's ruling in *Murray v. Chicago Youth Center*, 224 Ill.2d 213 (2007). This decision breathes new life into a case that is over thirteen years old and revises yet again the definition of "willful and wanton" conduct in the area of tort immunity.

The following facts have remained the same throughout the years: Ryan Murray, a 13-year-old student, was injured during an extracurricular tumbling class while attempting to perform a forward flip off a mini-trampoline. Following his attempt, Ryan landed partially off the safety matting on his upper chest and shoulders, injuring his neck and rendering him a quadriplegic. The injury occurred during the "freelance" portion of the class when the participants were allowed to do unorganized activities. The evidence revealed that: (1) the mats were set up improperly around the mini-trampoline; (2) the mini-trampolining activity was not supervised by a "professionally prepared" instructor; (3) spotters were not assigned to the mini-trampoline; and (4) none of the participants had been warned of the serious injuries that could result from improper use of a mini-trampoline. In addition, there was an expert opinion that it is well known that the mini-trampoline is associated with the risk of spinal cord injury and that the tumbling program was "one of the worst environments [the expert] had ever seen and violated every single safety standard."

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Report cards and transcripts for students with disabilities: Complying with Section 504, Title II and IDEA

by Matt Roeschley

Section 504 of the Rehabilitation Act of 1073 ("Section 504"), Title II of the Americans with Disabilities Act ("Title II"), and Part B of the Individuals with Disabilities Education Act ("IDEA") do not specifically address report cards and transcripts. Therefore, the question of what information should be included or omitted in these documents has remained largely unaddressed until recently. A 1996 opinion letter issued by the Office of Civil Rights (OCR), *Letter to Runkel*, 25 IDELR 387 (Sept. 30, 1996), addressed standards for transcripts for students with disabilities, but did not discuss report cards. However, a 2006 opinion letter delves into the issue as it pertains to report cards and delineates important distinctions between report cards and transcripts with regard to their basic purposes and the effect those purposes have on the amount and type of information that can be included for students with disabilities.

The most recent opinion letter, *California Department of Education*, 47 IDELR 45 (July 26, 2006), responds to inquiries from schools regarding report cards and transcripts, discusses the underlying purposes of both documents, and examines the general requirements of Section 504, Title II, and IDEA collectively to provide guidance on the types of information that can or should be included or omitted. The 2006 OCR opinion letter focuses on the different purposes of and standards for report cards and transcripts. According to the OCR, "Report cards are provided to parents so they can monitor a child's progress or level of achievement," whereas transcripts are "intended to inform postsecondary institutions or prospective employers of a student's academic credentials and achievements." In light of these diverse purposes, school report cards have a greater expectation of confidentiality than school transcripts. According to the 2006 OCR opinion letter, this distinction -- along with the general principles of Section 504, Title II, and IDEA -- determines which information can be included on report cards and transcripts, respectively.

Statutory Framework

Section 504 prohibits discrimination on the basis of disability in programs or activities that receive federal financial assistance. Similarly, Title II prohibits discrimination based on disability by public entities, including public schools, without regard to receipt of federal funding. IDEA provides for federal funding to local educational agencies, through state educational agencies, to assist schools with

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Ryan and his mother sued the Chicago Board of Education, Chicago Youth Centers ("CYC"), and the CYC employee who instructed the class, alleging that the use of a mini-trampoline was a hazardous recreational activity and the defendants acted willfully and wantonly. The defendants claimed immunity under the broad protections of the Tort Immunity Act, specifically Sections 2-201 and 3-108(a) (745 ILCS 10/2-201 and 3-108(a)). Ryan and his mother countered that the more specific Section 3-109 (relating to hazardous recreational activities) (745 ILCS 10/3-109) of the Act should govern, and under this section, the defendants' acts would be exempted from immunity because they were willful and wanton.

The trial court granted the defendants' motion for summary judgment which claimed that they were immune from the suit under Sections 2-201 and 3-108(a). On appeal, the appellate court held that Section 3-109(c) of the Tort Immunity Act was applicable and the immunity afforded to the defendants did not extend to willful and wanton acts. However, the appellate court then extended its holding and found, as a matter of law, that the facts set forth and all of the evidence submitted would not support a finding that the defendants acted willfully and wantonly (745 ILCS 10/3-109(c)). The Illinois Supreme Court initially upheld this ruling.

Section 2-201 of the Act provides, "Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." (745 ILCS 10/2-201) Section 3-108(a) of the Act provided, "Except as otherwise provided by this Act and subject to subdivision (b) neither a local public entity nor a public employee is liable for an injury caused by a failure to supervise an activity on or the use of any public property." (745 ILCS 10/3-108(a)) (Note: The statutory wording reads as it existed in 1992, when Ryan Murray's accident occurred.)

In *Murray*, a more specific immunity (Section 3-109(b)) was available to the defendants. This section protects a local public entity and its employees from liability involving hazardous recreational activities, except in situations involving (1) a failure to guard or warn of a dangerous condition, or (2) willful and

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the provision of a free and appropriate public education (FAPE) to eligible children with disabilities in mandatory age ranges. None of these three statutes explicitly addresses report cards and transcripts. IDEA does require that an Individualized Education Program ("IEP") for a child with a disability describe the way in which progress toward the IEP goals will be provided. Such progress reports may but are not required to be issued as part of the student's regular report card. Regardless of the requirement of a progress report under IDEA, the non-discrimination standards of Section 504 and Title II still apply to report cards.

Report Cards

Under Section 504 and Title II, schools cannot treat students differently on the basis of a disability. Schools may, however, provide a different aid, benefit, or service to persons with a disability where such assistance is necessary to provide an aid, benefit, or services that is equally as effective as that provided to others without a disability (34 C.F.R. § 104.4(b)(l)(i)-(iv) and 28 C.F.R. § 35.130 (b)(l)(i)-(iv)). Since report cards are intended to inform parents of their child's progress and level of achievement, Section 504 and Title II do not prohibit a report card from indicating that a student is receiving special education or related services, as long as this information is provided in a manner that truly informs parents about their child's progress in specific classes.

Report cards must go beyond a simple indication that a student is receiving special education and must include a "meaningful explanation of the student's progress, such as a grade or other evaluative standard." In essence, to comply with Section 504 and Title II, a report card for a student with a disability must indicate and fully explain the progress toward the goals set forth in the IEP.

To comply with Section 504 and Title II, schools that assign letter grades for non-disabled students based on a student's grade level standards in the general education curriculum must assign the same letter grades for disabled students who participate in regular education classes. However, when a disabled student does not participate in classes within the general education curriculum and the content of his or her courses is different from the general curriculum, it is the responsibility of the Illinois State Board of Education or the local school district to develop and implement standards to reflect progress or achievement for such modified course content. Furthermore, under Section 504 and Title II, schools may use an asterisk or other coding to distinguish between special education programs and services and the general education curriculum on report cards, as long as the course content is different.

Transcripts

A different standard applies to school transcripts of students with disabilities. Generally, transcripts are intended to inform post-secondary institutions or prospective employers of a student's academic achievement. Thus, there is an expectation that transcripts will be shared with parties other than the student and his or her parents. According to a previous OCR opinion letter, *Letter to Runkel*, 25 IDELR 387 (Sept. 30, 1996), transcripts cannot indicate that a

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wanton conduct which is a proximate cause of the injury. The statute goes on to list specific examples of hazardous recreational activities, including trampolining.

The Illinois Supreme Court's 2006 ruling noted that Sections 2-201 and 3-108(a), when applicable, provide immunity from both negligent and willful and wanton conduct. It also noted that the Illinois Supreme Court has not had an opportunity to consider the "interplay" of Sections 2-201 and 3-108(a) with the "limited immunity" provided by Section 3-109. The plain language in Sections 2-201 and 3-108, "except as otherwise provided," made it clear to the court that the "legislature did not intend for the immunities afforded public entities and employees by these provisions to be absolute and applicable in all instances." The July 2006 *Murray* decision concluded that the legislature intended to hold local governmental entities and their employees to a higher standard of care for hazardous recreational activities, like trampolining. Thus, the defendants' immunity from liability in this case is subject to the exceptions found in Section 3-109(c) of the Act." Therefore, according to *Murray*, when a more specific immunity may apply, that limited immunity trumps the general blanket immunity of Sections 2-201 and 3-108 of the Act. In its February 2007 decision, the Illinois Supreme Court affirmed its holding on the issue of immunity, but revisited its holding on the issue of willful and wanton conduct.

The Court held in its July 2006 decision that willful and wanton conduct, in the context of the Tort Immunity Act, is given a narrow definition, as opposed to the broader common law standard. However, in its February 2007 ruling, the court reversed itself and rejected the defendants' argument that the 1986 amendments to the Tort Immunity Act imposed a heightened willful and wanton conduct standard. The court discussed a string of cases that had addressed conduct that has been characterized as willful and wanton. The court cited to the case of *Ziarko v. Soo Line R.R.*, 161 Ill.2d 267 (1994), which held that "conduct characterized as willful and wanton may be proven where the acts have been less than intentional - i.e., when there has been 'a failure, after knowledge of impending danger, to exercise ordinary care to prevent' the danger, or a 'failure to discover the danger through … carelessness when it could have been discovered by the exercise of ordinary care.' " The Court noted that none of the cases distinguished between the Tort Immunity Act definition and the common law definition of willful and wanton conduct. Given this holding, the Court then looked at the specific facts in the *Murray* case. The Court agreed with the plaintiff's contention that the question of whether the defendants' conduct was willful and wanton was a question of fact for the jury. The Court stated that there were genuine and material issues of fact concerning the willful and wanton conduct and that it was error for the appellate court, and itself, to affirm the summary judgment. The Court then reversed itself and remanded the case for further proceedings in the trial court.

This ruling will allow Ryan Murray to have his day in court and sets forth two main ideas that are important to local governments and public entities covered by the Tort Immunity Act. First, if applicable to the facts of the case, a more specific, limited immunity will trump the general blanket immunity of Sections 2-201 and 3-108 of the Act. Second, there is no distinction between the definition of willful and wanton conduct in the context of the Tort Immunity Act and the broader common law standard. ■

Seventh Circuit limits First Amendment protection for teachers' in-class speech

by David Zafiratos

In *Mayer v. Monroe County Community School Corporation, et al.*, 474 F.3d 477 (7th Cir. 2007), the Seventh Circuit recently sided with a school district that did not renew a probationary teacher's contract for a second year. After allegedly being dismissed for expressing her views on the Iraq war during a class discussion on current events, Deborah Mayer brought a First Amendment lawsuit against the school. According to Mayer, a student asked her during class whether she participated in political demonstrations. She responded that she honked her car horn when she passed a demonstration against the Iraq war and saw a "Honk for Peace" sign. After some parents complained, the school instructed its teachers they could not take sides in any political controversy. The school did not renew Mayer's contract after her probationary period ended.

The school had informed Mayer she could discuss the controversy surrounding the United States' policy in Iraq with her students, but could not share her opinions. Applying the ruling in *Pickering v. Board of Education*, 391 U.S. 563 (1968), the district court held that Mayer's right to express her views on the subject was limited in the workplace by the requirement that her views not unduly disrupt her employer's business. On appeal, the Seventh Circuit relied upon the United States Supreme Court decision in *Garcetti et al. v. Ceballos*, 126 S.Ct. 1951 (2006), which held, "When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."

Mayer conceded that the class discussion was part of her official duties, but argued that principles of academic freedom superseded *Garcetti* in classrooms. The court disagreed, pointing to a previous Seventh Circuit decision, *Webster v. New Lenox School District No. 122*, 917 F.2d 1004 (7th Cir. 1990). In *Webster*, a public school teacher wanted to incorporate divine creation into his social studies class as a means of disagreeing with

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the approved textbook's stance that the world is billions of years old. The court held that, "Authorities charged by state law with curriculum development [may] require the obedience of subordinate employees, including the classroom teacher."

In explaining the logic of *Webster*'s rule, the court in *Mayer* noted that "[e]xpression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary." Further, the court described students in the classroom as a captive audience that should not be subject to a teacher's personal views. In addition, the court preferred that school boards, not teachers, decide which views are expressed in the classroom. Unlike teachers, school board members are elected officials whose views can be debated openly.

The court explicitly limited the holding of this case to elementary and secondary teachers, stating that "constitutional protection of scholarly viewpoints in post-secondary education" remains an open question. Additionally, the court stated this ruling did not affect publications written by primary and secondary school teachers, nor statements teachers make outside of the classroom. ■

SAVE THE DATE

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student has received special education or related services. The 2006 OCR opinion letter further explains that, because labels or other indications of special education "d[o] not constitute information about the student's academic achievements," they are not consistent with the basic purpose of a transcript of informing post-secondary institutions and prospective employers of a student's academic credentials and achievements.

Additionally, notations of special education services on transcripts also disclose the fact of a student's disability, which amounts to different treatment on the basis of a disability -- a violation of Section 504 and Title II. The 1996 and 2006 OCR opinion letters each explains that student transcripts may indicate that a student received a modified or alternate curriculum in general education, as long as the same notation (e.g. an asterisk or other symbol or code) is used for all students receiving modified or alternate curriculums, *including those in advanced placement, honors, or remedial instruction*. A consistent and generalized indication of modified or alternative curriculums on student transcripts does not identify or categorize students who received special education or related services, and thus does not treat students with disabilities differently than non-disabled students.

The 1996 OCR letter provides the following examples of transcript designations that should be carefully reviewed or avoided because they may be commonly or easily construed to identify disabled students: "L.C. (learning center)," "H.B. (homebound instruction)," "resource room," "P.E. requirement waived ---medical," "PF (peer facilitator used)," or "S.O.S. (special opportunity school)." Examples of more permissible transcript designations provided in the OCR letter include "I.S. (independent study)" or "modified curriculum," as long as these terms are also used to designate other curriculums, such as the gifted or talented programs. The most important question for school districts to ask when considering the best use of modified curriculum indicators on student transcripts is whether the identifier utilized tends to focus on or categorize students with disabilities. If the answer to this question is "yes," "probably," or even "maybe," there is a likelihood that the designation would violate Section 504 and Title II.

If you have any questions regarding the legality of your school district's notations on report cards and transcripts, please contact Matt Roeschley or Maureen Anichini Lemon at (630) 682-0085. ■

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