Chalkboard

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Pain and Concussion as "Serious Bodily Injury" under the IDEA's 45-Day Removal Provisions

by M. Scott Major

In past issues of Chalkboard, RFR has provided school districts with some important reminders regarding their obligations under the Individuals with Disabilities Education Act ("IDEA"). Among those was a reminder that the IDEA allows school districts to remove students with a disability to an interim alternative education setting ("IAES") for not more than 45 days for certain actions, regardless of whether their behavior is determined to be a manifestation of their disability. There are three instances where this is permissible: when the student 1) carries or possesses a weapon at school, on school premises, or to a school function; 2) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance while at school, on school premises, or at a school function; or 3) inflicts "serious bodily injury" upon another person while at school, on school premises, or at a school function. While the first two instances are clearly defined within the IDEA, school districts should exercise extreme caution before concluding that "serious bodily injury" has occurred, particularly when pain or concussion is the basis for that determination.

While the IDEA itself does not define "serious bodily injury," its implementing regulations adopt the following definition: "bodily injury which involves a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of

a bodily member, organ, or mental faculty." 18 U.S.C. § 1365(h)(3). The Office of Special Education and Rehabilitative Services ("OSERS") has warned state and local education authorities that they may not modify this statutory definition, e.g., via local board policies and procedures. *Questions and Answers on Discipline Procedures*, 52 IDELR 231 (OSERS 2009).

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When assaulted by an IDEA-qualified student, the majority of wounds that staff and students may suffer will typically not involve "substantial risk of death"; "protracted and obvious disfigurement"; or "protracted loss or impairment of a body member, organ or mental faculty," so they will not qualify as a "serious bodily injury" under the IDEA even if they cause serious pain or discomfort. It is only when the resulting pain becomes "extreme" that the injury might qualify. For example, courts and hearing officers have found "extreme physical pain" was not present when 1) a principal had a swollen knee, did not seek medical attention, then drove 200 miles the next day; 2) a paraprofessional suffered discomfort, disorientation, and pain that she rated as a seven out of ten, but she was given no pain medication from the hospital and was "back to normal" the next day; 3) no injured party received any outside medical care; and 4) a teacher refused prescription pain medication and did not miss any work. On the other hand, "extreme physical pain" has been found when two prescription drugs failed to bring relief to one teacher and her own characterization of her pain was "the worst in her life." It was also found when an administrator who suffered kicks, punches, and bites was prescribed muscle relaxers and pain relievers, sustained injuries that limited her arms' range of motion, restricted her use of one leg, and she required physical therapy to regain full use of those limbs.

Under this standard, most simple assaults, including those that produce genuine pain and discomfort, will not meet the definition of "serious bodily injury" under the 45-day rule, even those that result in concussion. However, a severe concussion has qualified in at least two due process proceedings. In one instance after a student struck his paraprofessional, serious bodily injury from concussion was found when the para suffered intense headaches, nausea, light sensitivity, and lack of energy; she had difficulty focusing and impaired thought processes; and her

doctor recommended she stay home for one week to allow her brain to heal and avoid permanent damage. *In re: Student with a Disability*, 115 LRP 44815 (SEA NH 12/7/14). In the other, after a student slammed his speech therapist's head against a wooden desk and shook it for several seconds, the therapist experienced a severe concussion evidenced by "word-finding problems," delayed thought organization, and memory issues. *William S. Hart Union High Sch. Dist.,* 116 LRP 23535 (SEA CA 5/10/16). But these instances are proving to be rare.

In light of the above, before removing a student with a disability to an IAES after they assault students or staff, school districts should very carefully consider whether a "serious bodily injury" has genuinely occurred that would trigger the 45-day removal provisions of the IDEA. Please note, even in those rare cases that do involve serious bodily injury, districts must still conduct a manifestation determination and should seriously consider seeking the advice of counsel before moving forward to avoid potentially violating their students' rights.

If you have any questions related to the discipline of students with disabilities, your RFR attorneys are here to advise you and help you develop practices that comply with applicable law.

Spring Supreme Court Roundup

by Emily C. Krukowski

Spring has been a busy time for our United States Supreme Court ("Supreme Court"). The Supreme Court has rendered several decisions on issues relevant to public school districts. These cases were heard during the Supreme Court's October 2021 Term.

Houston Community College System v. Wilson, 595 U.S. ____ (2022):

In March of 2022, the Supreme Court decided *Houston Community College System v. Wilson*, holding that David Wilson, a member of the Houston Community College Board of Trustees ("Board"), did not have a First Amendment retaliation claim after the Board censured him for publicly criticizing the Board and for bringing lawsuits challenging the Board's actions.

Mr. Wilson's tenure on the Board was a "stormy one" during which Mr. Wilson criticized the Board to various media outlets, arranged robocalls to the constituents of certain Board members to publicize his views, hired private investigators to surveil one Board member, and even filed lawsuits against the Board, alleging it had violated its bylaws. These actions ultimately led the Board to adopt a public resolution to

censure Mr. Wilson. Mr. Wilson claimed that this censure violated his First Amendment rights, and, through one of his existing lawsuits against the Board, brought a claim against the Board for retaliation under the First Amendment. The lawsuit made its way to the Supreme Court.

In analyzing the First Amendment issue, the Supreme Court began by discussing how established precedent dating back to colonial times has affirmed the power of elected bodies to censure their members. The Supreme Court then looked to its contemporary doctrine on First Amendment retaliation claims, which requires a plaintiff to show "that the government took an 'adverse action' in response to his speech that 'would not have been taken absent the retaliatory motive.'" *Wilson*, 595 U.S. ____. In considering the Board's conduct, the Supreme Court looked to whether the conduct was material or immaterial. Here, the conduct was not materially adverse because: (1) the censure itself was a form of speech by elected representatives that concerned the conduct of public office, and (2) the censure did not prevent Mr. Wilson from doing his job, did not deny him the privilege of office, and was not alleged to be defamatory.

Importantly, the Supreme Court noted that this decision was a "narrow" one, and there may be other situations where a censure or reprimand may give rise to First Amendment retaliation claims. Thus, it is important to recognize that this decision is limited to the facts of this particular case, and there may be other situations where censures or reprimands may violate an individual's First Amendment rights.

Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. ____ (2022):

The next interesting decision to come from the Supreme Court this Spring was *Cummings v. Premier Rehab Keller, P.L.L.C.*—a decision which considered whether emotional distress damages are recoverable in a private action to enforce either the Rehabilitation Act of 1973 or the Affordable Care Act.

The petitioner, Jane Cummings, was deaf and legally blind. She sought physical therapy services from Premier Rehab Keller, P.L.L.C. ("Premier Rehab"). Ms. Cummings requested that Premier Rehab provide an American Sign Language ("ASL") interpreter, as she primarily communicated through ASL sign language.

Premier Rehab declined, and informed Ms. Cummings that she could communicate with the therapist using written notes, lip reading, or gesturing. Ms. Cummings then sought care from another physical therapy provider, and brought suit against Premier Rehab. In her lawsuit, she alleged that Premier Rehab's failure to provide an ASL interpreter constituted discrimination on the basis of a disability in violation of Section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act") and the Affordable Care Act ("ACA"). She sought damages related to her emotional distress.

The task before the Supreme Court was to determine whether Ms. Cummings could recover emotional distress damages under the Rehabilitation Act and the ACA. In so doing, the Supreme Court began by citing to four statutes that prohibit recipients of federal financial assistance from discriminating based on certain protected grounds. Those cited were: Title VI of the Civil Rights Act, Title IX of the Education Amendments of 1972, the Rehabilitation Act, and the ACA. The Supreme Court noted that these Spending Clause statutes operate "by conditioning an offer of federal funding on a promise that the recipient not to discriminate." *Cummings*, 596 U.S. ____. Thus, this is essentially a contract between the government and the particular recipient of the funds. Accordingly, because this is a contract, and emotional distress damages are not traditionally available in suits for breach of contract, a recipient of federal funds would not have notice that they would face such a remedy in private actions brought to enforce the statutes.

While this decision only impacts school districts in the event a lawsuit is brought alleging violations of Spending Clause legislation, it is still a decision that should be kept in mind. Oftentimes, emotional distress damages are the only damages claimed by plaintiffs. Its effects on litigation and the type of recovery that can be awarded will be playing out in the courts in the following months.

Shurtleff et al. v. City of Boston et al., 596 U.S. ____ (2022):

The final decision—*Shurtleff et al. v. City of Boston et al.*—addressed whether flags that the City of Boston ("Boston") allowed groups to fly at the entrance of its City Hall was government speech, and whether Boston could, consistent with the Free Speech Clause, deny a private religious group's request to raise a flag.

For many years, Boston had allowed private groups to request use of a flagpole outside its City Hall to raise flags of their choosing. Boston had not denied a single request until 2017 when it denied the request of Harold Shurtleff, the director of an organization called

Camp Constitution. Mr. Shurtleff had requested to fly a Christian flag. Boston was concerned that allowing this flag would violate the U.S. Constitution's Establishment Clause, as it could be considered a government's establishment of religion. Following the denial, Mr. Shurtleff filed suit against Boston, alleging that its refusal to allow him to raise the flag violated the First Amendment right to free speech.

The Supreme Court first determined whether Boston's flag-raising program constituted government or private speech. The Supreme Court noted that this analysis can be blurred when, as in this case, a government invites people to participate in a program. To determine this issue, the Supreme Court takes a "holistic inquiry" to determine whether the government intended to speak for itself. Under the facts of this case, the flag-raising program did not constitute government speech. Here, the facts that led to a finding that this was not government speech were: (1) Boston sought to accommodate all applicants; (2) Boston never requested to see the flags before the events; (3) the application form only asked for contact information, a brief description of the events, and proposed dates and times; and (4) Boston had no written policies or clear internal guidance about what groups could fly and what those flags would communicate. This, as the Supreme Court concluded, did not rise to the level of meaningful involvement and control that would constitute government speech. Instead, this amounted to private speech.

Because this was private speech, the next issue was whether Boston's decision to refuse to let Mr. Shurtleff raise his flag violated the First Amendment. The First Amendment prohibits a government from excluding private speech based on "religious viewpoint," as that constitutes "impermissible viewpoint discrimination." *Shurtleff*, 596 U.S. ____. Boston had admitted that it refused Mr. Shurtleff's request because it "promoted a specific religion." As such, Boston's decision was discrimination based on a religious viewpoint in violation of the First Amendment.

Similar to the *Wilson* decision, *Shurtleff* turns on the facts of the particular case. Thus, this decision does not appear to establish a "bright-line" rule as to what constitutes government or private speech. However, it serves as an indication of how future First Amendment issues related to the interplay between government and private speech will be analyzed.

If you have any questions related to these Supreme Court decisions and how it may impact your school districts, your RFR attorneys are available for questions.

RFR News

Rosenstein, Fist & Ringold is pleased to announce that Adam Heavin has been hired as an Associate attorney with the Firm.

Adam T. Heavin

Adam is a native of Tulsa, Oklahoma and was admitted to the Oklahoma bar in 2022.

He received his undergraduate degree from Oral Roberts University, where he was a Whole Person Scholarship recipient and a Division One soccer player. He attended law school at the University of Tulsa College of Law, where he served as the Editor-In-Chief of the Tulsa Law Review and graduated with highest honors.

Mr. Heavin has been employed by Rosenstein, Fist & Ringold since 2021.

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We welcome your comments, criticisms and suggestions. Correspondence should be directed to: Rosenstein, Fist & Ringold, 525 South Main, Seventh Floor, Tulsa, Oklahoma 74103-4508, or call (918) 585-9211 or 1-800-767-5291. Our FAX number is (918) 583-5617. Help us make *Chalkboard* an asset to you.

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