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POTENTIAL LEGAL AND POLICY ISSUES TO WATCH IN 2005-2006

Overview

At the end of each year the last issue of the CEPI Education Law Newsletter is devoted to predicting potential legal and policy issue areas to watch and be ready for in the next school year. While the summer months give school policy-makers, administrators, classroom teachers, and other personnel time to relax and reflect back on their many accomplishments of the past school year, the summer months also provide an excellent opportunity to plan for next year.

Issues to Watch

In an effort to help educational policy-makers and administrators as they attempt to forecast and plan for problems and issues that may either carry over from last year or spring to life next year, I have identified and selected three topics for discussion. As the 2005 summer months move forward toward the beginning of the 2005-2006 school year, the following potential legal and policy issue producers are worth watching.

- Continuing problems and ramifications associated with the implementation of No Child Left Behind Act of 2001 (NCLB) requirements. As we know, the general purpose of NCLB is "...to ensure that all children have a fair, equal, and significant opportunity to obtain a high quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and academic assessments." Suffice it to say, however, while no person can disagree with such an overall goal, the "devil is in the details."

As of this writing, some states have already or are in the process of enacting strong legislative resolutions challenging the federal government's policy-making and regulatory authority under NCLB (e.g., Maine and Utah). Other states (e.g., Connecticut) are in court challenging funding and other fiscal ramifications of NCLB. Other states (e.g., Virginia) are seeking significant waivers from specific NCLB requirements that they say unreasonably punish them and hinder progress under their own, rigorous statewide standards.

Also worth watching is the growing battle in the courts over the question of whether or not parents can sue a local public school system for failure to adequately implement to requirements of NCLB. At this point, while

the question remains unanswered, courts are leaning toward holding that “parents do not have a private right of action under NCLB,” because the specific language of the statute does not provide for this. See, for example, Association of Community Organizations for Reform v City of New York Department of Education (S.D.N.Y. 2003) where plaintiffs unsuccessfully sued a local school system for failing to implement the mandates of NCLB.

- Resurgence of school finance issues testing the meaning and limits of a state’s constitutional mandate and resulting fiscal obligations to all children of school age. In Kansas, for example, the legislature has a duty to provide “a suitable education” to every child. In Montana the legislature has a duty to provide a “free, quality education” to all school children. In Nebraska the legislature shall provide for the “free instruction in the common schools of the state of all persons between the ages of five and twenty-one years.” In Virginia “The General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth, and seek to ensure that an educational program of high quality is established and continually maintained.”

Once again, as in years past, state public school finance issues already have made their way into court. While some well-known court decisions from the past have had new life breathed into them (e.g., Rose v Council for Better Education, Inc. [Ky. 1989]), more recent cases have linked “high stakes testing” requirements (as a precondition of promotion from grade-to-grade, as well as for graduation from high school), to the *fiscal obligation* of a state (i.e., basic level of support) to provide all children in public schools (where ever they live and whatever their socio-economic condition) with access to a “sound and basic education.”

A good example of a case on point is Campaign for Fiscal Equity, Inc. v New York (N.Y. 2003), where the court focused on linking state support levels to literacy, calculating, and verbal skills; as well as to providing adequately trained teachers, up-to-date curricula, adequate classrooms and other physical facilities in local school systems. However, the court made it clear that state education officials should not be blamed for the poor performance of students. Rather, said the court, since many students in local school systems arrive at school with backgrounds and problems that put them “at risk,” states should be “praised for success.”

- Reauthorization and changes in the Individuals with Disabilities Educational Act. In 2004, the United States Congress reauthorized and retitled the *Individuals with Disabilities Education Act (IDEA)*. Now called the *Individuals with Disabilities Education Improvement Act (IDEIA)*, there are several new features in the law. Of all the challenges inherent in the reauthorized IDEIA, one important aspect in particular deals with *burden of proof*. This is of critical importance in cases where school officials and the parents of a student with educational disabilities are at odds over whether or not a student’s individualized educational program and related services are appropriate to and meet that child’s specific needs.

A significant case (out of Maryland) to watch is Shaffer v Weist (4th Cir. 2004). Because IDEA (1997) was silent on the *burden of proof* (i.e., specific statutory language was absent), the United States Court of Appeals for the Fourth Circuit held the party or parties initiating the proceeding (in this case parents of the student with educational disabilities and not school officials) carry the *burden of proof*. This case is now before the United States Supreme Court. The National School Boards Association and other groups are carefully monitoring the progress of this case.

The reader should also watch for issues related to the requirements of NCLB coming up against IDEIA requirements as they: (1) impact on finding and employing “highly qualified teachers” for students in special education, and (2) impact on measuring “AYP” (Average Yearly Progress).

Policy Implications

As stated at the outset, the purpose of this year’s final commentary is to spot potential issue producers facing local educational policy-makers and administrators as they plan for the 2005-2006 school year. Realizing that it is not possible to identify and adequately treat every issue area, this writer selected the *three* discussed above. I hope that the information in this final commentary proves helpful in: (a) revisiting and up-dating existing policies, (b) crafting new school system policies and procedures, and (c) developing proactive and practical plans for immediate implementation (if and when necessary) as the 2005-2006 school year begins.

Resources Cited

Association of Community Organizations for Reform v New York City, 2003 LW 21471910 (S.D.N.Y. June 30, 2003)

Campaign for Fiscal Equity, Inc. v New York, 2003 N.Y.Lexis 1678 (N.Y. 2003)

Individuals With Disabilities Education Act (reauthorized and retitled as the Individuals With Disabilities Education Improvement Act), 20 U.S.C.A 1400, et seq. 2004

No Child Left Behind Act of 2001, 20 U.S.C. 6301, et seq. (2002)

Rose v Council for Better Schools, 790 S.W.2d 186 (Ky. 1989)

Shaffer v Weist, 377 F.3d 449 (4th Cir. 2004)

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Note: The views expressed in this commentary are those of the author.