

LEGALINSIGHTS

FOR SCHOOL DISTRICTS

OTTOWSEN BRITZ KELLY COOPER & GILBERT, LTD.

Volume 17, No. 1 -- Winter 2010

Recent legislation grants broad school access rights to parents and experts

by Timothy J. Hoppa

Developing educational programs for disabled students under the Individuals with Disabilities Education Act is a difficult and lengthy process that generally includes considerable parental involvement. The nature and extent to which a parent or an expert hired by a parent could have direct access to educational facilities during this process has not been defined, resulting in widely varying practices and policies.

The General Assembly has broadened the rights of parents to participate with school personnel in the development of appropriate educational and related services in Public Act 96-657. This law added subsection g-5 to Section 14-8.02 of the Illinois School Code, 105 ILCS 5/14-8.02(g-5). Effective August 25, 2009, this legislative amendment provides greater access to parents or their hired experts to school buildings, facilities, and personnel to evaluate and develop appropriate educational and related services for disabled children.

Both parents and their hired "qualified professionals" and independent educational evaluators must be granted reasonable access to any public school facility or program supported in whole or in part by public funds. Under the Act, a "qualified professional" is anyone with credentials to conduct an evaluation of the child in the areas

for which the evaluation is sought. Interns of "qualified professionals," including a master's or doctoral degree candidate, also are deemed "qualified professionals" for purposes of this amendment.

The law allows school districts to require parents and their retained evaluators to inform the building principal or supervisor in writing of the proposed visit, the purpose of the visit, and the approximate duration of the visit. We strongly recommend that you inform each building principal and program supervisor of this law, and require visitors to provide this information before the visit is allowed to occur. Visits are to be conducted at times mutually agreeable to the visitor and the school district. Under this new legislation, participating visitors are required to comply with all school safety, security, and other visitation policies. Particularly, laws and policies designed to protect individual privacy, such as the Illinois School Student Records Act must be strictly enforced.

Parents and their hired "qualified professionals" are granted slightly different access rights. Parents must be granted "reasonable access of sufficient duration and scope" to observe their child's current educational placement, services or programs, or a proposed

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Illinois Supreme Court invalidates special purpose levies under PTELL

by David Zafiratos

In *Acme Markets, Inc. v. Callanan*, the Illinois Supreme Court ruled that certain taxes levied by Will County and extended by County Treasurer Karen Callanan were invalid under the Property Tax Extension Limitation Law (PTELL) (35 ILCS 200/18-190). The Court ruled the tax was a "new rate" under PTELL which should have been submitted to a direct referendum for voter approval.

Acme Markets, Inc., brought a tax objection seeking a refund of taxes levied by Will County under the Detention Home Act for each year from 1997 through 2001. The County first levied this tax in 1997, when the County was subject to PTELL. The parties reached settlements on the objections for each year prior to 2001, but were unable to reach a settlement on the 2001 tax objection. The circuit court held the tax was valid even though it was not submitted to a direct referendum and dismissed the objection for that year's taxes.

On appeal, the appellate court agreed with the circuit court. Acme then appealed to the Illinois Supreme Court. The Illinois Supreme Court disagreed with both lower courts, ruling the tax was invalid under PTELL

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Court prohibits audio-taping special education classrooms

by Maureen Anichini Lemon

On December 8, 2009, the Second District Appellate Court ruled that a school district's plan to install audio-recording equipment in a special education classroom violates the Illinois Eavesdropping Act (the "Act"). *Plock v. Board of Education of Freeport School District No. 145*, 2009 WL 4757384; ___ N.E.2d ___ (2d Dist. 2009). The plaintiffs in this case were four special education teachers who sued the school district over its policy of operating audio-recording equipment in several special education classrooms. The policy had been implemented in April, 2007, in response to concerns by parents after a teacher and classroom aide had resigned over allegations of physically

and verbally abusing severely disabled students. To prevent future abuse, the school district installed both audio- and video-recording equipment in the special education classrooms.

The plaintiffs filed a two-count complaint claiming (1) the audio-taping of their classrooms violated their fourth amendment right to be free from unreasonable search and seizure and (2) the audio-taping violated the Act. The lawsuit challenged only the audio-taping of the classrooms; it did not challenge the video-taping of the classrooms.

In December 2007, the first authoritative decision occurred in this case when

the federal Northern District Court of Illinois issued a ruling on Count I. In that decision, the federal court ruled that the school district's policy did not violate the teachers' fourth amendment rights. The basis for this ruling was the court's conclusion that teachers do not have a reasonable expectation of privacy in the public school classrooms. "There is nothing private about communications which take place in such a setting." *Plock*, 545 F. Supp. 2d at 758. Having dismissed Count I, the federal court remanded the case to the Illinois circuit court to address the eavesdropping claim contained in Count II.

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educational placement or program. By contrast, the professionals retained by parents are granted even more access. They must be provided reasonable access of sufficient duration and scope to conduct an evaluation of the child, the child's performance and current educational program, placement, services or environment, or any proposed educational program, placement, services or environment. Additionally, they have the right to interview educational personnel. School districts may limit interviews to only personnel having information relevant to the child's current or proposed program, and the interviews must be scheduled so as not to interfere with the school personnel's school duties. They also may conduct child observations and assessments, as well as tests or assessments of the program, placement, services or environment being evaluated.

This new legislation answers certain questions regarding parental access, but creates many more. The phrase "suffi-

cient duration and scope" is not defined, despite being the only limitation on access. The amendment is silent on a school district's authority to impose limits on the number of visits or the length

School districts may limit interviews to only personnel having information relevant to the child's current or proposed program.

of each visit. If the school district does impose such limitations, it should establish specific protocol for requests to deviate from these limits. Such requests for additional time should not be unreasonably refused.

While the amendment contains a

provision for the protection of privacy rights, it is silent on whether visitors can utilize audio or video taping equipment. Because such equipment could be very valuable to a professional conducting an evaluation, school districts should anticipate requests to utilize recording equipment. Yet, any use of such equipment must not violate the privacy rights of other students. Finally, the amendment specifically prohibits a visitor from disrupting the educational process. Yet, it does not define what conduct is to be considered disruptive, nor does it address how a school district should respond to disruptive visitors. Until the General Assembly or courts provide further guidance on this topic, school districts should develop their own policies and procedures regarding these matters and apply them uniformly. If you have any questions regarding your rights and obligations under Section 14-8.02(g-5), please contact any attorney with whom you have worked at (630) 682-0085. ■

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and Acme was entitled to a refund.

At issue before the Supreme Court was (1) whether a “new rate” under Section 18-190 of PTELL, which must be approved by direct referendum, includes only rates that were statutorily created after Section 18-190 took effect; and if not, (2) whether the 2001 taxes levied by Will County were invalid because the detention home levy had never been submitted to a direct referendum.

What is a “new rate” under PTELL?

To determine the legislative intent, the Court reviewed the interpretation of the law by the Illinois Department of Revenue, the administrative agency charged with the law’s enforcement. That agency has interpreted a “new rate” as any tax a taxing district did not levy at the time PTELL went into effect. The Court held PTELL requires taxing districts levying a “new rate” to submit the proposed new rate to a direct referendum regardless of whether the statute authorizing the rate was adopted before or after the effective date of PTELL.

In ruling for Acme, the Court rejected the lower court holdings that a “new rate” under Section 18-190 of PTELL means only those taxes newly authorized by statutes enacted after PTELL’s effective date. This holding overruled the case of *DuPage County Collector for the Year 1993 v. 1212 Associates-MB Management Co.*, 288 Ill. App. 3d 480 (1997). As the Court explained, “[w]hether a rate is ‘new’ and therefore subject to a referendum under section 18-190 is determined by the time of the levy rather than by when the rate was authorized by statute.”

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The Illinois circuit court ruled that the school district’s policy to audio tape in the special education classrooms violates the Act. In this recent decision, the Illinois appellate court affirmed that decision because not all parties to the ‘conversation’ agreed to being recorded by the eavesdropping device. The court rejected the school district’s argument that ‘teaching’ does not constitute ‘conversation’ within the Act. Under the statute, ‘conversation’ includes any ‘oral communication’ regardless of whether it is intended to be private. The school district relied on the decision in *DeBoer v. Village of Oak Park*, 90 F. Supp.2d 922 (N.D. Ill. 1999), to support its argument that the conversation in a classroom does not constitute a ‘conversation’ under the Act. In *DeBoer*, the court distinguished public speech, such as that given by a speaker at a lecture, rally, ceremony or similar event, as not constituting a ‘conversation’ that is subject to the Act. The *Plock* court distinguished this case, suggesting that one might audiotape the speech-like communication given by university professors to a large lecture hall of students without violating the Act. Yet, at lower levels of education, where teachers are engaged in ongoing oral exchanges with students, the Act protects the conversations between the teachers and students.

The school district next argued that, since teachers have no expectation of privacy concerning the communications in their classrooms, those communications should be exempt from the Act. Yet, the Illinois appellate court found no indication in the Act that it applies only to conversations where there is an objective expectation of privacy. To the contrary, the Act applies to any conversation between two or more individuals regardless of their expectation of privacy.

The court noted that the Illinois General Assembly has legislated exemp-

tions to the Act in the past and could legislate an exemption for school classrooms, but has not. Two exemptions expressly discussed in the *Plock* decision are the ability to record meetings open to the public under the Illinois Open Meetings Act, and the ability of school buses to be equipped with recording devices while the bus is being used in the transportation of students to and from school and school-sponsored activities. The court refused to read additional exemptions, exceptions or limitations that are not clearly stated in the Act.

Finally, the court rejected the school district’s argument that public policy supports audio-taping classrooms to protect both students and teachers in those classrooms. While the school district’s intent might have been laudable, the court refused to interpret the Act in such a way as to ignore its plain language and, instead, make it “consistent with the court’s idea of orderliness and public policy.” The court noted that audio-taping is not the only means of protecting the students and teachers. Additional prophylactic measures are found in the following facts: the classrooms are video-taped, teacher aides are generally present, and teachers are subject to periodic evaluations. Finally, the court stated that, in addition to the public policy of protecting students and teachers, it must consider the public policy that protects Illinois citizens from eavesdropping.

As of the printing of this newsletter article, this recent *Plock* decision was still subject to revision or withdrawal by the Illinois appellate court. Yet, we believe that it presents a cautionary tale regarding how Illinois courts are interpreting the Illinois Eavesdropping Act. If you have any questions regarding that Act, or how this decision might impact practices in which your school district engages, please contact one of the attorneys with whom you have worked at (630) 682-0085. ■

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Validity of subsequent tax levies

After determining the County's detention home levy was a "new rate" under PTELL, the Court determined the County's 2001 detention home levy was invalid because it had not been submitted to a direct referendum when it was first imposed in 1997. In the opinion of one of the appellate court justices, only the 1997 levy was a "new rate," and once the tax was levied a second time it was no longer a "new rate." Since the County and Acme settled the objections from 1997 to 2000, the appellate court ruled Acme could not object to the 2001 levy as a "new rate." The Illinois Supreme Court disagreed, stating, "[w]hile it is true that the 2001 detention home tax levy was preceded by similar levies in 1997, 1998, 1999, and 2000, *the existence of the earlier levies does not insulate the 2001 levy from attack based on section 18-190.*" (Emphasis added).

Since PTELL requires a referendum for a new rate, and since the County had not yet held a referendum for the detention home levy, none of the levies, including 2001, were valid.

Levying taxes post-Acme Markets, Inc.

Any special purpose levy imposed by a district subject to PTELL prior to their county being impacted by PTELL and remaining as a levy each year thereafter - whether adopted as required by referendum or not - is not affected by this ruling. Any special purpose levy, which was not subject to referendum and added after the PTELL date of a particular county will, in the future, no longer be considered a valid levy and will be subject to a possible tax objection. The county clerk could also refuse to extend those special purpose levies added without referendum after the PTELL date.

Some school districts may have to alter their levy method for "special purpose" taxes following the *Acme Markets, Inc.* case. All districts should review their records to determine whether any of their taxes were first levied after the effective date of Section 18-190 of PTELL. Any such levy must have been submitted to a direct referendum at the time it was first enacted. Options do exist, however, for districts that failed to submit new rates to direct referendum under Section 18-190 of PTELL.

Some school districts may have to alter their levy method for "special purpose" taxes following the Acme Markets, Inc. case.

For districts with special purpose taxes seemingly invalidated by the *Acme Markets, Inc.* case, we suggest levying for those purposes directly into the district's general operating funds. This method is only available, however, for districts not at their maximum tax rates for their general operating funds. We also recommend maintaining a minimal balance (\$100) in those special purpose levies so they remain active in the event of a change in the law. Any district already at its maximum tax rate should include as much money as possible in their general operational funds before levying additional sums in special purpose funds. ■

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