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School Districts May Charge Matriculation and Incidental Fees

During the past legislative session, the General Assembly revised § 59-19-90 of the South Carolina Code of Laws to benefit all school districts in South Carolina. Specifically, all school districts may now charge matriculation and incidental fees; in the past, only school districts with local legislation could charge such fees unless the General Assembly passed a special proviso allowing all school districts to levy such fees on a year-by-year basis.

The new legislation states that school districts must "take into account the students' ability to pay and must hold the fee to a minimum reasonable amount. Fees may not be charged to students eligible for free lunches and must be reduced pro rata for students eligible for reduced price lunches." Accordingly, when school boards approve matriculation and incidental fees, they must carefully consider the needs of the schools, the ability of the students to pay fees, and the reasonableness of requiring students to assume these costs.

School Districts May Send Report Cards Home with Students

Proviso 1A.46, passed by the General Assembly as part of the 2003-04 fiscal year budget, suspends for the current school year the requirement that

school districts mail school and district report cards to parents and permits schools to send such report cards home with students instead. This proviso was presumably passed in order to give school districts some relief from postage and mailing costs during the difficult economic times.

Student Racial Diversity as a Basis for Admission Decisions Upheld

The extent to which public education authorities can, or should, consider the race of students when making decisions about admissions, attendance, and other aspects of an institution's educational programs has been vigorously debated for decades. Although the United States Supreme Court weighed in on the issue last month, its decision ensures that the debate will continue. In what one justice's dissenting opinion called a "split double header," the Court simultaneously invalidated the University of Michigan's method of considering race for its undergraduate admissions, while approving the same university's method of considering race for its law school admissions.

As a bedrock proposition, the Court ruled that the government has a "compelling interest" in "obtaining the educational benefits that flow from a diverse student body," through having a "critical mass" of minorities in that student body. The goal of a "critical mass," argued the university, is to have enough minority students in the student body that the students are free to be themselves, rather than think of themselves as mere representatives of their racial or ethnic minority. In turn, this variety of viewpoints produces the "benefits that flow from a diverse student body." A "compelling interest" is something the government must be able to prove in order to overcome the general prohibition in Constitutional law against the use of racial classifications by any government agency. Although it recognized the compelling nature of the interest, the Court also placed an unusual "cap" on the force of this "diversity" rationale, stating that it expects that "diversity" will no longer be considered compelling under the Constitution twenty-five years from now. Between now and then, wrote the Court, alternative

methods of assuring the “benefits that flow from a diverse student body” should have been developed.

A program supported by a “compelling interest” (in this case, the benefits that flow from a diverse student body) must also be “narrowly tailored” to suit that interest, or the government cannot use the program. The “narrowly tailored” analysis also examines the program’s potentially harmful effects on others -- in this case, upon the non-minority students who would have been offered admission but for the “plus” factor given to minority applicants for their race. After reviewing the actual practices the University of Michigan’s undergraduate and law programs used to grant some minority applicants admissions preference, the Court’s two decisions split on the degree of individualized attention the applicants received in the schools’ decision-making process. In undergraduate admissions, all minority students simply received a bonus of “points.” The Court struck this down as insufficiently “narrowly tailored.” The law school, on the other hand, made more individualized assessments of minority applicants, considering how they would contribute to a “critical mass” of minority enrollees. The law school’s practices, said the Court, were sufficiently “narrowly tailored.”

The impact of these decisions on the K-12 public education setting is not clear. We now know that school systems are not categorically prohibited in all circumstances from using race as a factor in school decisions. Indeed, for most of the last fifty years, South Carolina school districts have been encouraged, if not ordered, to consider race in their decisions because of the Constitutional law of desegregation of schools. The Supreme Court’s recognition that, in some circumstances, educational authorities may have a compelling interest in considering race when making decisions about their school systems, whatever one’s view of the underlying point of law, should remove some of the threat of litigation that has tended to cause local controversies on race-conscious education policies and programs in our State.

That is not to say, however, that the use of race will be unexamined or routinely allowed. The rejection of the “points” system for Michigan’s undergraduates illustrates that the “compelling interest” and “narrowly tailored” tests have teeth. The Supreme Court expects school authorities to work very hard to show a compelling interest and narrow tailoring if they elect to pursue racial preferences to achieve an educational objective. As the dissenting justices pointed out, the uncertain boundaries

of race-conscious admissions are practically a guarantee that further litigation will be necessary to clarify the “diversity” interest and to test methods adopted to further it.

Because any use of a racial preference has to clear high legal hurdles, school authorities should continue to plan, from “Day One,” for the legal defense of any program or preference they implement that makes a student’s race a significant or deciding factor in how that student is treated by the school system – particularly with regard to competitive programs, such as admission to special schools or courses. This necessity includes a careful, precise record of how such programs or classifications were developed and why consideration of race is necessary.

School Construction Law Amendments Await Governor’s Signature

As of this writing, House Bill 3418, which amends school construction laws in several respects, has passed the South Carolina Legislature and is before the Governor for his approval. Two key provisions of this legislation are (1) that “any requirement that public schools be constructed on a lot or parcel of certain minimum size is prohibited,” and (2) that “school districts must receive approval from the South Carolina Department of Education prior to property acquisition or additions on existing properties.”

Additionally, the legislation requires an annual review and update of the “South Carolina School Facilities and Planning Guide” (also called the “OSF Guide” or “Green Book”) by a committee appointed by the South Carolina Department of Education. The current OSF Guide goes beyond mere specifications criteria to address such topics as site selection, design professional selection, and project delivery method authorizations. Thus any “review and update” of the OSF Guide could actually make substantive changes in State policy, and have substantial effects upon school district building programs and construction procurement rules and practices. Finance and operations staff of all school districts should closely follow the OSF Guide review and update process.

Other features of the legislation include:

- all construction, improvement, and renovation of public school buildings and property must have plans and specifications submitted to the State Superintendent of Education (“State

Superintendent”);

- approval of the plans and specifications by the State must be received before public bidding can begin;
- plans and specifications must be coordinated with county officials such as traffic engineers and zoning administrators;
- all construction, improvements, and renovation of public school buildings and property must be inspected by the State Superintendent for compliance with the applicable codes and standards; and
- a certificate of approval must be obtained from the State Superintendent or designee before a building may be occupied.

The legislation also gives the State Superintendent authority to waive applicable school building regulations relating to square footage requirements for construction of a new public school building or for the conversion of an existing commercial building into a public school facility. Such waivers supersede otherwise applicable State school building regulations and also supersede the authority of local building officials to disapprove variances granted by the State Superintendent. The property owner of a building considered appropriate for conversion to a public school by the State Superintendent may lease its building to a local school board of trustees to be used as a public school.

Overtime Suits Filed Against S.C. School Districts

To compound the financial hurdles facing most school districts in South Carolina, on June 19, 2003, a Mississippi law firm, in conjunction with a Greenville, South Carolina firm, filed federal lawsuits seeking unpaid overtime under the Fair Labor Standards Act (FLSA) against at least twenty school districts in our state. Each suit purports to be a “class action” filed on behalf of non-exempt, classified employees, such as bus drivers, secretaries, cafeteria workers, custodians, and instructional aides. Although only one or two employees have been named as plaintiffs in each case, the suit papers confirm that the plaintiffs’ attorneys plan to add significant numbers of current and former employees as parties to each suit as the cases progress. The attorneys are attempting to attract would-be plaintiffs through newspaper and television advertisements. According to documents filed with the court, the plaintiffs’ attorneys

are “currently examining complaints against 51 of the 86 school districts in South Carolina.”

The type and amount of allegedly uncompensated work greatly varies for the employees named in each suit. For example, in one suit, a cook/custodian alleges that he was not paid for time that he spent waiting for delivery trucks, cleaning up after sporting events, and performing Saturday work. In another suit, a teacher’s aide claims that she was not properly paid for extra work involved in preparing for and attending PTA meetings, open house activities, and staff development meetings. She also claims that she regularly was required to work during her lunch hour.

The same Mississippi law firm, which refers to itself as the “School Litigation Group,” has filed similar lawsuits against school districts in that state, as well as Alabama, Tennessee, Arkansas, Georgia, and other southern states. 105 of the 152 school districts in Mississippi have paid a combined \$15 to \$20 million dollars to settle the many overtime claims filed against them.

The districts named as defendants in these lawsuits obviously must take steps to defend themselves. All other districts should brace themselves for similar lawsuits. We recommend taking prompt action to assemble time and pay records and conduct a self-audit to evaluate potential exposure to overtime liability.

Reauthorization of IDEA

The Individuals with Disabilities Act (IDEA), originally enacted in 1975, was reauthorized in 1997. The IDEA is now due for another reauthorization. The key issues debated by Congress have centered on full federal funding, improving due process procedures, paperwork reduction, costs associated with special education litigation, discipline, better training for teachers, and the No Child Left Behind Act. The full House has passed legislation to reauthorize the IDEA; however, the Senate’s version of the bill has only recently been approved by a committee and is currently headed to the full Senate for discussion and a vote during July 2003.

The House passed revisions to the IDEA that provide new flexibility and resources to improve early intervention and reduce misidentification of children for special education, paperwork reduction, limits on attorney fees, and elimination of requirements for manifestation hearings. The bill also calls for Congress to pay up to 40 percent of the costs of educating disabled

students by 2011. The proposed Senate version preserves requirements for manifestation hearings, reduces paperwork, limits attorney fees, and modifies the criteria for determining if the school had knowledge that a child is disabled. Also, the proposed Senate bill increases funding but does not specify an appropriation level.

After the Senate passes its bill, a joint committee of the House and Senate will meet to resolve differences between the House and the Senate versions. We will continue to monitor the reauthorization process and provide districts an update as soon as the IDEA is reauthorized.

Court Eases "Preclearance" Standards

In a recent opinion, *Georgia v. Ashcroft*, the United States Supreme Court issued a decision that could make it easier to secure approval from the United States Department of Justice ("DOJ") for changes affecting school board elections or board organization. South Carolina is one of the states still subject to Section 5 of the federal Voting Rights Act of 1965, which requires that all changes in election districts, board size, election dates, candidate qualifications, and similar issues, be approved in advance by the DOJ before they can be implemented. This process is called "preclearance," and is familiar to many school boards that were redistricted following the 2000 census. To be approved, a proposed change must be proven not to be "retrogressive" for racial minorities with respect to their effective use of their voting rights.

In last month's decision, the Supreme Court ruled that Section 5 preclearance requests should be measured by the "totality of the circumstances" of minority voting influence, and not just by the race of persons likely to win the elections. Important to the retrogression inquiry, said the Court, was the possibility that while a new election plan might not preserve the same racial make-up of the elected body, it might offset that result by creating additional "influence districts" or "coalitional districts," in which minority voters might not be in the majority, but nonetheless have sufficient voting clout alone or in coalition with others that their concerns must be addressed by the candidates and their representatives, regardless of the actual race of the candidates or winners of the election. The Court wrote, "[t]he State may choose . . . that it is better to risk having fewer minority representatives in order to achieve greater overall representation of a minority group by increasing the number of representatives sympathetic to the interests of

minority voters," and that, "Section 5 gives States the flexibility to choose one theory of effective representation over the other."

The ability to use alternative theories of effective representation to meet the "totality of the circumstances" inquiry may open possibilities for permissible school board structures. However, it requires careful planning for a sound and complete explanation to the DOJ, since the governmental body proposing to make a change bears the burden of showing that the proposal is not retrogressive.

Legislature Authorizes Furloughs

During the past legislative session, the General Assembly passed a proviso for the 2003-04 fiscal year only, which permits school districts to furlough certain employees in very limited circumstances. We will provide specific guidance regarding this proviso shortly. In the meantime, please call us with any questions.



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