



## Lawyer: City at risk for leaving gate off hinges

By Stephanie Chelf , Staff writer

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METHUEN - By leaving a 1,200-pound gate off its hinges for at least four years on school grounds, the city may find itself liable in the death of an 11-year-boy, the city's lawyer says.

City Solicitor Peter McQuillan's investigation into the Labor Day tragedy that killed Timothy DiLeo, 11, and seriously injured his 8-year-old brother, Andrew, found the city has left itself open to lawsuit.

In his five-page report released yesterday, McQuillan called the lack of documentation on when and why the gate was left leaning up against a brick wall in the Dumpster area of Tenney Grammar School "troubling."

"The fact that the gate was allowed to remain in such a manner for such an extended period of time is inexplicable," McQuillan wrote. "The scarcity of documentation regarding the removal of the gate is troubling."

According to the investigation, the gate was taken off its hinges and left there sometime between Nov. 14, 2000, and Oct. 24, 2003. On Sept. 3, 2007, the gate toppled onto Timothy and Andrew DiLeo while they played in the Dumpster area of the school with their 13-year-old brother, Steven, and friend Brandon LaPorte, 14.

"It is evident that upon (the gate's) removal it remained on the scene up until the time of this incident," McQuillan wrote.

The boys told police they had climbed the gate to sit on top of the brick wall and exchange Pokemon cards. Steven DiLeo and Brandon LaPorte told police they climbed the gate and their weight caused it to topple, landing on Timothy and Andrew DiLeo.

In the report, McQuillan offers his own theory on how the accident happened.

"Given the dimensions and weight of the gate in question a more feasible theory is that both the older boys were sitting atop the wall with feet upon the gate and gaining leverage, began pushing and rocking the gate with their feet until, unexpectedly and tragically, it gave way landing on the victims below," McQuillan wrote.

The DiLeo family's lawyer, Robert Gilbert of Andover, met with McQuillan yesterday to discuss the report. Gilbert did not return a call yesterday to comment on McQuillan's findings. The DiLeo family has not taken any legal action.

The legal ramifications

McQuillan's report states the city could face a negligent charge and also may have violated the child trespassing statute, which holds landowners liable for physical harm to a child when an "artificial condition" exists in an area where children are likely to trespass.

"It will suffice to say that the child trespassing statute is applicable together with a potential action for negligence against the city," McQuillan wrote.

A local legal expert said the city and any outside contractors involved in removing or installing the gate can expect to be held liable for the accident.

"If the city doesn't choose to settle on some level, a lawsuit is highly likely under the circumstances," said Michael Coyne, associate dean at the Massachusetts School of Law in Andover. "It's a pretty straight negligence suit. You allowed a dangerous condition to exist where you knew children would be present."

Coyne said the city will likely look for contractors or others involved in the design, construction and maintenance of the gate.

"If there is a third party that took the gate off its hinges or allowed it to remain there, then (the city) will find that the third party should shoulder some liability," Coyne said.

The city is protected from what could be a multimillion wrongful death suit because of "charitable immunity," which caps damages. However, outside firms or individuals could also be named in a lawsuit, Coyne said.

"A damage claim for a child can be in the millions," Coyne said. "Insurance will cover the city's liability, but there is still enormous expense for attorney fees and to indemnify individuals. Obviously everyone deeply regrets what happened. I don't believe anyone in the city would oppose a reasonable settlement."

In his report, McQuillan interviewed current and former school staff, reviewed police reports, and reviewed all construction documents related to the Tenney Grammar School renovations.

Former Superintendent of Maintenance Joseph Patti said the gate was ordered to be taken off its hinges because it prevented the trash collector from accessing the Dumpster. A company called Olenick Metal Works, Inc., used a torch cut to take the gate off its hinges, according to McQuillan's report. The president of Olenick is now deceased and the company is no longer in business.

According to the report former superintendent Phillip Littlefield and former business Manager John Crafton said they do not recall ever reviewing or signing any purchase orders related to the gate.

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