



STUDENT SAFETY INITIATIVE LEGISLATION

A comprehensive package of legislation, known as the "School Safety Initiative" was recently signed into law by Governor Granholm in late September. The 18 public acts comprising the School Safety Initiative amend various sections of the Revised School Code¹, the Teacher Tenure Act², the Sex Offenders Registration Act³, the Code of Criminal Procedure⁴, and the Child Care Organizations Act⁵, as summarized in the chart below. If you are interested in a more detailed and thorough analysis of the Student Safety Initiative, please e-mail Daniel Martin at dmartin@scholtenfant.com.

Legislation	Section of Code Amended	Summary of Regulatory Effect	Effective Date
PA 121 (SB 617)	SORA 28.733, 28.735, 28.736	Establishes "Student Safety Zones" ("area that lies 1,000 feet or less from school property") and prohibits persons required to register as sex offenders from residing within a student safety zone	1/1/06
PA 122 (SB 606)	CCP 777.11b	Provides sentencing guidelines for failure to register or update sex offender registration information	1/1/06
PA 123 (SB 607)	SORA 28.725	Requires notification if person vacates residence	1/1/06
PA 124 (SB 609)	TTA 38.74, 38.101a, 38.103	Specifies that tenure rights are subject to Sections 1230d and 1535a of the Revised School Code; provides that convictions of certain offenses are deemed to be reasonably and adversely related to ability to serve as teacher and are sufficient grounds for discharge or demotion; changes the definition of demotion to indicate that it does not include a discontinuance of salary pursuant to Section 3 of Article IV	1/1/06
PA 125 (SB 611)	CCP 777.13p	Provides sentencing guidelines for failure of school employee to report being charged or convicted of certain offenses	9/29/05

¹ Act 451 of the Public Acts of 1976, as amended; MCL 380.1-380.1853.

² Act 4 of the Public Acts of 1931 (Exec. Sess.), as amended ; MCL 38.71-38.191.

³ Act 295 of the Public Acts of 1994, as amended; MCL 28.721-28.732.

⁴ Act 175 of the Public Acts of 1927, as amended; MCL 760.1-777.69.

⁵ Act 116 of the Public Acts of 1973, as amended; MCL 722.111-733.128.

PA 126 (SB 129)	CCP 771.2a	Allows court to place an individual convicted of listed offense on probation for minimum of five years, and requires court to condition probation to require that individual not reside, work or loiter within a Student Safety Zone	1/1/06
PA 127 (HB 4932)	SORA 28.733, 28.734	Prohibits persons required to register as sex offenders from working or loitering within a Student Safety Zone	1/1/06
PA 128 (SB 615)	CCOA 722.115f; 722.115g	Requires criminal background checks for licensees, employees and residents over 18 years of age for group day care homes; establishes reporting requirement when persons are arraigned for certain offenses	1/1/06
PA 129 (HB 4402)	RSC 380.1230, 380.1230c	Expands requirement for criminal history checks beyond applicants for positions as teacher or administrator to include any individual seeking full or part-time employment, or who will be assigned to regularly and continuously work under contract in a school; prohibits schools from employing or allowing persons to work under contract with the school if convicted of certain offenses	1/1/06
PA 130 (HB 4928)	RSC 380.1230f, 380.1230g 380.1535a, 380.1535b	Revises the notice procedures for teachers and others with state board approval when charged or convicted with certain criminal offenses; requires discontinuance and escrow of their salaries; requires cooperation between Department of Ed, State Police and IT with respect to automated fingerprinting system; requires schools to conduct criminal background checks on all employees and contract workers who regularly and continuously work with the school (not just applicants, not just teachers and administrators) by July 1, 2008; allows State Police to charge fee for conducting the background checks	1/1/06
PA 131 (HB 4930)	RSC 380.1230d	Requires notification when school employees and contract workers are charged with or convicted of certain crimes	1/1/06
PA 132 (HB 4934)	SORA 28.725, 28.729	Prescribes penalties for persons required to register as a sex offender for failing to register or report	1/1/06
PA 133 (HB 4936)	CCOA amend 722.115, add 722.115c, 722.115d, 722.115e	Requires child care providers to conduct criminal background checks on applicants prior to offer of employment and on all current employees; prohibits employment of individuals convicted of listed offenses; requires notification and reporting when employee charged with certain crimes	1/1/06
PA 134 (HB 4958)	CCP 777.15g	Provides sentencing guidelines for child care or day care center employee's failure to report criminal charges	1/1/06

PA 135 (HB 4937)	CCP 768.27a	Allows use of evidence that a criminal defendant committed similar offenses when person charged with committing a listed offense against a minor	1/1/06
PA 136 (HB 4991)	TTA 38.101	Specifies that tenure rights are subject to 1230d and 1535a of the Revised School Code	1/1/06
PA 137 (SB 83)	State Bd of Ed 388.1009a	Increases the maximum number of members on the Special Education Advisory Committee by 6, going from 27 to 33 members	9/29/05
PA 138 (SB 601)	RSC 380.1230a	Expands requirement for criminal history checks beyond applicants for positions as teacher or administrator to any individual seeking full or part-time employment, or who will be assigned to regularly and continuously work under contract in a school; prohibits schools from employing or allowing persons to work under contract with the school if convicted of certain offenses	1/1/06
PA 139 (SB 616)	CCP 777.11b	Provides sentencing guidelines for violations of Student Safety Zones (persons who are required to register as a sex offender and who live, work, or loiter within 1,000 feet of school property)	1/1/06

Action:

While criminal background checks have been required of certain school district employees for several years, this new package of legislation will require districts to “request the department of state police to conduct a criminal records check through the federal bureau of investigation on an applicant for, or an individual who is hired for, any full or part-time employment or who is assigned to regularly and continuously work under contract in any of its schools.” Additionally, these amendments will require districts to conduct background checks and submit fingerprints for **all persons employed** either full or part time as of January 1, 2006 (not just applicants and new hires) by July 1, 2008. As for substitute teachers or other persons working with more than one district, a district may share results with other district, if the employee/contractor agrees in writing.

The legislation also requires the MDE to work with the State Police and the Department of Information and Technology to maintain an automated fingerprint identification system for the fingerprints collected, to regularly check

these records, for teachers to report charges and convictions to the MDE and district, and other modifications to the rights of teachers under the tenure act to name only a few. These changes will require school districts to review their policies and procedures to assure compliance with these requirements. Districts will ALSO need to review collective bargaining agreements.

Many questions arise regarding the specifics of these requirements, such as who (the employee or the district) is responsible for the cost of the fingerprints and background checks conducted by the State Police, and whether a district must request another background check on teachers, bus drivers, administrators or positions requiring board approval who have just recently been hired, e.g. with in the last year, etc.?

The above is a very brief summary of some of the requirements of the acts, and should not be taken to set forth an exhaustive list of the actions a school district and/or its board will need to take.

MICHIGAN SOCIAL SECURITY NUMBER PRIVACY ACT

The Michigan Social Security Number Privacy Act (“Act”) became effective on March 1, 2005. The purpose of the Act is to establish guidelines for maintaining records that contain social security numbers, to prescribe penalties for violations of the Act, and to provide remedies for non-compliance with the Act. In essence, the Act prohibits disclosure of social security numbers unless otherwise permitted by law, regulation, or rule.

Beginning January 1, 2006, any person who obtains one or more social security numbers in the ordinary course of business must create a privacy policy that ensures confidentiality, prohibits unlawful disclosure, and limits access to information or documents that contain an individual’s social security number. MCL 445.84. For purposes of the Act, a “person” is defined as any “individual, partnership, limited liability company, association, corporation, public or nonpublic elementary or secondary school, trade school, vocational school, community or junior college, college, university, state or local governmental agency or department, or other legal entity.” MCL 445.82(e). The privacy policy, which must be published in an employee handbook, procedures manual, or other similar document, must also describe how to properly dispose of documents that contain social security numbers and must set forth the penalties for violations of the privacy policy.

Generally, the Act prohibits the use of more than four digits of someone’s social security number in any recordkeeping or identifying capacity. But, the Act also contains a broad list of exceptions for use of social security numbers. Any use of four or more sequential digits of a social security number is not a violation of the Act if the use is: (1) authorized or required by state or federal statute, rule, regulation, by court order or rule, or pursuant to legal discovery or process; (2) used by or provided to a Title IV-D agency for child support enforcement or collection; (3) used by or provided to a law enforcement agency, court, or prosecutor as part of a criminal investigation or prosecution. MCL

445.83(2). The Act also excludes the use of all or more than four sequential digits of a social security number for administrative purposes conducted in the ordinary course of business. Administrative use includes things such as: (1) verification of an individual’s identity; (2) investigation of an individual’s claim, credit, criminal or driving history; (3) to detect or prevent identity theft or other crime; (4) to lawfully pursue an individual’s legal rights; or (5) to provide or administer employee benefits. MCL 445.83(3)(a). One notable exception to the Act is that it is not a violation of the Act if a person uses all or more than four sequential digits of a social security number as a primary account number, so long as the use of the social security number began before the effective date of this Act (March 1, 2005) and the use of the social security number is continuous, ongoing, and in the ordinary course of business. If the use of the number is stopped for any reason, then this exception no longer applies. MCL 445.83(3)(b).

Action:

Since the apparent intent of the Act is to limit distribution and publication of social security numbers, the use of social security numbers as identifiers should be eliminated wherever possible. Any new recordkeeping or identification processes should use no more than four digits of a social security number. Existing recordkeeping that utilizes full social security numbers may continue; however, it would be wise to consider reducing the identifying information to just four digits or to consider transitioning to a different identification system. Moreover, access to social security numbers should be limited to human resources personnel. Destruction or shredding of any discarded documents containing social security numbers should be required and any violations of the policy should be incorporated into any disciplinary system. For questions relating to the requirements of the Act or for assistance with reviewing or drafting a privacy policy, contact legal counsel.

DECISION FAVORS SCHOOLS OF CHOICE AGREEMENTS BETWEEN ISDs

A recent decision by the U.S. District Court for the Western District of Michigan affirmed the decision of the Michigan Legislature to require school districts to enter into a written agreement regarding the costs of special education, prior to permitting a student to attend a public school of choice. In *Clark v. Banks*, 2005 WL 2001159 (W.D. Mich. Aug. 17, 2005), the court found that requiring such an agreement between districts in different Intermediate School Districts (“ISDs”) did not discriminate on the basis of disability, but found instead that the requirement is rationally related to the state’s interests in providing a free appropriate public education for students with disabilities and ensuring that school districts are properly funded to accomplish this task.

The Michigan “schools of choice” system is a voluntary program in which each school district determines whether it will accept non-resident applicants for enrollment. The process for enrolling non-resident students is governed by two nearly identical statutes. Section 105 of the State School Aid Act (MCL 388.1705) applies when a school district decides to accept applications from non-resident students who reside in a district within the same ISD; and Section 105c (MCL 388.1705c) applies when a district decides to accept applications from non-resident students who reside in a district located in a contiguous ISD.

Both statutes expressly prohibit a school district from granting or denying enrollment “based on intellectual, academic, artistic, or other ability, talent, or accomplishment, or lack thereof, or based on a mental or physical disability” or “based upon religion, race, color, national origin, sex, height, weight, marital status, or athletic ability or, generally, in violation of state or federal law prohibiting discrimination.” MCL 388.1705(6), (8); MCL 388.1705c(6), (8). Further, both statutes provide that if the number of qualified non-resident applicants does not exceed the number of available positions in the school, grade, or program, then the school district must enroll the eligible non-resident applicants. MCL

388.1705(13); MCL 388.1705c(13). A blind draw is used to fill available positions if the number of qualified non-resident applicants exceeds the number of available positions.

Although the two schools of choice statutes are nearly identical, they differ significantly in one important aspect. Section 105c provides that in order to enroll a non-resident pupil eligible for special education programs and services from a contiguous ISD, the enrolling district and the resident district must enter into a written agreement “for the purpose of providing the pupil with a free appropriate public education.” The written agreement must include, but is not limited to, an agreement on the responsibility for payment of the added costs for special education programs and services for the pupil. Such an agreement is not required to enroll a general education student, nor is such an agreement required if the student eligible for special education programs and services seeks enrollment in a district within the same ISD boundaries as the district where the student resides.

In this case, the student is a 6 year-old child in need of special education services who resides with his mother in the Lansing School District (“Lansing”). The mother is employed in Eaton Rapids and the child attends daycare in that area. Rather than relocate, the parent sought to enroll the student in the Eaton Rapids Public Schools (“Eaton Rapids”) under Michigan’s schools of choice process. Eaton Rapids is located in Eaton Intermediate School District, an ISD contiguous to the child’s district of residence. In June 2004, Eaton Rapids agreed to enroll the student, contingent upon entering into the required agreement with Lansing. On July 1, 2004, Eaton Rapids submitted a proposed agreement to Lansing which stated that Eaton Rapids would enroll the student if Lansing would release the student’s \$6,700 foundation allowance and pay an additional \$18,307 for “costs unique to the student.” Lansing rejected the proposal but expressed its willingness to enter into an agreement which only released the \$6,700 foundation allowance. In rejecting Eaton

Rapids' proposal, Lansing explained that, "the district is not willing to pay the additional cost for a special education program that is already available in the Lansing School District." Eaton Rapids submitted a revised proposal, reducing the estimated costs by approximately \$8,000. Lansing again rejected the proposal. Since the school districts were unable to reach agreement, Eaton Rapids did not enroll the student.

The student, through his mother, sued the superintendents of Lansing School District and Eaton Rapids Public Schools, Governor Jennifer Granholm, and Thomas D. Watkins, Jr., then-Superintendent of Public Instruction. The student claimed that by enacting and enforcing Section 105c (which requires a written agreement between contiguous ISDs) the State violated his rights under the Equal Protection Clause of the United States Constitution, Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act (ADA), and the Michigan Persons with Disabilities Civil Rights Act.

The student first argued that the schools of choice legislation violated the Equal Protection Clause because he was being treated differently than general education students seeking enrollment in a contiguous ISD. The court rejected this argument and noted that while the schools of choice legislation makes a clear distinction between general education and special education students, the Equal Protection Clause is only implicated if the students are "similarly situated." Because school districts are obligated by federal and state mandates to provide special education programs and services to disabled students, and because such programs frequently cost more than educating a general education student, special education students are not similarly situated to general education students.

Moreover, even if special education and general education students were similarly situated, the court held that there was a rational relationship between the requirement for a written agreement and a legitimate governmental interest and thus, the legislation does not violate the equal protection clause. Absent a "suspect

classification," such as race, or an alleged violation of a fundamental right, such as religion, a state statute will generally be upheld against an equal protection challenge. The court noted that mental disability is not a quasi-suspect class requiring a heightened level of scrutiny. The court also explained that the schools of choice legislation met the rational basis test since the intent of the legislature was to ensure that each special education student received a free appropriate public education (FAPE), while at the same time ensuring that school districts are adequately funded to accomplish the task.

In finding a rational relationship between the schools of choice legislation and a legitimate governmental interest, the court reviewed the statutory scheme governing ISD and school district funding. Each ISD must establish a plan for providing special education services to its constituent districts. The court recognized that since there are 57 ISDs and over 500 school districts in Michigan, the provision of services will vary from ISD to ISD. Given the variety of methods by which special education services are provided in each ISD, as well as the variety in the amount and distribution methods of special education funding, the Michigan Legislature reasonably required districts to enter into a written agreement prior to enrolling a special education student from a contiguous ISD. This statutory provision works to ensure the provision of FAPE and sufficient funding to accomplish the task.

The court stressed that the written agreement requirement of Section 105c is triggered by the special education student's residence, not, as the student argued, by his disability. The discrepancy between ISD programs and funding only becomes an issue when a student who is a resident of one ISD seeks enrollment in another ISD. As such, an agreement is not needed between enrolling and resident districts within the same ISD. The court also rejected the student's argument that ISD funding follows the student's enrollment and therefore, there is no need to reach an agreement regarding funding. The court explained that the weighted formulas used to determine

distribution of the foundation allowance and federal special education funds considers enrollment from the previous year. Thus, a portion of the foundation allowance lags behind a student who transfers to another district. For funding purposes, during the first year a student is enrolled in a new ISD, the student is still counted as enrolled in his previous ISD. Therefore, having found a rational relationship for the written agreement requirement, the court dismissed the student's equal protection claims.

The court also dismissed the student's claims under Section 504 of the Rehabilitation Act of 1973, Title II of the ADA, and the Michigan Persons with Disabilities Civil Rights Act. Under those statutes, the student was required to show that the schools of choice legislation discriminated on the basis of disability. Citing two provisions in the schools of choice legislation that expressly prohibit granting or refusing enrollment based on mental or physical disability, the court found the student's claims were without merit. Moreover, the court again stressed that the written agreement requirement for special education students seeking to enroll in a contiguous ISD was due to residency, not disability. As the court pointed out, the student could have transferred to another district within the same ISD and no agreement would have been required.

Action:

This decision protects a district's right (and obligation) to negotiate agreements with a student's resident district for allocation of the costs associated with special education when a district agrees to accept a student from a different, but contiguous ISD, under schools of choice. When making a decision about entering into a written agreement regarding the costs of special education programs and services, districts should not adopt a "blanket" policy.

Instead, the district should make the decision based upon an assessment of its own programs and services, as well as the costs of implementing the student's IEP. In this case, Lansing's decision not to enter into an agreement with Eaton Rapids was based on an assessment of its own programs and services and a reasonable determination that its programs could adequately address the student's needs. Contrary to the student's argument, Lansing did not adopt a "blanket" policy against entering into agreements, but rather, determined on a case-by-case basis whether it could offer adequate programs and services for a particular special education student seeking enrollment in a contiguous ISD.

Care must also be taken to ensure that the required contract is entered into before enrolling the student. If a district were to enroll a student and allow that student to attend school, it may be precluded (and likely is precluded) from seeking a contract for future years. Similarly, once the student is enrolled and attending, a preference attaches for future enrollment. Thus, it is important to assure compliance with the contract requirement before a student is enrolled and permitted to attend.

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**FAILURE TO MEET PAPERWORK REQUIREMENTS RESULTS
IN TERMINATION OF TENURED TEACHER**

Finding that timely and accurate completion of special education paperwork is a crucial component of a special education teacher's job, a Missouri court recently affirmed the discharge of a tenured special education teacher for her inability to properly complete paperwork. Hellman v. Union School District, Case No.ED85171 (MO App 2005).

Charlotte Hellman was employed as a high school special education teacher and provided services primarily to students with learning disabilities or behavior disorders. Her job duties included case management, planning and coordination of students' special education programs, evaluating students and completing their Individualized Education Plans (IEPs). Hellman had been employed by the district since 1988 and during that time her teaching skills had not been challenged. When the district reorganized its special education programs in 2001, school officials discovered that Hellman had failed to properly complete required special education paperwork for the two preceding school years.

During the 2001-2002 school year, the district implemented a "Job Target" plan for Hellman which included two improvement objectives: (1) to complete all required forms and records within required timelines; and (2) assurance that all activities required to complete forms and records met process and compliance standards. To assist Hellman with meeting these objectives, the Director of Special Education held numerous conferences with Hellman, offered verbal and written reminders of relevant due dates, provided samples of correctly completed paperwork, and reviewed the relevant legal requirements for completing paperwork. While Hellman's performance temporarily improved during the school year, she did not maintain continued compliance with the requirements for completing paperwork. Under Missouri tenure law, the district issued a 5-page "notice of deficiency" which contained specific

performance deficiencies largely related to Hellman's failure to complete required paperwork for students assigned to her caseload. The notice expressly warned her that failure to improve her performance could result in dismissal for "willful and persistent violation of Board policy and/or incompetence, inefficiency, and insubordination." By the end of the following school year, Hellman's performance had not improved and she continued to turn in late, inaccurate, or incomplete paperwork. Tenure charges were drafted and submitted, resulting in Hellman's termination.

The Missouri Court of Appeals affirmed the lower court's decision which upheld Hellman's discharge. Hellman did not dispute that case management and the resultant paperwork are "an integral part of a special education teacher's job." Rather, she argued that her paperwork deficiencies did not harm her students or result in parent complaints about her services. Rejecting her arguments, the court reasoned that, "The Board heard ample testimony that the accurate and timely completion of special education paperwork is inextricable from a special education teacher's 'professional teaching duties.'" The court found that the record supported the Board's finding that "viewed in their totality, Ms. Hellman's deficiencies rise to the level of incompetency, inefficiency, and insubordination." Moreover, the court concluded that since local board policy required that district programs and services comply with state and local plans for Part B of the Individuals with Disabilities Education Act (IDEA), Hellman's failure to comply with the IDEA's paperwork requirements "ran afoul of board policy" and also violated state and federal laws. As such, the Board's decision to terminate Hellman was proper.

Action:

While it is important to keep in mind that this case was a tenure appeal under Missouri law and thus not binding in Michigan, it may

provide useful direction for the evaluation and discipline of Michigan teachers. Special education paperwork burdens are faced by teachers throughout the country and Michigan is no exception. The determination that timely and accurate completion of paperwork is

“inextricable” from the special education teacher’s other professional duties was a significant factor in the court’s decision and something for evaluators to consider when assessing the performance of special education teachers.

FERPA FEES

The Family Policy Compliance Office recently summarized the Family Educational Rights and Privacy Act (“FERPA”) regulations pertaining to fees charged by school districts for providing copies of education records. A parent inquired about fees that schools may charge for copies of education records provided under FERPA. Specifically, the issue is whether there is any official guidance that defines what a fee can cover and whether it is permissible for a school to make a profit from the copying fees that they may charge.

FERPA requires a school to provide a parent with the opportunity to inspect and review the education records of their children within 45 days of receiving a request. The FPCO noted that a school is not required to provide a parent with copies of their children’s education records unless failing to do so would effectively prevent the parent from obtaining access to those records. The FPCO suggested an example of this would be where a parent does not live within commuting distance of the school. The FPCO further noted that a school is permitted to provide a parent with a copy of education records in response to a request even if the parent does live within commuting distance to the school, it is just not required to do so.

The FPCO noted that if providing copies of education records is necessary to provide the parent access, a school is permitted to charge a fee for those copies unless the fee would effectively prevent the parent from obtaining access to the records. 34 CFR 99.11(a) provides:

Unless the imposition of a fee effectively prevents a parent or eligible

student from exercising the right to inspect and review the student’s education records, an educational agency or institution may charge a fee for a copy of an education record which is made for the parent or eligible student.

(b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.

The FPCO noted that a school district cannot therefore charge a fee to search for or retrieve the education records. As such, the fee would have to be considered reasonable. The FPCO noted: “We generally think of that as a fee similar to the fee charged by commercial copying services in the area in which the school is located.” The FPCO also noted that “other factors” could affect the fee, but it did not elaborate.

The FPCO noted that the parent making the inquiry lived within commuting distance of the school from which the parent was seeking copies of their child’s education records. The FPCO informed the parent that the school is not required by FERPA to provide the parent with copies of education records in that instance, but is merely required to provide the parent an opportunity to inspect and review the records. The FPCO noted that in such a case, any arrangement between the school and the parent for providing copies of the education records to the parent, including the fee to be charged, would be outside the scope of FERPA.

COMMENTS TO REPORTERS VIOLATE FERPA

A federal compliance officer determined that a school district had violated the IDEA and FERPA when individual board members disclosed information obtained from a student's IEP to reporters and during a talk radio show regarding school vouchers. El Paso County School District No. 11, 44 IDELR 79 (SEA CO 2005).

The incident in question arose from various e-mails and purchase orders disclosed between the superintendent and members of the school board of education. The purchase orders involved a contract with a private reading specialist who provided services to a special needs child. The purchase order did not contain the name of the child, but did include information that the services were for a student with special needs, the name of the provider and the contract amount. Following the release of this information to the school board members, individual members further released the information by way of a letter to the editor published in a local newspaper, and discussions held by board members on a call-in talk radio show discussing school vouchers. The parent of the child receiving the services referenced in the purchase order filed a complaint claiming that the school district violated the IDEA and FERPA by releasing this information to the public.

The federal compliance officer found that the purchase order was an educational record. This purchase order, taken in conjunction with the student's IEP which required the provision of the service, set forth personally identifiable information which could only be released to the public with prior written consent of the parent. The federal compliance officer found that the initial disclosure to school board members fell within the "legitimate educational interest" exception to FERPA. However, the subsequent disclosure by individual board members was a violation. "While the federal compliance officer

does not have authority to address the actions of individual school board members as individuals,

he does have authority to address their actions, under the IDEA and FERPA as incorporated in the IDEA, when they act in their capacity as school board and school district representatives, whether or not these actions are taken with the authority of other school board members or the school district." The federal compliance officer went on to state that:

"At a minimum, the school district, and the school board, has a responsibility to not release information under the 'legitimate educational interests' exception of FERPA when they know, or should know, that the person to whom they release it is likely to violate the provisions of the IDEA and FEERPA. And, at a minimum, if such violation occurs, the school district, and the school board, has a responsibility to take sufficient appropriate action to limit its reoccurrence."

Action: The question of what constitutes an education record for purposes of FERPA is, at times, a difficult one to answer. While some items are clearly education records, it is also a violation of FERPA to release information from education records where that information "would make the student's identity easily traceable." Since the information released to the newspaper regarding the financial obligations of the district were derived from records maintained by the district, such as receipts or vouchers, the federal compliance officer found that the information was directly related to the student and therefore a part of his education record.

The federal compliance officer also found that the school board members, even though they acted individually, obtained the information as school board members and inappropriately

released it thereafter. While the initial disclosure to board members was appropriate, the further disclosure to reporters and radio shows was not, and the school district could be held accountable for the actions of its board members regardless of whether they acted with authority of the board or not. District employees, and board members, must be careful that comments made and information being released in the public media are not obtained

from students' education records. If it is, disclosure is inappropriate. The best advice is, when in doubt, make no comments.

FYI ON FOIA

A recent unpublished decision of the Michigan Court of Appeals presents an opportunity to review aspects under the Michigan Freedom of Information Act ("FOIA") that typically fall below the radar: subscription requests and attorney fees for a prevailing party in a lawsuit.

Section 3 of the FOIA provides that a "person has a right to subscribe to future issuances of public records that are created, issued, or disseminated on a regular basis." Generally, a subscription is valid for a six month period, but may be renewable. A key question in responding to subscription requests is what does it mean for a public record to be "created, issued or disseminated on a regular basis." Some records, such as meeting agendas and meeting minutes, clearly fall within a subscription request. Other records are more questionable.

In Gendler v. Flint Community Schools (unpublished), a vocational education teacher made various FOIA requests to the school district, including a request for the personnel file of a principal and a request described as a subscription for lesson plans and grade information. The school district denied the subscription request on the grounds that the items sought were not "disseminated on a regular basis." The district also originally claimed, based on its attorney's advice, that most of the principal's personnel file was

exempt from disclosure. The teacher appealed the denials to circuit court. Shortly after the appeal was filed, the district's attorney reconsidered whether the principal's personnel file should be exempt from disclosure, and advised the school district to disclose the personnel file, which it did.

The trial court found in favor of the school district. The trial court ruled that with respect to the request for a subscription to lesson plans and grade information, the school district complied to the extent required by law. With respect to the principal's file, the trial court found that the principal's personnel file was not turned over as a result of the lawsuit being filed - i.e., that the lawsuit was not the cause of the disclosure of the personnel file. The teacher appealed the decision to the Michigan Court of Appeals.

The Court of Appeals remanded the case back to the trial court to make specific findings of fact regarding whether each of the requested subscription items were provided and, if not, why those items did or did not qualify as documents that are "created, issued, or disseminated" on a regular, predictable basis and are therefore subject to disclosure under FOIA as part of a subscription request. With respect to the principal's personnel file, the Court of Appeals found that no appellate relief is appropriate because the trial court's decision was not clearly erroneous.

**BOARD OF EDUCATION MAY HOLD EXPULSION HEARING PRIOR
TO MANIFESTATION DETERMINATION REVIEW MEETING**

A hearing officer ruled that a board of education may hold an expulsion hearing prior to completing a manifestation determination review meeting of a student not yet eligible for special education services, but entitled to the protections of the IDEA, so long as the board delays imposition of the expulsion until following the MDR. McKinney Independent School District, 44 IDELR 88 (SEA TX 2005).

R.J., a sixth grade student eligible for accommodations under Section 504, set a fire in a school bathroom. R.J. had been evaluated in the third grade to determine whether or not he was eligible as a student with a disability under the IDEA. At that time, the school district determined that he was ineligible under IDEA, but that R.J. qualified under Section 504. When R.J. was in the sixth grade, the school district suspended him for five school days for kicking in the door on a school bathroom stall. Following this suspension, the student's mother requested by e-mail that the school district evaluate R.J. to determine whether or not he was eligible as a student with a disability under the IDEA. After receiving this request on November 30, 2004, the school district scheduled a meeting to consider the evaluation of R.J. The meeting was scheduled for December 9, 2004. However, on December 3, 2004, prior to the school district holding the evaluation meeting, R.J. set a fire in a school bathroom, which resulted in his arrest and another school suspension. On December 6, the assistant principal notified R.J.'s parents that he could not return to school since he was under suspension. The parents withdrew R.J. from school, had some evaluations performed at their own expense, and enrolled R.J. in a private school.

On December 13, 2004, the school district notified R.J.'s parents that it would seek expulsion of R.J. for the fire. The district scheduled a MDR under Section 504 and a

board expulsion hearing for December 16 and 17. At the request of the parents' attorney, the meetings were postponed until after the Christmas break. Ultimately, the expulsion hearing was scheduled for January 13, 2005, and the MDR was postponed while the parties attempted to identify an agreeable date. The school district attempted to schedule the MDR on several occasions, conditioned on the parents signing consent for an evaluation. The parents have continually refused to sign the consent for evaluation or make the student available.

On January 13, 2005, the expulsion hearing was held, and the hearing officer found that R.J. was guilty of attempted arson and ordered that R.J. be expelled for 180 school days. The parents appealed the hearing officer decision to the school board of education, and requested that the expulsion be postponed until after the MDR was held. The board of education granted the parents' request to postpone imposition of the expulsion.

The parents filed a request for a due process hearing, identifying several issues. The first issue was whether the MDR was to be conducted pursuant to Section 504 or under the IDEA. The hearing officer determined that since the parents had requested an evaluation in writing (by e-mail) before the student committed the misconduct, the school district was deemed to have knowledge that the student may be a student with a disability. Therefore, R.J. was protected by the "not yet eligible" provisions of the IDEA, and the MDR must take place in accordance with the IDEA.

The parents also argued that the school district violated the IDEA by not holding the MDR within ten school days of its decision to expel R.J. The hearing officer rejected this argument, stating that the parents had originally agreed to postpone the MDR, and thereby waived this requirement, at least temporarily. Further, the hearing officer found that the IDEA

required an evaluation to be completed prior to the MDR being held. Since the parents had refused to provide consent for the evaluation, they had effectively precluded the district from holding the MDR, and thus a matter for which the school district could not be held accountable.

The last issue was whether the IDEA required that a MDR be held prior to the board holding an expulsion hearing. Citing Farrin v. Main School Administrative District No. 59 (U.S. Dist. Ct. Maine 2001), the hearing officer found that nothing in the IDEA required a school district to hold the MDR prior to the board expulsion hearing.

Action:

A student is able to claim the protections of the IDEA if the school district “knew or should have known” that the student was a student with a disability at the time a misconduct occurs. A school district is deemed to have knowledge that a student is a student with a disability if: (a) the parents has requested an evaluation in writing, (b) the parents has expressed concern that the student may be a student with a disability to the student’s teacher or the special education director, or (c) a teacher has expressed concern over a specific pattern of behavior to the special education director. In this case, since the parents had requested an evaluation by e-mail,

the district was deemed to know that the student was a student with a disability, and thus he could invoke the protections of the IDEA. Therefore, prior to making a “change in placement” for more than ten school days, the school district was required to hold a MDR. Similarly, since the parents had requested an evaluation, the district was obligated to evaluate the student. Citing Doe v. Maher (a companion case to Honig v. Doe), the hearing officer made clear that an IEP team needed the evaluations completed prior to being able to hold a MDR, and that parents may not hold a district accountable where they refuse to permit the school to evaluate.

In addressing the timing of the MDR, the hearing officer stated that the board expulsion hearing could precede the MDR. It should be noted that this result is conditioned upon the facts of this case. In particular, the board had delayed imposition of the expulsion pending completion of the MDR. Thus, while there is no requirement in the IDEA that a MDR be held prior to the board’s expulsion hearing, a district is not permitted to impose a “change in placement” (imposition of the expulsion) until after the MDR has been held and it has been determined that the behavior is not a manifestation of the student’s disability. Had the school district imposed the expulsion, a different result would likely have occurred.

FAILURE TO PROVIDE FAPE RESULTS IN RECORD SETTLEMENT

In what is believed to be a record payment for a special education case, the Manhattan Beach (Calif.) Unified School District and the California Department of Education (CDE) agreed to pay more than \$6.7 million to a family that claimed the two agencies failed to provide FAPE for their son who has autism.

The disagreement between the parents and the district began in January 1999 when the parents requested a due process hearing, claiming that the district failed to provide their

child with FAPE during the fourth grade. The student’s IEP at that time included proper reading instruction, language instruction, and socialization interventions. However, due to a very tight budget, the district did not provide the services identified in the student’s IEP. The hearing officer, agreeing with the family that the district should have provided the services, ordered the district to provide compensatory education for the services it did not provide. However, the district failed to comply with the hearing officer’s order and the parents then sued in federal court, seeking to enforce the hearing officer’s decision. The judge in the case

dismissed it on the grounds that the parents had failed to first exhaust administrative remedies by filing a compliance complaint with the CDE.

The parents appealed the dismissal and at the same time they filed a complaint with the CDE. In March 2001, the CDE found that the district had not complied with the hearing officer's decision and ordered compliance with that decision and additional compensatory education. However, the district failed to comply with the corrective actions set forth in the CDE Compliance Report. The Ninth Circuit reversed the dismissal of the parent's lawsuit and remanded the case to the district court for further proceedings. The parents then amended their complaint and claimed that the CDE failed to take appropriate steps to force the district to comply with the hearing officer's decision and the CDE Compliance Report.

In accepting the settlement agreement, the judge stated that the district's failure to provide FAPE "resulted in permanent damage to [the student's] academic, physical, and social/emotional well-being and has impaired his ability to function at the level at which he could have reasonably been expected to function." He further criticized the district for using "the power it has over [the student's] education as a means of retaliating against the [parents] for their criticism of, and challenges to, the district." Moreover, the judge rebuked the CDE for its failure to exercise appropriate oversight over the district's failure to comply with the hearing officer's order and the CDE corrective action. In an interim order, the judge transferred control of the student's education from the district and CDE to a Special Master. Under the settlement agreement, the district and CDE were ordered to set aside money for the education of the student at the direction of the Special Master.

In this case, the consequences for failing to provide FAPE were substantial: (a) \$1.13 million will be placed in the Special Master's fund, to ensure services for the student will continue for the next two years; (b) \$1.58 million will be deposited into a special needs trust for the student; (c) \$2.4 million will go into a trust for the student's family; and (d) \$1.65

million in attorney fees will be paid to the law firm representing the parents.

Action:

The lawsuit could have been avoided if the district had simply complied with the state orders to provide services for the student. When an IEP team decides on the services to be provided to meet a student's needs, the IEP must be implemented. When a hearing officer or court makes a decision favoring the student, the district must implement that decision. Budgetary constraints are no defense; simply put, failure to provide IEP services will result in compensatory education, and may cost more in the long run. To avoid this kind of problem, it is important for IEP teams to discuss how the provision of IEP services will be carried out, paying particular attention to IEP goals that are to be implemented and monitored by more than one person. While it is tempting to keep costs down when budgets are tight by reducing services (or simply not providing those in the child's IEP), the cost of providing such services is often less than the costs to go to a hearing or court.

"Education is not the filling of a bucket, but the lighting of a fire."

-W.B. Yeats

RESPONSIBILITY FOR REEVALUATIONS

IDEA 2004 provides that a reevaluation of each child with a disability must be conducted if the needs of the child warrant reevaluation, or if a parent or teacher requests a reevaluation. Such an evaluation must occur at least once every three years unless the parent and the district agree otherwise. 20 U.S.C. 1414(a)(2). However, recent decisions have emphasized that in some cases, the district's responsibility for conducting reevaluations is not limitless.

In Herbin v. District of Columbia, 362 F. Supp. 254 (U.S. Dist. Ct., DC, 2005), the court found that because a student's evaluations were current and there was no emergency need for the district to conduct a reevaluation, a four-month delay in conducting a reevaluation was not unreasonable. In September 2001, the student was evaluated and found eligible for special education services as a student with a learning disability and an IEP was developed. Four months later, following repeated disciplinary problems and concerns about the student's ability to "achieve academically at the same rate as his peers," the parent requested that the district conduct a "comprehensive reevaluation of the student." When the district failed to respond within 30-calendar days (as requested by the parent), the parent filed a due process hearing request, alleging that the district

denied the student FAPE when it failed to complete new evaluations within a 30-day period. In settlement of the matter, the district offered to reevaluate the student and reconvene the IEP team by May. However, the parent was unwilling to agree to any resolution without a "finding on the record" that the student had been denied FAPE.

The District Court agreed with the local hearing officer's findings that the IDEA places no time limits on when a school system must complete reevaluations and that the existence of current evaluations, the lack of emergency

conditions, and failure of the parent to provide reasons for the requested evaluation justified the delay. The hearing officer further noted that the parent did not challenge the adequacy of the current evaluations or the appropriateness of the placement. Rather, the parent contended that new assessments were needed because the student continued to have behavioral and academic problems. Explaining that although "protracted delays" in responding to requests for reevaluations should be avoided, in this case, the delay was not unreasonable because "the more current an evaluation and IEP determination, the less likely that a delay in responding to the reevaluation request will be prejudicial or injurious."

However, the court disagreed with the hearing officer's interpretation that a school district "is not obligated to complete new evaluations upon request" without "some showing" that "conditions warrant" a new evaluation. Instead, the court found that the statute expressly requires a showing of conditions for a three-year reevaluation (if not requested by a parent or agency), but omits that requirement for parental requests. Thus, imposing such a requirement (i.e., "some showing") is not permitted by statute.

In Owen J. Roberts School District, 43 IDELR 266 (SEA, Pa., 2005), the parents were denied reimbursement for an Independent Educational Evaluation (IEE) because they "effectively precluded" the district from exercising its responsibility for conducting a triennial reevaluation of the student. In this case, at the time the triennial reevaluation for the student was due, the parents unilaterally made their own arrangements for an evaluation, failed to inform the district of such evaluation, and then refused to give the district permission to conduct its own evaluations. Instead, the parents offered the results of the IEE for consideration by the IEP team. In this case, the parents did not disagree with the District's evaluation, they

simply “precluded” the district from completing its own evaluations. Thus, while the district was required to consider the results of the IEE, they were not required to adopt the findings, nor was the district required to pay for the IEE.

Action:

Any request for a reevaluation should not be ignored. However, neither IDEA, nor the Michigan Administrative Rules for Special Education, identify specific timelines for completing reevaluations. Each request must be considered on a case-by-case basis, taking into account the facts and circumstances surrounding

the request. Districts have an obligation to conduct an evaluation at least once every three years, or when “conditions warrant” or upon parent or teacher request. The language of IDEA 2004 limits reevaluations, including those requested by parents, to not more than one time each year, unless the district and parents agree otherwise. Also, while a district must consider the results of an IEE, it is not required to pay for the evaluation(s) if it has been denied the opportunity to fulfill its statutory obligation for conducting the reevaluation.

HIGH COURT DECLINES TO REVIEW AUTISM METHODOLOGY DISPUTE

The U.S. Supreme Court, in deciding not to review Deal v. Hamilton Community Schools, 392 F. 3d 840 (6th Cir. 2004), *cert. denied*, 2005 U.S. LEXIS 7325, leaves intact the decision of the Sixth Circuit Court of Appeals which found that the school district had committed both procedural and substantive violations of IDEA when it predetermined the student’s educational plan.

Deal, discussed in the Winter 2005 School Law Update, is a departure from a long line of cases decided in the Sixth Circuit. Prior to this decision, the Sixth Circuit had long held that educational methodology is a matter left to the discretion of the school district, so long as the student receives FAPE. *See, inter alia*, Burilovich v. Bd. of Ed. of Lincoln Consolidated Schools, 208 F.3d 560 (6th Cir. 2000); Renner v. Ann Arbor Public Schools, 185 F.3d 635 (6th Cir. 1999). The court, while acknowledging that the Sixth Circuit case law adopted the U. S. Supreme Court’s analysis in Rowley (which holds that the IDEA requires an education which is reasonably calculated to enable the child to derive educational benefit), nonetheless focused on the disagreement regarding the level of education that must be provided to a disabled child and concluded that a “meaningful

educational benefit” approach must be used to determine whether an IEP confers the appropriate amount of educational benefit. Relying on testimony relative to the research supporting Lovaas-style programming for students with autism and citing to cases primarily from the Third Circuit, the court stated

that, “there is a point at which the difference in outcome between two methods can be so great that provision of the lesser program could amount to a denial of FAPE.” The court, in adopting the “meaningful benefit” standard seems to imply that districts must provide an education which is something more than the Rowley “educational benefit” test, and which will enable a student to become self-sufficient, “especially where self-sufficiency is a realistic goal for a particular child.”

This case seems to abandon nearly two decades of Sixth Circuit precedence, both as to a district’s right to select educational methodology and the “level” of educational programming required to provide FAPE. This decision highlights the need for a district to collect appropriate data regarding student progress in its programs. It is also important that districts fully explain the rationale for choosing one

methodology over another in the IEP. As evidenced by cases in other jurisdictions, issues surrounding predetermination and student progress are areas ripe for challenges to a school district's special education programs and services. See, Brown v. Bartholomew Consolidated School Corporation, 43 IDELR 60 (S.D. Indiana, 2005); KA v. Charlotte Mecklenburg Bd. of Educ., 43 IDELR 160 (WD

NC 2005); DF v. Ramapo Central School District, 43 IDELR 56 (SD of NY 2004). How Deal will reshape Sixth Circuit decisions relative to appropriate education for students with disabilities remains to be seen.

STUDENT DISCIPLINE: WHAT PROCESS IS "DUE"?

When it comes to student discipline, how much due process is due? The inescapable answer continues to be: It depends! Courts have consistently recognized "the flexibility of the Due Process Clause," with the facts and circumstances of each case affecting the outcome.

The U.S. Court of Appeals for the Sixth Circuit recently considered several procedural due process issues in Flaim v. Medical College of Ohio, et al. Although the case involved a college student, the legal principles have equal application to the discipline of students of any age or grade level.

Flaim was a third-year medical student who was arrested on multiple drug charges and convicted of a single felony drug offense. The college's disciplinary proceedings resulted in the student's expulsion. In response, the student filed a lawsuit in the federal district court alleging violation of his procedural due process rights. On motion by the college, the federal court dismissed the complaint and the student appealed to the Sixth Circuit. In affirming the decision of the district court, the Court of Appeals analyzed extensively the student's procedural due process rights in relation to the expulsion process having been followed by the college. The college's process did not allow the student to effectively use legal counsel, did not afford the student an opportunity to cross-examine the college's fundamental witness (i.e. the arresting officer), did not include any written

findings or a statement of the reasons for expulsion, and did not provide for any internal appeal of the decision.

In evaluating the student's claims, the Court of Appeals referred to the basic requirements of due process as these requirements have consistently been articulated by the U.S. Supreme Court in Goss v. Lopez and several other subsequent decisions. Based on these decisions, the two fundamental due process requirements remain: (1) notice, and (2) an opportunity to be heard.

In this case, the court concluded that the student well understood the charges against him (i.e. conviction of a felony drug offense) and that he therefore had sufficient notice of the reason for disciplinary action and sufficient notice of the facts and proofs in support of the charges. After all, the student had just completed criminal proceedings involving the same charges. At the disciplinary hearing, the college produced the arresting police officer who testified extensively concerning the facts in support of the drug charges. During this proceeding, the student was allowed to have his attorney present, but was not allowed to confer with the attorney; and neither the student nor the attorney was allowed to cross-examine the arresting officer. Notwithstanding the absence of an opportunity for cross-examination, the court concluded that the student had more than ample opportunity to respond to the charges and to have his story heard by the disciplinary

committee. In this regard, the disciplinary committee questioned the student extensively and otherwise enabled the student to respond, on his own behalf, to the charges against him.

Although the student was allowed to be accompanied by legal counsel at the disciplinary proceeding, the attorney was not allowed to participate in the proceeding or even allowed to consult with the student during the proceeding. Nevertheless, the court concluded that, under the circumstances, representation by legal counsel was not necessary to satisfy due process requirements. Because the college was not represented by legal counsel at the disciplinary proceeding, and because the proceeding did not involve complex legal issues or substantial discrepancies in testimony, representation by legal counsel was not required. The suggestion remains, however, that representation by legal counsel may be appropriate, if not required, in order to satisfy due process requirements under different facts or circumstances.

Relying upon various U.S. Supreme Court decisions, the Court of Appeals in Flaim v. Medical College of Ohio, et al. reiterated the Supreme Court's instruction to the effect that, in determining the amount of due process required in any given case or situation, courts are to look at three factors: (1) the seriousness of the charge

and potential sanctions, (2) the likelihood of error and the benefit of providing additional procedural safeguards, and (3) the public or governmental burden resulting from such additional procedures or safeguards, etc.

In this case, the court concluded that the student well understood the charges against him, that he had an adequate opportunity to respond to the charges on his own behalf, that he understood the reason for his expulsion (even in the absence of written notice confirming the same), and that additional appeals or other safeguards would cause an undue burden to the college and were not necessary to afford the student his constitutional due process entitlement.

While it is perhaps axiomatic that students seeking to embark on a medical career ought not be acknowledged and continuing drug offenders, the fact remains that the Due Process Clause continues to be a flexible standard and that the specific procedural requirements necessary to achieve both "adequate notice" and an "adequate opportunity to respond" may vary depending upon the facts and circumstances of each case or situation.

SCHOOL DISTRICT LIABLE FOR IGNORING PEER HARASSMENT

A school district was held liable for its deliberate indifference to pervasive, severe, disability-based harassment by a peer that effectively deprived a disabled student access to the school's resources and opportunities. In K.M., on behalf of D.G. v. Hyde Park Central School District, 381 F. Supp. 2d 343 (S.D.N.Y. 2005), the parent of a student with a disability brought suit on behalf of her disabled child against the school district. The parent claimed that D.G. suffered disability-based peer-to-peer harassment throughout the school year and that the district's failure to intervene amounted to

discrimination in violation of Section 504 and Title II of the American's with Disabilities Act. D.G. was a 13-year-old eighth-grader diagnosed with Pervasive Developmental Disorder and dyslexia with normal intelligence. The parent alleged that D.G. was the victim of repeated instances of being called "stupid," "idiot," "retard," and other disability-related insults and acts of physical aggression and intimidation while in school and on the school bus, specifically, (1) D.G. was thrown to the ground, "body slammed," and taunted by several students one day; (2) D.G. was beaten with his

own binder between classes on another occasion; (3) D.G. was subjected to “disability-related slurs” and his school books were thrown in the garbage in the cafeteria on five to eight occasions; (4) a student called D.G. a “retard” and started a fist fight with him; (5) another student took D.G.’s planner on another occasion; and (6) two students taunted and hit D.G. on an afternoon bus ride. D.G. and/or his mother promptly reported each of these incidents to school officials but that no action was taken to protect D.G. from further harassment. The parent alleged that D.G. responded to the long-term harassment with suicidal ideation and by not returning to school for the remaining 7 months of the school year (instead receiving a home tutor from the district).

The district denied many of the parent’s allegations and moved for summary judgment, but the court denied such relief. The court held that “a school district’s deliberate indifference to pervasive, severe disability-based harassment that effectively deprived a disabled student of access to the school’s resources and opportunities would be actionable under Section 504 and Title II.” The court indicated that “deliberate indifference” includes inaction that is “clearly unreasonable in light of known circumstances.” The court clarified that a school district sued for peer-to-peer harassment is not held liable for the actions of the harassing students; rather, the district is held liable for its

own deliberate indifference to the acts of the harassing students. The court distinguished simple acts of teasing and name-calling, holding that, in order to be subjected to liability, the harassment at issue must be “serious enough to have the systemic effect of denying the victim equal access to an educational program or activity.”

Applying these principles to the case before it, the court found that a reasonable juror, looking at the facts referenced above, could conclude that D.G. was subjected to severe and pervasive peer abuse, that this abuse was known to teachers and administrators in the district, and that it so altered the conditions of D.G.’s school experience that he felt he could not attend school for the better part of the year.

Action:

Every district must have a bullying policy. All districts must also have harassment policies; but if you don’t follow your policies, or fail to adequately document your efforts to address peer-to-peer harassment, the district may be held liable. All district employees, especially teachers and building principals or assistant principals, must be on the lookout for students harassing others and take appropriate action to report and respond.

COURTS DIFFER AS TO ACCESS TO STUDENT RECORDS BY PROTECTION AND ADVOCACY GROUPS

Potentially conflicting interpretations of the Protection and Advocacy for Individuals with Mental Illness Act of 1986 (“PAIMI”), the Developmental Disabilities Assistance and Bill of Rights Act (“DD Act”), and the Protection and Advocacy of Individual Rights Act (“PAIR”) were evident in two recent cases, Wisconsin Coalition for Advocacy, Inc. v. State of Wisconsin Department of Public Instruction, 44 IDELR 35 (W.D. Wis. 2005) and Connecticut Office of Protection and Advocacy

for Persons with Disabilities v. Hartford Board of Education, 44 IDELR 64 (D. Conn. 2005).

In the case in Wisconsin, the plaintiff Wisconsin Coalition for Advocacy brought suit against the State of Wisconsin Department of Public Instruction seeking to acquire access to confidential records relating to undisclosed students who had been placed in a “seclusion room” within a particular school. The defendant had produced records relating to its use of the

seclusion room, but redacted the names of several of the individual students who had been placed in the seclusion room. The plaintiff wanted unredacted records so that it could contact the students and their families in investigating potential abuse. The court held that, pursuant to PAIMI, the DD Act, and PAIR, the plaintiff was not entitled to records relating to the seclusion room unless plaintiff could first show that it had the authorization of the individual students or their legal representatives to seek such information. The court held that the plaintiff could have advertised its services to the community in order to encourage people to come forward with specific complaints.

A more comprehensive view of the applicable statutes was evident in the case in Connecticut, with a different result. In the case from Connecticut, the plaintiff State of Connecticut Office of Protection and Advocacy for Persons with Disabilities sought directory information (i.e., the names and contact information for students and their parents) of students attending the Hartford Transitional Learning Academy (“HTLA”). The plaintiff had received complaints that unidentified students had been subjected to inappropriate restraint and seclusion in the HTLA, and the plaintiff wanted the names and contact information for the attending students and their parents so that plaintiff could obtain their permission and seek records to further investigate potential abuses.

The district court in Connecticut held that the plaintiff was entitled to such directory information. The court held that with this directory information, the plaintiff could then contact the parents or legal guardians of the students and attempt to obtain permission to seek further records. In this way, production of the directory information, the court held, allowed the plaintiff advocacy association to carry out its purpose under the statutes without running afoul of the confidentiality requirements of FERPA or IDEA.

Action:

Recently, Michigan Protection and Advocacy has been seeking access to student records relating to seclusion and use of restraint. It is unclear how these cases may impact those efforts, or how either of these cases may fare on appeal.

These two cases are not necessarily in conflict. It is possible that in the case out of Wisconsin, the plaintiff might have obtained a different result had it chosen to request directory information from the defendant district as to the names and contact information of all of the students attending the particular school at issue. In this way, the plaintiff advocacy organization might have then used that information to contact all of the students and their parents, determine if any had specific complaints about being placed in the seclusion room, and, if so, seek permission from those students and their legal representatives for the release of the specific records relating to those students’ placement in the seclusion room.

<p>COURT ADDRESSES STATUTE OF LIMITATIONS</p>
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In a recent case, the 6th Circuit Court of Appeals applied a 2 year statute of limitations for actions premised on violation of the IDEA. Cavanaugh v Cardinal Local School District, 44 IDELR 31 (6th Cir., 2005). In applying the 2 year statute of limitations, the court, applying the provisions of IDEA-97, reasoned that since there was no limitation period set forth in the statute, the most analogous state limitation period was to be applied. Stating that “compensatory” claims were akin to actions for personal injury, the court adopted the Ohio state statute for personal injury actions, being 2 years. Under the provisions of IDEA 2004, however, the selection of analogous state statutes will not be needed, as the IDEA 2004 sets forth a 2 year statute of limitations which will be applied unless the state sets forth a different time period. There are situations where the limitations period may be inapplicable, which will still need to be applied on a case-by case basis.

In Goldring v. District of Columbia Public Schools, 43 IDELR 241 (DC Cir., 2005) the District of Columbia Circuit Court of Appeals held that expert witness fees were not available as part of the costs awarded to a prevailing parent in an IDEA matter. In doing so, the DC Circuit joins the 7th Circuit and the 8th Circuit in holding that expert fees are not recoverable. The 2nd Circuit and the 3rd Circuit, on the other hand, have held that they are. The 6th Circuit has not yet issued a decision on this specific issue.

In a similar vein, the US district court of Hawai'i has held that attorney fees incurred in a family court proceeding, even if the underlying issues had their origin in the requirements of IDEA, were not recoverable under the attorney fees provisions of the IDEA. Melodee H. and John H. v. Dept. of Ed, State of Hawaii, 43 IDELR 216 (Dist. Ct., HI., 2005).

COURTS CONTINUE TO LOOK TO ACADEMIC PERFORMANCE AND PROGRESS

Academic progress and achievement of students, while having always been important, have taken on more importance given the requirements of NCLB and the recent reauthorization of IDEA. Courts continue to look at academic achievement and progress as an important factor in determining eligibility for services, and determining whether a student has been provided a free appropriate public education.

In Mr. and Mrs. I v. Maine School Administrative District No. 55, 43 IDELR 197 (D.C. Me., 2005) a magistrate judge found that a student was not eligible for special education services because the disability did not "adversely affect" educational performance. In that case, a student diagnosed with Aspergers Syndrome, depression and anxiety achieved high academic grades, was well behaved and performed well in the educational environment. Noting that the IDEA does not define "adversely affects educational performance," the judge found that the phrase included more than just academics, but instead looked to a student's non-academic needs such as daily living skills, mobility and other social aspects. Even though the student had been diagnosed with depression, anxiety and Aspergers Syndrome, a diagnosis

alone does not confer eligibility. Further, even though the student attempted suicide, the judge found that a "limited period during which there is deterioration in a student's social skills and conduct as well as academic performance" was not sufficient to constitute an adverse educational affect.

Likewise, where a student is already eligible for special education, the courts continue to look at academic performance and progress as one important factor in determining whether the student has been provided a FAPE. In Grant by Sunderlin v Independent School District No. 11, 43 IDELR 219 (D.C. Mn., 2005) the federal court stated that whether a student has received educational benefit is typically determined by looking at whether the student made progress.

In that case, the judge found that the student grade equivalency score increase on the Gates-MacGinity reading tests from 3.8 to 4.1 over the 2000-2001 school year, as well as an increase in standard scores on the Woodcock Johnson Revised Broad Reading test from 87 in the 4th grade to 89 in the sixth grade showed that the student made progress and did not require 1:1 reading instruction in order to receive a FAPE.

Scholten Fant will be providing a workshop regarding the final regulations for IDEA in early March, 2006. Please email your interest in attending or date suggestions to mbevins@sholtenfant.com.