



ONE-DAY IN-SCHOOL SUSPENSION
FOUND DE MINIMIS

In *Laney v Wilson County Board of Education, et al.*, 501 F3d 577 (6th Cir., 2007) the U.S. Court of Appeals for the Sixth Circuit found a student's one-day in-school suspension to be a mere *de minimis* deprivation of the Due Process Clause, which did not implicate procedural due process protections under the Fourteenth Amendment.

The one-day in-school suspension resulted from the eighth grade student's violation of the school district's Code of Conduct, which prohibited personal communications devices on school property during school hours. When the student's cell phone rang during class, it was temporarily confiscated, and the student received a one-day in-school suspension. The school did not provide the student "rudimentary due process" before imposing suspension. Instead, the notice of suspension was sent home with the student after the suspension had been served.

Because neither the student nor her parents were provided notice and an opportunity to be heard prior to the student's suspension, the student's father filed a Section 1983 claim against the school principals and the board. The claim alleged the school officials violated the Fourteenth Amendment by depriving the student of "... life, liberty, or property without due process of law" when they failed to give notification and an opportunity to be heard prior to imposing the one-day in-school suspension.

The Sixth Circuit began its analysis to the U.S. Supreme Court's 1975 landmark decision in *Goss v Lopez*. In *Goss*, the Court held that students facing ten-day suspensions from school were entitled to Due Process Clause protection because they were deprived of two rights - i.e. a "property" interest in receiving educational benefits and a "liberty" interest in their reputations. The Sixth Circuit had to determine whether a one-day in-school suspension deprived a student of either a property or liberty interest.

Entitlement to a free public education was found in *Goss* to be a "property" interest that should not be withdrawn absent fair procedures to determine whether the misconduct had occurred. Furthermore, *Goss* held that a student's suspension from school could be detrimental to a student's "liberty" (i.e. to the student's "good name, reputation, honor, or integrity") and should not occur without due process.

Goss dealt with ten-day suspensions involving a student's separation and exclusion from school and the educational process. In *Laney*, however, the student was not excluded from school. In fact, her one-day in-school suspension, although served in administrative offices and out of the classroom, required that she complete academic requirements.

The Sixth Circuit recognized that an in-school suspension could, but does not necessarily, deprive a student of a "property" interest in educational

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benefits. Such deprivation, if any, depends on the nature and extent of the student's exclusion from the educational process. Similarly, *Laney* concluded that in-school suspensions are not typically detrimental to a student's "liberty" interest (reputation) and that there was no such detriment to *Laney*. In concluding that the deprivation in the present case was *de minimis*, the Sixth Circuit cautioned that

"[a] suspension of sufficient length or consequence can implicate the Due Process Clause. An in-school suspen-

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Cont....ONE-DAY IN-SCHOOL SUSPENSION FOUND *DE MINIMIS*

sion that so isolates a student from educational opportunities that it infringes her property interest in an education, or one so long in duration that it damages one's reputation, could raise issues simply not present on our facts. We conclude, however, that a one-day in-school suspension, during which the student was required to complete school work and was recorded as having attended school, does not deprive her of a property interest in educational benefits or a liberty interest in reputation. In any event, because such a suspension is a *de minimis* deprivation, it would not implicate due process requirements."

Action:

While the claims alleging infringement of the student's property and lib-

erty interests were dismissed by the Sixth Circuit, as being *de minimis*, it is neither safe nor prudent to conclude that in-school suspensions will never trigger the due process protections of the Fourteenth Amendment. Important to the decision was the fact that the student was not prevented from receiving educational opportunities, and in fact was expected to complete academic work while serving the in-school suspension. Depending upon how a district structures its in-school suspension, the outcome may be different. An in-school suspension allowing the student to continue to receive instruction and to complete academic work is clearly preferable to one which does not allow such opportunities.

The prudent approach in any discipline situation, whether it involves an out-of-school suspension or in-school suspension, is to provide rudi-

mentary due process. Such rudimentary due process is not unduly burdensome. Where a student is subjected to short term (ten school days or less) suspensions, rudimentary due process merely requires that the student be provided notice of the charges of misconduct (either written or oral) and an opportunity to be heard (to explain his or her side of the story). The *Goss* Court explained that this type of rudimentary due process can occur almost immediately, such as where a disciplinary conference is held with the student in the principal's office. The requirement is met where the principal informs the student of the charges and allows the student to respond. Had such approach been followed in this case, the district would not have been called upon to defend its actions in federal court. As is generally the case, "bad facts" can lead to "bad outcomes."

Scholten Fant publishes *School Law Update* as a service to provide our clients with periodic updates on legal issues related to schools. As a means to achieve our goal of providing our clients with the best legal services possible, if you have any suggestions for topics to be addressed in future newsletters, workshops or seminars, please share your ideas with one of our school law attorneys, paralegals, or support staff.

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COURT RULES CRIMINAL BACKGROUND CHECKS ARE NOT UNFUNDED MANDATE

The Michigan Court of Appeals ruled that the Student Safety Initiative requirements that compel school districts to request criminal history checks for prospective and current employees, and to reimburse an employee for lost compensation in the event the employee is suspended from active performance but later reinstated is not an unfunded mandate. *Owczarek v State of Michigan*, Docket #273322 (MI App 2007).

As you will recall, the Student Safety Initiative requires school districts to request criminal history background checks on both potential and current school employees. The statute provides that the State Police may charge a fee for conducting such checks, but is silent with respect to who must pay. Who owes (District or employees) as we have previously advised, is therefore subject to the collective bargaining process. The Court of Appeals found that the legislative mandate to request and secure criminal background checks is therefore not an activity or service within the meaning

of Section 29 of the Headlee Amendment. Because the school district may pass the cost on to the employees, the Court of Appeals has determined that requiring school districts to request criminal history checks is not an unfunded mandate.

The Student Safety Initiative also requires school districts to suspend employees who are convicted of cer-

**“THE STATUTE IS SILENT WITH RESPECT TO WHO
MUST PAY FOR CRIMINAL BACKGROUND CHECKS”.**

tain offenses. In such situations, the school district is required to discontinue the employee's compensation until the Superintendent of Public Instruction has made a final determination whether or not to suspend or revoke the teaching certificate. If compensation is discontinued, but the Superintendent of Public Instruction decides not to permanently suspend or revoke the teaching certificate, or if the employee's conviction is reversed

on final appeal, then the school district is required by state law to reinstate the individual with full rights and benefits and make the individual “whole for lost compensation.” The Court of Appeals held this requirement creates nothing more than an entitlement to back pay, which is similar to an award granted to employees who are wrongfully discharged or disciplined. The Court stated that the legislature “has merely codified an existing traditional remedy for the protection of the public employee whose termination or suspension . . . is subsequently vacated.”

The Court found that this back pay requirement is not an activity or service under Section 29 of the Headlee Amendment.

As of the date of this publication, the case has not been appealed to the Michigan Supreme Court.

Action:

School districts should negotiate provisions that would have their employees pay for criminal history background checks.

MORE SCHOOL ELECTION REFORM

After only a couple of years since the last significant election consolidation and reform, the Michigan Legislature is on the verge of further amending the Michigan Election Law to revise yet again the provisions pertaining to the scheduling and frequency of school elections.

We anticipated reporting the final outcome of the legislation in this

Newsletter. At the time of its preparation, however, these amendments were not finalized, due primarily to continued debate over presidential primary election issues.

It remains, however, virtually certain that further amendment of the Michigan Election Law will be concluded before the end of the year. While the final form of the amend-

ments remains to be seen, it is highly probable that most school districts will be required to alter, yet again, both the timing and the frequency of their school elections.

Stay tuned, therefore, for the “final” school election legislation, until it gets amended again.

*They may forget what you said but they will never forget how you made them feel.
– Anonymous*



SUPREME COURT AFFIRMS DECISION REGARDING REIMBURSEMENT OF PRIVATE SCHOOL COSTS

An equally divided Supreme Court affirmed the ruling of the Second Circuit Court of Appeals which held that a parent of a student with a disability is entitled to seek reimbursement of private school costs under the IDEA even though the student never received services through a public school. *Board of Education of the City of New York v Tom F.*, 48 IDELR 239 (US, 2007). While not deciding that the parents were, in fact, entitled to tuition reimbursement, the decision affirms the Second Circuit decision remanding the case to the Federal District Court to determine whether the parents are entitled to such reimbursement. Justice Kennedy did not take part in the decision, thus resulting in the equally divided Court.

The case began when the parents of a student attending a private school requested a due process hearing to recover private school tuition. The student had attended private school since kindergarten. During the time the student was attending private school, the school district evaluated the student and determined him eligible for special education programs and services as learning disabled. The district proposed a program placing the student in a public school in a "Modified Instructional Services - I" classroom, which provided for a teacher to student ratio of 15 to 1. In addition, the IEP recommended group speech and language therapy two times per week and school counseling in a group session one time per week. The parents rejected the IEP, continued the student in the private school, and requested a due process hearing seeking reimbursement.

The local hearing officer found in favor of the parents and ordered reimbursement. The district appealed.

The review officer affirmed the local hearing officer's award of tuition on the grounds that the IEP team did not include the appropriate members (the student's special education teacher was in the hospital, and an evaluator acted as a special education teacher at the IEP meeting).

The district appealed to Federal District Court, which reversed. In the District Court, the school district argued that the plain language of the IDEA amendments of 1997 required that a student first receive special education programs and services under the authority of a public agency. Since the student had never attended a public school, the district argued that the statute prohibited the parents from seeking reimbursement. Secondly, the school district argued that the IEP team was appropriately constituted. The Federal District Court only dealt with the first of these issues. The Court found that the plain language of the IDEA amendments of 1997 permitted reimbursement where a student "previously received special education and related services under the authority of a public agency. . . ." Since the student in the present case had never received special education programs or services from a public school district, the Court found they failed to meet this statutory threshold.

The parents appealed the decision to the Second Circuit Court of Appeals, which reversed the District Court decision, relying upon its own decision in *Frank G. v Board of Education of Hyde Park*, 46 IDELR 33 (2nd Cir., 2006). In that decision, the Second Circuit held that a student need not have received special education programs and services from the school district, but rather this requirement was fulfilled if the parents properly requested special education programs, and gave the district notice

that it rejected the IEP prepared by the district. The Second Circuit reasoned that the 1997 Amendments had not altered or restricted the Court's authority to award an "appropriate" remedy, including tuition reimbursement.

The school district appealed to the United States Supreme Court. In an equally divided decision, the Supreme Court upheld the decision of the Second Circuit. Justice Kennedy did not participate, and therefore there was no majority decision. Where there is a "tie" before the Supreme Court, the lower Court of Appeals' decision remains intact and is affirmed.

Action:

Regrettably, the Supreme Court decision does not add any analysis or guidance. Instead, all the decision does is leave the Second Circuit Court of Appeals' decision as the final decision in the present case, which remanded the matter to the District Court to determine whether the school district proposed an appropriate IEP and whether the parents were entitled to reimbursement if it had not. There remains a split among the circuits with respect to the issue of whether a student must first receive services from a public school in order to be able to seek tuition reimbursement. The First Circuit previously held that a parent was not entitled to reimbursement where the student had not received special education from the public school and had not given notice to the district that it rejected an IEP prepared by the district. The Second Circuit distinguished the First Circuit's ruling from the present case since the par-

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Cont....SUPREME COURT AFFIRMS DECISION REGARDING REIMBURSEMENT OF PRIVATE SCHOOL COSTS

ents in the *Tom F.* case had provided notice to the district, even though the student had never attended or received services from the public school district. On remand, the Federal District Court will need to determine whether the IEP team was appropriately constituted, and whether the school district proposed an appropriate IEP. If the school district did not propose an appropriate IEP, the parents will need to show that the private school provided an appropriate program entitling them to reimbursement.

While private school reimbursement cases are much more rare in Michigan

than other states, school districts must remember that the local district is obligated to make an offer of FAPE to students who are unilaterally placed by their parents in private schools. Since a school district's Child Find obligation extends to students attending private schools, once a student is identified as being a student with special needs and attending a private school, the district should convene an IEP team and make an offer of a public school program that would provide the student a FAPE. If the IEP is appropriate and the parents refuse to take advantage of the program, they will be prohibited

from seeking tuition reimbursement though they may still receive auxiliary services at the private school under Michigan's Auxiliary Services Act. If the parents disagree with the public school program, provide appropriate notice and seek a due process hearing, the ruling in *Tom F.* may provide for reimbursement of those school costs even though the student never attended a public school. The way to guard against private school tuition reimbursement requests is to assure that students are timely evaluated and an appropriate public school IEP is proposed.

MDE CHANGES HOW TO COUNT SUSPENSION DAYS FOR SRSD REPORTING

Recently, Michigan Department of Education (MDE) emphasized the importance of accurately reporting suspension and expulsion data in the current educational climate of accountability. While districts report data utilizing the Single Record Student Database (SRSD) to the MDE relating to many factors, (including graduation and drop-out rates, special education students "exiting" services, etc.) the focus of this article is to call to your attention the reporting of suspension days in SRSD, as compared to counting days for procedural safeguard/disciplinary processes under the IDEA. The most recent guidance is in a manual for use in the Fall 2007 data submissions, which was updated in the Summer and Fall of 2007.

Districts must be meticulous when it comes to the timeliness, accuracy and quality of suspension/expulsion data that is reported to the State. Departing from its previous position of not parsing out days, the special education disciplinary fields of the SRSD (fields #126-137) have been restructured and expanded, and now include clarifica-

tions for entering data related to suspension of students with disabilities. In clarifying how to enter the data, MDE has now included definitions for calculating days of cumulative suspensions. These examples and reporting guidelines differ from the manner a district considers "days" of suspension under the IDEA. Under IDEA, certain processes occur when a student has been removed from his or her educational placement for disciplinary purposes. The IDEA regulations define "day" as a calendar day, and "school day" as "any day, including a partial day that children are in attendance at school for instructional purposes. School day has the same meaning for all children in school, including children with and without disabilities." 34 CFR 300.11. Hearing officers have also held that a partial day of removal is counted as a "day" for disciplinary purposes under the IDEA regulations. *See, e.g., St. Paul Indep. Sch. Dist. # 625*, 106 LRP 14323 (SEA MN 2003).

For SRSD suspension/expulsion reporting, however, the manual requires

districts to report in-school and out-of-school suspension broken down to the one-half day. When calculating cumulative days of in-school and out-of-school suspension(s), districts must include all in-school and out-of-school suspensions of one-half school day in length and longer, but should not include suspensions that are less than one-half of a school day. These definitions and calculations of cumulative suspension days represent a significant change from how data was previously reported and underscore the need for a thorough understanding of the special education discipline process, as well as the reporting requirements, and how the two may differ. Simply put, just because we may not report the day as a "suspension" day in SRSD does not mean we do not count the day of suspension for IDEA disciplinary procedures, such as providing modified FAPE on the 11th day of removal, or in calculating pattern of removal days to determine a change in placement. For more information on "counting days," feel free to contact one of Scholten Fant's school law attorneys.



THE PERSONAL CURRICULUM: LEGISLATURE AMENDS THE STATUTE AND MDE ISSUES GUIDANCE

The much awaited guidance on the Personal Curriculum was issued by the Michigan Department of Education (MDE) just in time for the legislature to amend the statute. On October 23, 2007, the MDE released a redrafted guidance document on the personal curriculum following public comments over the summer regarding the previous draft document. MDE also released a document entitled "Personal Curriculum Supporting Materials and Examples" that provides sample forms, agendas and sample schedule modifications. In addition, several Q and A documents have been posted on the Department websites attempting to clarify frequently asked questions regarding such issues as awarding credit, career and technical education programs, assessments, and allowable modifications. These documents may be accessed on the Department's website at www.michigan.gov/mde and following the links to the Office of School Improvement. On the heels of the release of these documents, the governor signed PA 141 of 2007, which amended the statute to provide for a personal curriculum for transfer students.

In the Personal Curriculum Guidelines the MDE makes clear that local districts continue to retain substantial local control over high school graduation requirements and the implementation of the statutory requirements. In fact, each local district should be in the process of making several decisions relative to how the Michigan Merit Curriculum (MMC) and Personal Curriculum will be implemented in the local district. (See the Local District "To Do" list in insert.) The guidance documents reiterate that while the MMC establishes the minimum high school graduation requirements, local districts are free to establish requirements which exceed those imposed by the statute. In

addition, the guidance documents indicate that a local district will need to establish criteria for mastery of content expectations, the extent of allowable modifications through a Personal Curriculum, and what constitutes credit for a specific course. In doing so, local boards of education will need to determine the performance parameters for determining whether a student has demonstrated "mastery" of a sufficient number of core content expectations in order to receive credit. Districts will need to establish the "cut score" a student must achieve in order to demonstrate mastery and the number or percentage of content expectations a student must demonstrate mastery on in order to receive credit. A district may permit an alternate cut score where a student with a disability may be held to an alternate level of mastery if the student's inability to achieve the district's standard level of mastery is due to the child's disability. Thus, while the statute establishes the minimum high school graduation expectations, local districts still have control over local graduation requirements, and will exercise significant decision-making authority with respect to implementing the provisions related to determining mastery of content expectations, awarding credit, and the use of the personal curriculum.

In addition to the guidelines for the personal curriculum described above, the MDE issued supporting materials and examples to accompany the guidelines. These materials include a sample Personal Curriculum form and forms for progress monitoring on specific content expectations. Examples of various schedules and modifications are provided, along with a suggested Personal Curriculum committee agenda and a suggested devel-

opment process broken down by grade. These documents, coupled with the Q and A documents, provide much needed assistance and guidance for local districts as they undertake implementation of the MMC and the personal curriculum requirements.

Shortly after the MDE issued Personal Curriculum Guidelines, PA 141 was signed into law. This Act amends the statute which provides for a personal curriculum (MCL 380.1278b) to include an additional provision relating to transfer students, and to delete the requirement that the MDE develop or approve assessments.

As originally enacted, the statute required the MDE to develop or approve assessment instruments for use by local districts and public school academies in assessing a student with respect to the content expectations of the various MMC required courses. In fact, MDE began this process, and piloted assessments in January 2007 in the areas of Algebra I and Geometry. It was (is?) anticipated that assessments for English 9 and Biology would be released in May, 2008. This firm contacted MDE to inquire if the assessments would still be developed or made available. No return call had been received at the time of printing this newsletter. Local districts will likely need to develop their own assessments, and not rely upon a state developed or approved assessment tool.

In addition, the amendments provide for a Personal Curriculum for certain transfer students. If a student transfers to a public school from out-of-state or from a non-public school, the parent may request a personal curriculum and the district may per-

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Cont....THE PERSONAL CURRICULUM:
LEGISLATURE AMENDS THE STATUTE AND MDE ISSUES GUIDANCE

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mit modification of the MMC requirements beyond that which would normally be allowed. The PC is created in much the same way as any other PC by a team that must include the student, a parent of the student, and a high school counselor. In order to be permitted a PC with modifications beyond the "typical" MMC modifications, the student must have completed the equivalent of two years of high school. A district is permitted to use assessments to determine what credits earned previously may be used to satisfy the MMC requirements. The PC developed must incorporate as much of the MMC content as is practicable for the student. Further, the PC must include at least one mathematics credit during the final year of high school and the civics requirement. If the student will be attending at least one full school year, then the mathematics course must be at least Algebra I, or a course which normally comes after Algebra I if the student has already mastered the content of Algebra I.

The amendments took immediate effect, (November 14, 2007).

Action:

Local districts should already be in the process of developing policies and procedures to implement the requirements of the MMC and the personal

curriculum. Many local district curriculum committees may be well along the path of establishing proficiency expectations, cut scores and determining a district's "tolerance" to modifications. The above referenced MDE documents will provide additional assistance as districts undertake this task. If your district has not begun the process of identifying assessment tools, "cut scores" or performance parameters for awarding credit, it should do so ASAP. Remember, the MMC and PC are now in effect, and since MDE is no longer required to develop or approve assessment instruments, the local district must do so to assure proper assessment of students in the MMC curricular areas. Once the assessment is identified, decisions must be made by the district to determine what will constitute "mastery" of a content area. Since many students, including those with disabilities, are able to request a PC now, establishing local district tolerance and procedures for PCs should be underway.

Remember that the guidance MDE documents and the statute are "living" documents and as local districts and the MDE gain experience with the MMC and personal curriculum, further guidance may be issued. Some of the information set forth in the MDE guidelines and supporting materials, in this firm's opinion, contain misstatements or overgeneralizations. For example, the MDE guidelines

contain a statement relative to the use of the IEP which indicates that the IEP will set forth the "courses (which may be included in the PC)." Contrary to the statement in the MDE guidelines, an IEP does not set forth a student's "courses." Instead, this statement likely should indicate that the IEP will set forth the "course or courses of study." Since several other areas of the MDE guidelines and supporting materials make clear that the IEP identifies the course or courses of study, this likely is an unintended misstatement. Similarly, the supporting materials provide a grade-by-grade process which seems to indicate that progress reporting and review of a student's personal curriculum is the responsibility of special education staff. Since any student may request a personal curriculum, and since the personal curriculum process is a district wide educational process (not a general education or special education procedure alone), the implication that these tasks are the responsibility of special education staff is a misnomer, and all school teams should undertake timely review and revision of a student's personal curriculum.

If your district needs assistance in developing policies or administrative guidelines regarding the MMC and the PC, or inservice training in the requirements of the statute and guidance documents in general, please contact one of Scholten Fant's school law attorneys.

SCHOLTEN FANT WISHES EVERYONE A VERY HAPPY HOLIDAYS

AND A SAFE 2008~



LOCAL DISTRICT PERSONAL CURRICULUM “TO DO” LIST:

If your local district curriculum team has not started these items, you may be behind the eight ball! Examples of the decisions local curriculum teams need to make include:

- Assure that the local district curriculum and course offerings align with the MMC credit/course requirements.
- Determine which content expectations may make up specific courses allowed but not identified by the MMC explicitly (i.e. what content makes up a course such as integrated math).
- Determine how the content expectations within strands and subject areas may be divided into partial credit.
- Determine the number or percentage of content expectations a student must demonstrate mastery on to receive full credit.
- Determine a method or methods of assessment for each credit/course offering to assess each content area expectation and strand within the course.
- Determine the performance parameters that determine whether or not a student has demonstrated mastery of a sufficient amount of the core content expectations to be awarded credit.
- Determine the “cut score” a student must achieve to evidence mastery.
- Determine the minimum alternative cut score which will be permitted, if at all, for students with certain barriers to learning (i.e. students with disabilities).

INSURANCE COVERAGE FOR SPECIAL EDUCATION DUE PROCESS HEARING COSTS

As some of you may have heard, various insurance companies have begun covering the costs of special education due process hearings. Indiana Insurance, a subsidiary of Liberty Mutual Insurance Group, provides property and casualty insurance for school districts and has covered the cost of special education due process hearings for several years. More recently, SET-SEG has expanded its insurance coverage to include special education due process hearings. Other insurance companies, including ACE Specialty Insurance, W.R.M., Gallagher-Bassett, and others, provide insurance for school districts, but not all provide coverage for special education hearings. Scholten Fant is approved counsel for Indiana Ins., SET-SEG and others for providing representation in these matters.

When a district receives a special education due process complaint, it should review its insurance coverage, contact its attorney and the due process coordinator at Michigan Department of Education (Harvalee Saunto). Steps should be taken immediately to provide notice to the district’s insurance carrier (SET-SEG, Indiana Insurance, etc.) providing a copy of the due process complaint. Since the timelines for responding to a complaint are very short, timely notice to the insurance carrier is imperative. A school district must file its response to the due process complaint within ten calendar days. As it may take an insurance carrier a day or two to assign counsel, delaying just a few days or over a weekend could have significant impact.

Once you have notified the insurance carrier and the MDE, begin preparing copies of the student’s education record. It is also helpful to prepare a chronology of events leading to the due process request. One of the first steps an attorney must take is a review of the records and the “prior written notice” provided to the parent. Taking steps to assemble the necessary documents early will assist the attorney assigned to represent the district in filing a timely response to the complaint.

If you receive a complaint and need assistance in determining whether insurance coverage is available, with notification of the insurance company or with notification of the Michigan Department of Education, please call one of Scholten Fant's school law attorneys.



COURTS HOLD PARENTS STILL CANNOT REPRESENT CHILD'S INTEREST IN FEDERAL COURT

Despite the Supreme Court ruling in *Winkelman v Parma City School District*, 127 SCt 1994 (US 2007) (*School Law Update*, Summer 2007), federal courts around the country continue to restrict the ability of parents to represent their child's interest in federal court. As you may recall, *Winkelman* held that parents have their own individual rights under the IDEA, including the right to have their child receive a FAPE. Since parents have their own rights, they can represent themselves in federal court without an attorney. The Supreme Court did not, however, rule as to whether a parent may represent the rights of their child in federal court. The longstanding rule has been that non-lawyers are prohibited from representing the interests of third parties in court.

Several federal courts across the country have now engaged in the "hairsplitting" regarding whether a parent was representing their own rights or that of their children. For example, in *L.J. v Broward County School District*, 48 IDELR 34 (S.D. FL 2007),

the Court held that the general rule prohibiting non-lawyers from representing third parties continued to apply and that parents were prohibited from representing the interests of their children's right to FAPE, but permitted the parent to move forward on a claim that their own right to FAPE was violated by the school district. Federal courts in Kansas, Colorado and Illinois have held similarly. See, *Neville v Dennis*, 48 IDELR 241 (D. KS 2007); *Chase v Mesa County Valley School District*, 48 IDELR 248 (D. CO 2007); *Loch v Board of Ed. of Edwardsville School District*, 48 IDELR 217 (S.D. IL 2007). The court decisions distinguishing between a parent's IDEA rights and a child's IDEA rights provide little guidance to what the specific difference is between the two claims. One court, *Alexandra R. v Brookline School District*, 48 IDELR 190 (D. NH 2007) refused to dismiss an IDEA claim brought by the parents on behalf of a child finding that even if the student's parents cannot, strictly speaking, represent the child in pursuing her IDEA claims against the school dis-

trict, the parents may pursue their own identical claims.

This issue has not yet been addressed in Michigan since the Supreme Court ruling in *Winkelman*. Prior to *Winkelman*, Michigan Federal Courts have held that parents are not permitted to represent their children in federal court. See, *Welch v Board of Education of the State of Michigan*, 35 IDELR 247 (W.D. MI 2001). While federal courts have been reluctant to specifically identify the differences between a parent's IDEA claim and a child's IDEA claim, the courts have refused to permit expansion of claims for relief brought under the IDEA. In *Blanchard v Morton School District*, 48 IDELR 207 (9th Cir 2007), the Ninth Circuit affirmed the dismissal of an action finding that a parent could not recover (under Section 1983) for emotional suffering or wages lost while pursuing an IDEA claim. Thus, the parent was limited to the relief available under the IDEA which did not include emotional suffering or lost wages.

Need PD?

Scholten Fant School Law attorneys can help with your professional development needs. Topics may include:

- ◆ General Educators Role in the IEP Process
- ◆ State Board Seclusion and Restraint Document
- ◆ Michigan Merit Curriculum and the Personal Curriculum
- ◆ Discipline of Students with Disabilities
- ◆ Teacher Evaluations under the Tenure Act
- ◆ Custom Presentations Designed to Meet Your Needs.



MICHIGAN DEPARTMENT OF EDUCATION
SEEKS PUBLIC COMMENT ON EXTENDED SCHOOL YEAR DOCUMENTS

The Michigan Department of Education (MDE) has posted a number of documents regarding special education on its website and is requesting written public comment until December 28, 2007. These documents include the most recent guidelines for Extended School Year (ESY) services, Part 8 complaint investigation procedures, and Part C proposed state eligibility definition and development of IFSP timelines. The documents can be accessed on the MDE website, www.michigan.gov/mde, by following the link listed under "MDE Quick Links" to "Notices & Public Comments."

Of significant importance in these documents are the guidelines for ESY services. Following the revision of various rules over the summer, the 230-day program requirements for severely cognitively impaired and severely multiply impaired students were eliminated. While these rule revisions are not yet in effect (the MDE is still reviewing public comment received over the summer and the final rules are anticipated sometime in January 2008), the ESY guidelines were issued to assist school districts in making individual determinations as to which students would require ESY services.

Previously, Michigan has relied upon the Sixth Circuit case decisions approving the "regression/recoupment" approach. Under this approach, ESY services are only necessary if the student will significantly re-

gress during the school break such that the skills lost cannot be recouped within a reasonable amount of time (generally six to nine weeks) once school resumes. While the proposed ESY guidelines continues to include regression/recoupment as one means of determining whether a student needs ESY services, the document adds two additional methods for determining eligibility for ESY: Nature and

IEP is potentially jeopardized by an interruption in instruction, the student may be eligible for services. The various factors to ESY consider may include "breakthrough opportunities" (whether a student is at a critical point for acquiring one or more skills), "interfering behaviors" (a determination that an interruption in instruction would result in a loss of progress on interfering behaviors such as stereotypic, ritualistic, aggressive or injurious behaviors that affect a student's ability to accomplish IEP goals), "IEP goals" (where a student has not made adequate progress on his or her IEP goals), and "loss of access to on the job training" (where an interruption in instruction would lead to regression in skills relating to vocational training).

While the document makes clear that ESY services are not granted solely on the basis of a student failing to meet one or more IEP goals, and that the purpose of ESY services is not to develop new skills, the guidelines significantly expand the regression/recoupment standard currently utilized by most districts in Michigan. The Michigan Association of Administrators of Special Education (MAASE) has submitted a position statement to the Department. School districts are encouraged to submit additional written comment by mail, e-mail or facsimile no later than 5:00 p.m., December 28, 2007.

The ESY document identifies three factors which may entitle a student to ESY services:

- **Regression/Recoupment**
- **Nature and Severity of the Student's Disability**
- **Critical Stages and Areas of Learning**

Severity of the Disability, and Critical Stages and areas of Learning.

"Nature and Severity of the Student's Disability." If a student requires a consistent and highly structured program due to the severity of his or her disability, or if a severely disabled student may revert to lower functioning levels or exhibit more behaviors which interfere with learning after a long break, the student may be eligible for ESY services under this factor, regardless of any regression/recoupment analysis.

"Critical Stages and Areas of Learning," if a student's degree of progress in any critical life skill identified in the

Do not train children to learning by force and harshness, but direct them to it by what amuses their minds, so that you may be better able to discover with accuracy the peculiar bent of the genius of each.

-- Plato



MORE ON THE HOW AND WHAT OF FUNCTIONAL BEHAVIORAL ASSESSMENTS AND BEHAVIOR INTERVENTION PLANS

Over the past several months courts, hearing officers and the Office of Special Education Programs (OSEP) have issued various decisions and letters giving guidance regarding functional behavioral assessments (FBAs) and behavior intervention plans (BIPs). While the IDEA and its implementing regulations only require a district to perform a FBA and implement a BIP in the disciplinary context (i.e. 34 CFR 300.530(f), where a misconduct is determined to be a manifestation of the student's disability), districts are still required to address student behavior in a proactive manner through the IEP where a student's behavior impedes the student's learning or the learning of others. *See*, 34 CFR 300.324(a)(2).

While federal courts have held that there is no single way to perform an FBA and no specific statutory requirements for a BIP, courts continue to find that a complete failure to conduct an FBA or address behavior through a BIP (or the components of an IEP) results in the denial of FAPE. In *Lauren P. v. Wissahickon School District*, 48 IDELR 99 (E.D. PA 2007), a

Federal Court found that a school district denied a student FAPE by failing to conduct an FBA and develop a BIP. In *Lauren P.*, the student exhibited behaviors such as failing to attend to a task and turn in assignments, which the Court found inhibited the student's ability in the educational setting. As such, the district should have conducted a FBA and implemented a BIP to address these problems. By failing to do so, the Court found the student was denied FAPE, and awarded one year of compensatory education. The Court specifically noted that the school district, while not addressing the behavior through an FBA or a BIP,

tended to "blame the student" through comments such as the student lacks motivation and needs to take responsibility for her books and materials. Instead of blaming the student for "behaving like a student with a disability," the district should have developed a BIP.

Where a student exhibits problematic behavior that negatively affects his or her learning, a FBA is likely appropriate. When conducting an FBA, parental consent may be necessary. In *Letter to Christiansen*, 48 IDELR 161 (OSEP 2007), the Office of Special Education Programs indicated that whether parental consent would be required prior to performing an FBA

The EI center program's "boilerplate" behavior plan which utilized level system and required students to earned points in order to transition to home district found to be not individualized and denied FAPE.

would be dependent upon the scope of the FBA. Essentially, if the FBA were conducted to obtain data regarding an individual student and their need for behavioral supports, consent would be required. On the other hand, if the FBA were conducted to determine the effectiveness of school or classroom-wide behavioral supports for all students, consent would not be required.

Once a FBA has been completed, an individualized BIP should be devised and implemented. They key is that the BIP must be individualized. In *Rochester Indep. Sch. Dist., #535*, 48 IDELR 56 (SEA MN 2007), a hear-

ing officer held that a "boilerplate" BIP utilized for all students within a particular program, such as a center-based EI program, denied FAPE to the student because it was not individualized to address the student's specific needs. The BIP in question was a program-wide "level" system where the student was required to earn points to move through the levels prior to being considered for transition back to a mainstreamed program. The hearing officer also found that such an approach ("earning" the ability to transition to a less restrictive setting) violated a parent's right to participate in educational placement decisions. Bottom line, a BIP must be based upon the student's individual needs, not merely program or classroom structure.

The IDEA does not set forth what components a BIP should have (*see, Alex R. v. Forrestville Valley Sch. Dist.*, 41 IDELR 146 (7th Cir 2004)), or even that a BIP needs to be in a separate written document. Indeed, the requirement that a district provide positive behavior supports may be met by including such supports in the student's IEP. *See, Bd. of Ed. of Ind. Sch. Dist. #11 v. Renollett*, 45 IDELR 117 (8th Cir 2006) and *Brett S. v. West Chester Pub. Schs.*, 45 IDELR 121 (E.D. PA 2006) (discussed in *School Law Update*, Spring 2006). Notwithstanding, best practice would suggest that BIPs include proactive interventions and positive behavior supports designed to reduce the behaviors prior to their occurrence, reactive strategies with respect to intervening once the behavior has occurred, and strategies for teaching appropriate replacement

(Continued on page 12)



Cont....GUIDANCE ON FUNCTIONAL BEHAVIORAL ASSESSMENTS

(Continued from page 11)

behaviors. Such strategies can be as varied as the individual student need. A recent example of an unusual BIP component involved medication. While the IDEA prohibits a school district from requiring that a student obtain and take medication in order to attend school, a Federal District Court in Washington recently held that including a requirement that a student take medication which a doctor has already prescribed as part of the student's BIP was permissible. See, *S.J. v Issaquah School District No. 411*, 48 IDELR 218 (W.D. WA 2007). In that case, a physician had already prescribed medication which would assist in improving a student's behavior. The school district required that the student take the medication as part of his BIP.

Originally, the parent agreed. Later, the parent challenged the provision as violating the IDEA. Since the BIP did not require the student to obtain medication in order to attend school, the Federal Court found that it was permissible to require the student to take medication which had already been prescribed.

The IDEA requires that a school district provide positive behavior supports for children who have behavioral issues. While the focus is on positive supports, use of the word positive does not prohibit a district from utilizing adverse consequences for inappropriate behavior. The use of aversive interventions, which may include such things as seclusion and physical restraint, is also not prohibited by the

IDEA. In *Letter to Trader*, 48 IDELR 47 (OSEP 2006), the OSEP indicated that states are permitted to enact regulations which would permit the use of aversive behavioral interventions. Michigan has adopted guidelines for the use of seclusion and restraint, and where these interventions are anticipated to be utilized on a regular basis, they should be included in the student's individual BIP. The state seclusion and restraint guideline also requires that a district obtain informed parental consent for the use of such interventions and that the plan be written.

For a summary of the Seclusion and Restraint Guidelines, please see School Law Update Winter 2007.

HEALTH CARE POOLING:

THE PUBLIC EMPLOYEES' HEALTH BENEFIT ACT

The Public Employees' Health Benefit Act ("PEHBA") became law on October 1, 2007. The PEHBA was a response to continued increasing health care costs for public employers, in particular public school districts. In 2004, an analysis by Standard & Poor's indicated that 24.2 percent of public school districts' core operating spending went toward employee benefits, including health insurance. The legislature wanted to give school districts and health care providers more access to information about prices and performance, to allow public employers to form insurance pools, and to increase and enhance competition in the health care market.

The PEHBA allows a school district to join with other public employers to establish and maintain a public employer pooled plan to provide medical, optical, or dental benefits to

at least 250 public employees on a self-insured basis. The PEHBA also allows public employers to establish and maintain a plan on a self-insured basis, or to procure coverage or benefits from one or more carriers either on an individual basis or with one or more other public employers.

The PEHBA also has bidding requirements. A public employer or a pooled plan that procures coverage or benefits from one or more carriers must solicit at least four bids when establishing a medical benefit plan, and also every three years when renewing or continuing a medical benefit plan. A medical benefit plan includes payment of medical, optical, or dental benefits.

The PEHBA also requires a public employer with 100 or more employees in a medical benefit plan, or a combination of employers that together have 100 or more employees in a medical

benefit plan or who have signed a letter of intent to enter them into a plan, to be given claims utilization and cost information. The PEHBA requires all medical benefit plans in the state to compile claims utilization and cost information for the medical benefit plan in the aggregate and for each public employer, and to make that information available to medical benefit plans with 100 or more employees.

Action:

In today's economy, everyone is aware of the rising costs of health care and the need for local school districts to contain costs. The PEHBA is one step in providing options. Pooling of health insurance, however, will likely have collective bargaining implications. If you have any questions regarding the PEHBA, please contact one of our school law attorneys.



AS THE WEATHER CHANGES, DON'T CHILL STUDENT SPEECH

The Sixth Circuit Court of Appeals recently ruled that a student could proceed with a First Amendment claim for nominal damages against a school district based on a prior policy that could have had a chilling effect on his free speech. *Morrison v Board of Education of Boyd County*, _____ F3d _____ (6th Cir 2007). The Court's opinion dealt predominantly with issues of interest only to attorneys, dealing with justiciability (i.e., whether the case was moot because the policy had subsequently been changed by the school district, and whether the student had standing). Still, districts can learn how to prepare policies and codes of conduct to protect yourself from such claims.

The case originated with the district walking the fine line between avoiding hostile environments for students with diverse sexual orientations and the restricting free speech rights of students. In 2002, students' attempts to begin a gay-straight alliance were met with hostility by other students. In response, the school banned the gay-straight student alliance, and all other student organizations for the 2002-2003 school year. A number of students sued the district claiming that the district failed to provide equal access to the gay-straight student alliance. That lawsuit was settled, with the school district agreeing to adopt the policies prohibiting harassment on the basis of actual or perceived sexual orientation, and to provide mandatory anti-harassment training to all students. The Board policy adopted in response to the consent decree prohibited harassment and discrimination, which it defined as:

“Unlawful behavior based on race, color, national origin, age,

religion, sex[,] actual or perceived sexual orientation or gender identity, nor disability that is sufficiently severe, pervasive, or objectively offensive that it adversely affects a student's education or creates a hostile or abusive educational environment.

The provisions in this policy shall not be interpreted as applying to speech otherwise protected under the state or federal constitutions where the speech does not otherwise materially or substantially disrupt the educational process. . . .”

However, the student code of conduct repeated only the first paragraph of that policy, but instead of including the second paragraph, had the following language:

“Harassment/discrimination is intimidation by threats of or actual physical violence; the creation by whatever means, of a climate of hostility or intimidation, or the use of language, conduct, or symbols in such a manner as to be commonly understood to convey hatred, contempt, or prejudice or to have the effect of insulting or stigmatizing an individual.”

The code of conduct took out the *Tinker* test making it constitutionally suspect.

Further, the school district created two different training videos. As part of one video, a clinical psychologist stated “you can't avoid meeting people that you believe are wrong. . . . just because you don't like them, just because you disagree with them, just because you believe they are wrong, wholeheartedly, absolutely, they are wrong. Just because you believe that does not give you per-

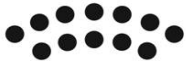
mission to say anything about it. It doesn't require that you do anything. You just respect, you just exist, you continue, you leave it alone.”

The Sixth Circuit acknowledged that the school board's policy had a savings clause that made it clear it would not apply to speech protected by the constitution; however, the code of conduct had no such savings clause. Similarly, the video had a broad definition of harassment and made it clear that students would not be permitted to speak out regarding their views on certain issues. As such, even though the board subsequently changed its policy and code of conduct to comply with the constitution, the Sixth Circuit allowed the student's claims for a chilling effect on his prior speech to go forward.

Action:

We understand that school officials walk a fine line between protecting students from harassment while simultaneously allowing students to engage in free speech. Under the Supreme Court's analysis of students' First Amendment rights, a student's speech is not protected when it would materially or substantially disrupt the educational process. A school district cannot prohibit all speech that some members of our school community might find offensive, unless there is a likelihood that it would also disrupt the educational environment. Be careful when preparing policies that would seek to limit students' First Amendment activities even under the guise of preventing harassment. For assistance in preparing such policies, feel free to contact one of our school law attorneys.





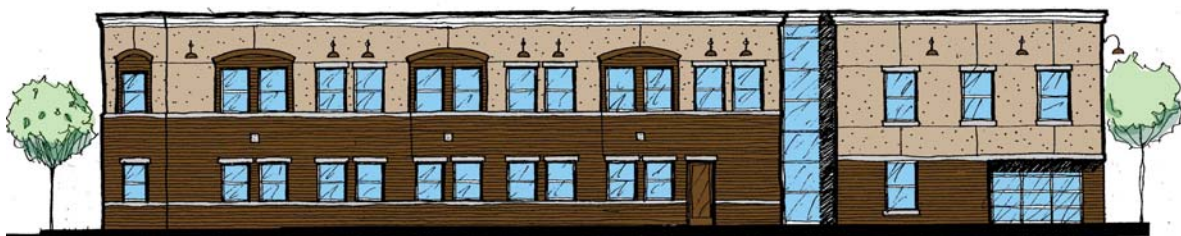
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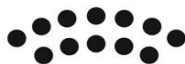
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