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SCHOOL LAW UPDATE

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**MICHIGAN COURT OF APPEALS RULES THAT PRIVATE SCHOOL STUDENTS
ARE ENTITLED TO INDEPENDENT EDUCATIONAL EVALUATIONS**

In a recent decision, the Michigan Court of Appeals has ruled that a local school district is obligated to provide independent educational evaluations (IEE) to the parents of children attending nonpublic schools located within the district. Michigan Department of Education v Grosse Pointe Public Schools, ___ Mich App ___ (Docket No. 25228, 252428, May 5, 2005).

This case involves DG, a minor child attending a private school located in the Grosse Pointe Public School District (School District). DG resides with his mother, SG, outside of the School District boundaries. DG is in remission from a brain tumor but, as a result, developed problems walking. In September 2002, SG requested that the School District evaluate DG's physical therapy needs. The District did so and, after the evaluation, determined that DG did not require additional physical therapy services beyond that which he was already receiving in the private school, namely group sessions. SG disagreed with the evaluation performed by the School District and requested an independent educational evaluation (IEE). The District denied SG's request stating that independent evaluations were not ancillary services required to be provided under Michigan law to private school students.

The parent filed a complaint with Wayne County Regional Educational Service Agency (Wayne County RESA) which reviewed the requirements under the Individuals With Disabilities Education Act (IDEA) and Michigan Auxiliary Services Act (ASA). Wayne County RESA concluded that DG was not entitled to an independent educational evaluation since such procedural safeguards and evaluations are not

included in the definition of auxiliary services set forth in the ASA.

SG disagreed with Wayne County RESA's determination, and appealed to the Michigan Department of Education (MDE). MDE issued a report finding the School District violated Special Education Rule No. 340.1701 [the Rule incorporating the requirements of the Federal Regulations and State Plan as part of a school district's obligation under Michigan Special Education Rule] and Rule 340.1723(c) [the Special Education Rule requiring independent educational evaluations]. The MDE found that Michigan's Auxiliary Services Act and Chapter X of the State Plan provided that students voluntarily enrolled in private schools were entitled to the same evaluation and procedural safeguards as public school students, including IEEs provided under Rule 340.1723(c). Thus, the MDE determined that the School District was required to either grant SG's request for an IEE or initiate the due process hearing procedures to prove that its evaluation was appropriate. The MDE ordered the School District to take one of these actions within two days of receiving the report. The School District paid the \$125 for the IEE rather than initiating the due process procedures.

Following the ruling by the MDE, the School District filed a complaint for declaratory and injunctive relief in Wayne County Circuit Court, requesting that the State Plan be declared unlawful to the extent that it required any school district to provide special education procedural safeguards to students voluntarily enrolled in nonpublic schools. The District also requested that the court permanently enjoin the Michigan Department of Education from enforcing the

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State Plan to require school districts to provide special education to students attending private schools.

The Circuit Court denied the relief and dismissed the complaint, finding that the language in the Michigan School Code, MCL 380.1701, required that school districts provide “every” handicapped person “all” special education services. Relying on this language, the Circuit Court determined that students attending private schools were included, and therefore the rules promulgated pursuant to MCL 380.1701 applied to students in private schools, including IEEs. The School District appealed. In a 2-1 decision, the Michigan Court of Appeals affirmed the Circuit Court finding that the School District was required to provide handicapped persons in private schools “the same services as it provides students of public schools, including funding an IEE” pursuant to the requirements of the School Code and the Special Education Rules, as well as Michigan’s Auxiliary Services Act.

The Court of Appeals found that the Michigan Mandatory Special Education Act and the Auxiliary Services Act, both portions of the School Code, must be read in harmony. Although the School District argued that the Auxiliary Services Act did not include independent evaluations in the enumerated auxiliary services set forth in the Act or its rules, the Court reasoned that the Special Education Rules amended in 1976 provided for independent evaluations. The Auxiliary Services Act was also amended in 1976 to include the phrase “ancillary services”. “Ancillary services” are not defined anywhere within the School Code. Instead, this phrase is found only in the Special Education Rules. Since the legislature is presumed to know what the statutes provide, the court determined that the intent of the legislature was to include those services defined as “ancillary services” under Special Education Rules as being available to students attending non-public schools. The Court found persuasive a 1999 Attorney General’s opinion finding that Michigan’s Auxiliary Services included all “ancillary

services” as defined under Special Education Rules.

Essentially, the Court opined that since the Auxiliary Services Act provides for evaluations, such provision would be hollow if it did not also include the procedural safeguards to protect the right to an evaluation. Thus, the Court found that where a parent disagrees with an evaluation performed by a school district on a student attending a private school, the school district must either grant the IEE or initiate the due process procedures. The School District raised a number of other issues, including one based upon the Headlee Amendment, which the Court found unpersuasive. Determining that the requirement to provide IEEs to students attending non-public schools was not based on the State Plan, the Court found there was no Headlee Amendment problem. In addition, however, the Court identified procedural defects relating to the Headlee claim.

Action: This case significantly broadens the scope of Auxiliary Services required to be provided to students attending nonpublic schools. Historically, Auxiliary Services have included diagnostic services and various therapies, such as occupational therapy, physical therapy, speech and language services, social work services, etc. The Auxiliary Services Rules, which have not been amended since the mid-1960’s, specifically set forth what “auxiliary services” are. By holding that the Auxiliary Services Act incorporates those “ancillary services” identified in the Special Education Rules, the Court expands a school district’s role in providing services to students attending private schools.

With the pending effective date of July 1, 2005, IDEA 2004 imposes significantly greater responsibilities on school districts to consult with private schools and spend a “pro rata” share of federal funds providing services to students attending private schools. IDEA 2004 also requires that these federal funds must “supplement,” and not supplant, State funded obligations. With this ruling, the Court has essentially determined that all ancillary services, and the procedural safeguards which go with

them, are to be provided to private school students under state law. Thus, auxiliary services would not be able to be counted as a private school student's pro rata share of federal funds, and school districts must find another way of providing services with these funds. The net result may well be an increase in expenditures on students attending private schools.

A necessary query following the ruling of the Court of Appeals is whether or not *all* procedural safeguards set forth in the IDEA and/or Michigan Special Education Rules are available to students attending private schools. The IDEA specifically provides that if a parent disagrees with the services provided to a student,

there is no right to a due process hearing. Instead, their remedy is to file a complaint. 34 CFR 300.457. However, in Michigan, a state review officer has previously held that students are entitled to due process hearings if they disagree with the services proposed to be provided to students attending private schools. See, South Lyon Comm. Schs., 30 IDELR 728 (SEA MI, 1999). If a school district is obligated to initiate the due process procedures to defend an evaluation, is the next logical extension of the safeguards to require due process hearings (and the associated expenses) whenever a parent disagrees with the level of service provided to children attending private schools?

SIXTH CIRCUIT ISSUES NEW FOURTH AMENDMENT DECISION REGARDING STUDENT STRIP SEARCHES

In Beard v. Whitmore Lake School District, Nos. 03-1904/1942 (6th Cir., April 4, 2005), the Sixth Circuit Court of Appeals ruled that the strip searches of numerous students violated the Fourth Amendment.

On May 24, 2000, a student in a gym class at Whitmore Lake High School reported to her gym teacher that her prom money had been stolen at some point during the class. The acting principal was advised of the theft, called the police to report the incident, and asked two female teachers and one male teacher to assist the acting principal. When the acting principal arrived at the gymnasium, the male students were in the boys' locker room and the female students were in the gymnasium. The teachers searched the female students' backpacks in the gymnasium without success. The acting principal and a female teacher then took the female students into the girls' locker room where the girls pulled up their shirts and pulled down their pants while standing in a circle. The girls were never touched and did not remove their underwear.

The male gym teacher and another male teacher searched the boys' book bags and lockers and searched the boys individually in the shower room. This search consisted of the boys

individually lowering their pants and underwear and removing their shirts. The boys were not physically touched.

During the searches, a police officer arrived and told the male and female teachers to continue searching the students. The stolen money was never discovered.

The students sued the district, teachers and police officer, claiming that the strip searches were a violation of their Fourth Amendment rights. The Federal District Court denied the district's motion to dismiss based on qualified immunity, and the district appealed.

The Sixth Circuit Court of Appeals held that the searches performed on the students in this case were unconstitutional. Citing the Supreme Court's decision in New Jersey v. T.L.O., 469 U.S. 325 (1985), the court noted that the Fourth Amendment applies to searches conducted by school authorities, but that strict adherence to a probable cause requirement is not required. Rather, the legality of a school search depends on its reasonableness under all the circumstances. The court noted that determining the reasonableness of a school search involves a two-fold inquiry: first, was the action justified at its inception; and second, was the search

reasonably related in scope to the circumstances justifying the search. Further citing to the Supreme Court's TLO decision, the Sixth Circuit noted that, in general, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. A search is generally "permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and nature of the infraction".

The Sixth Circuit assumed, without holding, that the searches of both the male and female students were justified at their inception. In other words, the Sixth Circuit assumed that some search of the persons and effects of students may be warranted when "substantial property has been reported recently stolen". The court also noted that the lack of individual suspicion that any particular student had taken the money did not automatically render the search unreasonable. Nevertheless, the Sixth Circuit held that the scope of the searches in this case did not pass constitutional muster.

Regarding the searches of the male students, the court focused on three factors. First, the court noted that the privacy interest that the male students had in their unclothed bodies was significant. The court reasoned that the scope of the search exceeded what normally would be expected by a high-school student in a locker room; the court also noted that the boys were attending gym class as part of the general curriculum and as such, they did not voluntarily consent to be regulated more closely than the general student population as might students who, for example, choose to go out for school sports teams. Second, the court noted that the character of the intrusion was far more invasive than random urinalysis testing that has been upheld by the Supreme Court where students

remained fully clothed. Third, the Sixth Circuit noted that the governmental interest in maintaining an atmosphere free of theft, though of some weight, was not as great as in health and safety cases. See, e.g., Vernonia School District 47J v. Acton, 515 U.S. 646 (1995) [Supreme Court upheld as reasonable random urinalysis testing of student athletes going out for sports teams in which the governmental interest at stake was the health and safety of students]. Considering all of these factors, the Sixth Circuit concluded that the search of the male students was in violation of the Fourth Amendment.

Regarding the searches of the female students, the court likewise concluded for similar reasons that the nonconsensual search in the absence of individualized suspicion was not justified under the Fourth Amendment.

It should be noted that although the Sixth Circuit held that the searches at issue violated the Fourth Amendment, the court nevertheless ruled that the district court had erred in denying the District's motion for summary judgment. The Sixth Circuit held that the school officials were entitled to qualified immunity because their actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known".

Action: The best practice regarding strip searches is simply not to do them. If an issue is of such an important, urgent nature as to require a strip search, call the police and have them conduct the search. Searches of all students in a classroom should never be done.

While the Court held in this case that the school officials were entitled to immunity because there was no violation of a "clearly established" protected right, this would likely not be the result in future cases where a district were to strip search an entire classroom of students. If in doubt, contact your school counsel.

DRESS CODE – NO FUNDAMENTAL RIGHT TO WEAR BLUE JEANS

The United States Court of Appeals for the Sixth Circuit recently upheld a dress code policy for middle school students. Blau v Fort Thomas Public School District, 401 F. 3d 381 (6th Cir. 2005).

A Kentucky middle school sought to adopt a dress code policy for the purpose of creating unity, strengthening school spirit and pride, and focusing attention upon learning and away from distractions. The district argued that the dress code would enhance school safety, improve the learning environment, promote good behavior, reduce discipline problems and improve test scores, and improve children's self-respect and self esteem, bridge socio-economic differences between families, help to eliminate stereo types and produce a cost savings for families. The district formed a committee consisting of two board members, two teachers, four parents and four students to make a recommendation about the proposed dress code policy. The district ultimately adopted a dress code policy that prohibited:

- Clothing that is too tight, revealing or baggy as well as tops and bottoms that do not overlap;
- Visible body piercings (other than ears);
- Unnaturally colored hair that is distracting to the educational process, including blue, green, red, purple or orange;
- Pants, shorts or skirts that are not of a solid color of navy blue, black, and a shade of khaki or white;
- Tops with writing on them in logos that are larger than the size of a quarter, except for school logos; and
- Form-fitting or baggy shirts of any material that is sheer or light weight enough to be seen through.

The father of one of the students who served on the dress code committee sued the district, alleging that the dress code policy violated his

daughter's First Amendment right to freedom of expression, his daughter's substantive due process right to wear the clothes of her choosing, and his substantive due process right to control the dress of his child. The Court rejected all three Constitutional arguments.

In rejecting the Constitutional claims, the Court first noted that the student admitted that there was not "any particular message" that she wished to convey through her clothing. She merely wanted to be able to wear clothes that looked nice on her, or that she felt good in, or that expressed her individuality. The Court noted that if a school district may prohibit a student from wearing nihilistic Marilyn Manson tee-shirts, a school district surely may enforce a dress code that regulates the types of pants and tops a student may wear without respect to any particular message. The Court stated: "The First Amendment does not protect such vague and attenuating notions of expression – namely self-expression through any and all clothing that a 12-year-old may wish to wear on any given day." In order to be protected by the First Amendment, the Court noted that the student would have to show that the desired clothing can fairly be described as "indeed with elements of communication" which "conveys a particularized message that would be understood by those who view it." The Court nonetheless conducted a First Amendment analysis and found that the dress code was (1) unrelated to the suppression of expression, (2) furthered important and substantial governmental interests, and (3) did not burden substantially more speech than was necessary to further that interest.

Second, the Court rejected the claim that the dress code violated the student's substantive due process right to wear the clothes of her choosing. The Court noted that the list of fundamental rights protected by substantive due process is short, and does not include the right to wear dungarees (jeans).

Finally, the Court rejected the claim that the dress code interfered with the father's

fundamental right to direct the education and dress of his child. The Court stated: “While parents may have a fundamental right to decide whether to send their child to a public school, they do not have a fundamental right generally to direct how a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extra-curricular activities offered at the school or, as here, a dress code, these issues of public education are generally committed to the control of state and local authorities.”

Action: If your school district either has a dress code policy or is considering one, make sure that you include language that the purpose of the policy is to address matters other than controlling student expression. Such matters can include the following: creating unity, strengthening school spirit and pride, focusing attention on learning and away from distractions,

enhancing school safety, improving the learning environment, promoting good behavior, reducing discipline problems, building socio-economic differences between families, eliminating stereo types and producing cost savings for families.

If you are interested in seeing a copy of the dress code policy upheld by the Sixth Circuit Court of Appeals, feel free to email dmartin@scholtenfant.com.

“The first step in the acquisition of wisdom is silence, the second listening, the third memory, the fourth practice, the fifth teaching others.”
~Solomon Ibn Gabriol

NON-EXEMPT SCHOOL EMPLOYEES AS SCHOOL VOLUNTEERS

Questions frequently arise concerning the ability of non-exempt school employees to also serve as volunteer coaches, or as volunteers in another extra curricular program or activity, in the school district by which they are employed.

When these situations occur, the fundamental issue is whether the employee is a *bona fide* volunteer or whether the employee is instead performing duties for which he or she must be compensated under the Fair Labor Standards Act (“FLSA”).

This question generally arises only in connection with the volunteer work of a so-called “non-exempt” employee (i.e. an employee who, by virtue of his or her job assignment and/or rate of pay, is subject to the minimum wage and overtime requirements of the FLSA). Such employees are typically hourly employees. Because “exempt” employees are not subject to the FLSA’s overtime requirements, the matter of volunteering is generally not an issue with respect to them. Although caution needs to be exercised to ensure that employees are properly

characterized and treated as being exempt or non-exempt, that distinction is not the focus of this article. Instead, we address only the issue of non-exempt (e.g. hourly) employees also serving as volunteers for the district by which they are employed.

While every case or situation is fact-sensitive, an individual generally qualifies as a *bona fide* volunteer, rather than an employee, when all of the following criteria are satisfied:

1. The work or service is performed for civic, charitable or humanitarian purposes, without any promise, expectation or receipt of compensation;
2. The work or service is freely offered, without direct or implied coercion from the employer; and
3. The volunteer services are clearly different and distinct from the services which the individual performs as an employee of the same public agency.

If these basic criteria are not satisfied, then the work or services performed, allegedly as a volunteer, will likely constitute compensable time, perhaps even at overtime rates, under the FLSA.

Some elaboration and a few illustrations may be useful. For example, the prohibition against receiving any compensation or remuneration for the volunteer services is not absolute. Therefore, payment of reasonable expenses or benefits, or even payment of a “nominal” fee, may be allowed. While reimbursement for reasonable expenses is generally not problematic, payment of benefits or a “normal” fee are more likely to be construed as prohibited compensation. Because these terms are not defined, the safest course of action is obviously to refrain from paying volunteers either benefits or fees.

The third criterion prescribed above - i.e. that the individual may not as a volunteer perform the same (or substantially the same) services for the same public agency that he/she performs as a non-exempt employee - is perhaps best described by a few examples. Therefore:

(a) A clerical employee for a public school would be able to volunteer similar clerical services for a PTA group if, but only if, the PTA group is an entity separate and apart from the school. If the PTA is not a separate entity, however, then the clerical PTA work or service would likely require compensation by the school.

(b) A person employed as a public school bus driver could volunteer as a wrestling or other coach for the same school district because the services performed as an employee and those performed as a volunteer are clearly different and distinct.

(c) A person employed as a public school bus driver could not, however, volunteer as a bus driver to transport one of the schools’ athletic teams to an away contest because the work or service is basically the same.

Because each case and situation is fact dependent, and because there are a few exceptions to the general rules, consultation with counsel is likely prudent in the event of question or doubt about a given employee and volunteer situation.

**DON'T OVERLOOK STUDENT NEEDS THAT MAY AFFECT
EDUCATIONAL PERFORMANCE**

Failure of an IEP Team to consider substance abuse issues or chronic behavioral needs have been found to deny a FAPE for students with disabilities. In Lewis Central School Dist., Loess Hills AEA 13 & Iowa Dept. of Educ., 42 IDELR 247 (SEA Iowa, 2005), the District’s failure to address the drug problems of a 17-year-old student with ADD and significant learning disabilities denied him an appropriate educational program and In re: Student with a Disability, 42 IDELR 224 (SEA Pa., 2005), the District’s failure to reconvene an IEP team to address chronic and acute behavioral needs denied an appropriate education for a seventh grader with a learning disability, ADD, and SED.

In Lewis Central School District, the student was a 17-year-old student with a significant learning disability and attention

deficit/hyperactivity disorder. When he was six, the student began receiving special education programs and services for behavioral and academic needs. In March 2004, he was caught with a pipe commonly used for drug-related activity in his possession at school. The student’s use of illegal drugs was a concern shared by both school officials and his parents. The March incident led to a referral to a Student Assistance Program offered by the district and development of a contract between the administration, the student and his parents. According to the terms of the agreement, the student agreed to submit to a drug screening each month; to see the drug counselor provided by the school on a weekly basis; to do 40 hours of community services; to not skip any class; and to attend an AA meeting once a week until graduation. If he violated any provision of the

agreement, a recommendation for expulsion would be made to the Board of Education. At the same time, the district also conducted a functional behavioral assessment (FBA) and developed a behavior intervention plan (BIP).

In May 2004, the student failed his monthly drug screen and the IEP team, including his parents, met to complete a manifestation determination review. The team was unable to reach consensus regarding the relationship between the child's disability and the behavior (violation of the contract) subject to review. The district placed him into a 45-day interim alternative educational setting (IAES) for drug-related issues and thereafter recommended that the student be placed in a program at a different school. The parents disagreed with the proposed placement and argued that the FBA and BIP developed in March failed to address the identified behavior of concern, namely, drug-related behaviors. They also argued that the agreement developed in March between the parents, the student, and the administration did not give due consideration of manifestation determination issues.

The ALJ in this case considered the adequacy of the IEP in relation to the behavior leading to disciplinary action and other elements such as the use of functional behavioral assessments and behavior intervention programs. The ALJ concluded that the FBA and BIP developed for the student in March 2004 did not address drug-related behaviors such as activities, causes, or motivation relating to drug use, but rather identified areas of concern such as "being tardy to classes, not doing independent work without being prompted, and possessing drugs and/or drug-related materials at school." The ALJ found that the IEP was inadequate because it should have been based on an FBA and BIP that addressed drug-related behaviors that significantly impacted the student's educational program and the likelihood of disciplinary actions. The ALJ explained that the purpose of the FBA is to explore the child's misbehavior and discover what, if anything can be done to address it and prevent it from occurring again. Here, the student's drug-related behaviors were specifically at the heart of the disciplinary proceedings in which he was involved and the

FBA and BIP had failed to address the drug-related behavior leading to the disciplinary action. The ALJ found that the shortcomings of the FBA and BIP were significant enough to question any determination that there was no relationship between the student's disability and his drug-related behavior and thus, the IAES and recommended change in placement were not appropriate.

In another case, In re: Student with a disability, an appeals panel of the Pennsylvania State Education Agency concluded that a district failed to provide a seventh-grader with a learning disability, ADD and SED, an appropriate IEP when it failed to reconvene his IEP team to address his chronic and acute behavioral needs. Though the student's IEP may have been appropriate at the beginning of the student's seventh-grade year, the District had a legal duty to convene the IEP team to address the student's behavior once it knew or should have known the behavior was a manifestation of the student's disability and was impacting his education.

The student, who attended a charter school, started having problems with aggression and negative behaviors in first grade. At that time, he was evaluated and found to be eligible for special education. The student's behavioral difficulties continued throughout the course of his education and were repeatedly identified by the IEP team as an area of concern. In October 2003, an IEP was developed for the student's seventh-grade year. The student's inappropriate, disruptive, disrespectful, and aggressive behavior towards peers and staff members continued to escalate throughout the year and resulted in repeated in-school and out-of-school suspensions. The school responded by implementing "Daily Progress Reports," suggesting that parents contact a human services agency for help, requesting that parents consider an alternative placement, suggesting the parents consider placing the child on medication, and initiating a "safety plan" within the school. However, the IEP team did not meet prior to the school's actual or proposed changes in special education programming and placement.

In April, the district met with parents to discuss the need for a manifestation determination review (MDR) concerning a recent out-of-school suspension for an incident between the student and the principal. The team decided that a psychological evaluation should be completed prior to the MDR and that an FBA should be performed. The results of the evaluation found that the student exhibited a pattern of behavior consistent with ADD, poor rule-governed behavior (poor peer relationships) and a “Verbal Learning Disability.” At that time, the parents requested a due process hearing, arguing that the district had continuously over the years identified the student as SED and listed as concerns poor peer relationships, inappropriate and aggressive behaviors, and therefore, an FBA should have been an integral part of the student’s seventh-grade IEP.

The appeals panel agreed with the hearing officer that the school knew, based upon years and years of classroom teacher and staff reports from kindergarten through seventh grade, current behavioral episodes, annual achievement tests, and formal evaluations that the student was a child with behavioral issues, who because of his disability, was unable to experience progress in his educational program. Even if the seventh-

grade IEP was appropriate at the beginning of the year, by the end of the first quarter of seventh grade, the school clearly knew, or should have known, that the student’s behaviors were impacting his educational program and the student was in a serious and rapid behavioral regression. The district had a duty to convene the IEP team for the purpose of addressing the student’s chronic and acute behavior needs. The district should have swiftly completed an appropriate evaluation, including an FBA, in response to the student’s deteriorating behavior.

Action: The IEP team has a responsibility to address all areas related to a student’s special education needs. Individualization requires consideration of both academic and non-academic benefits that a student receives and goals should be revised or changed based on lack of significant success in academic or behavioral areas. A district must convene the IEP team and if needed, devise and conduct an appropriate FBA that addresses behaviors of concern when they arise. Districts should be cautious about implementing such things as “contracts” or “safety plans” that are not part of the student’s IEP and that are not based on appropriate assessments.

SCHOOLS NOT REQUIRED TO PROVIDE AUTOMATIC ACCESS TO RECORDS UNDER FERPA

Under the Family Educational Rights and Privacy Act (FERPA), schools are only required to give parents “the opportunity to inspect and review the student’s education records.” 34 C.F.R. 99.10. While some districts provide one or both parents with automatic access to certain records such as report cards or achievement tests, doing so is not a requirement of FERPA.

In Letter to Anonymous, 105 LRP 11223 (FPCO 2004), the Family Policy Compliance Office addressed the issue of whether a school must provide a duplication of materials that it sends home to a child’s mother, to the child’s father in a circumstance where the father shares joint custody with full legal rights. The FPCO advised that FERPA does not require districts to “automatically and/or periodically

provide either parent access to their children’s educational records.” Rather, the law mandates the district comply with each individual parental request for access. Custody has no bearing on a natural parent’s rights under FERPA, unless those rights have been specifically revoked by court order or under state law. FERPA gives custodial and non-custodial parents alike the right to have access to their children’s records.

The FPCO also addressed a question posed by the parent regarding daily classroom activities by explaining that a document listing the teacher’s planned activities for the class generally would not be an educational record because it would not directly relate to the individual student. However, if the teacher maintained a list of activities for an individual

student that included the student's name or other personally identifiable information, then the list would be an educational record protected by FERPA.

Action: A district's practice of sending home certain records is a voluntary one under FERPA and the district's only obligation is to comply with each individual parental request for access. However, in cases where the parents are

divorced, districts should be aware of any court order that would limit one parent's ability to access the student's educational record. Similarly, if a court has issued a Personal Protection Order (PPO) of which the district is aware, records may need to be redacted to delete information such as addresses and telephone numbers.

FOIA – FRANK COMMUNICATION EXEMPTION UPHELD

The Michigan Court of Appeals recently addressed and explained the "frank communication" exemption under the Freedom of Information Act, holding in favor of Eastern Michigan University in its decision not to disclose a letter from the Vice President of Finance to a University Board member regarding the University's President. Herald Company, Inc., d/b/a Booth Newspapers, Inc. v Eastern Michigan University Board of Regents, 265 Mich App 185 (2005).

The Eastern Michigan University Board investigated expenditures involved in the construction of the President's residence. As a part of its investigation, the Board asked the Vice President of Finance for his written opinion regarding the President's role in the project. The Board also hired Deloitte & Touche to conduct a comprehensive audit of the expenditures for the President's residence. The University released a voluminous and exhaustive report on the subject to the public and press. However, when the University received a FOIA request for all documents related to the President's residence and the investigation, the University declined to disclose the Vice President's letter citing the "frank communication" exemption under Section 13(1)(m) of the FOIA.

The trial court ruled in favor of the University, based on the following reasons. First, the letter contained substantially more opinion than fact; second, the factual material contained in the letter would not be easily severable from the majority of the opinions and comments; third, the letter was preliminary to a final determination of policy or action; fourth, the public interest encouraging the frank

communication within the public body clearly outweighed the interest in disclosing the letter; finally, the University conducted a thorough investigation and published a voluminous and exhaustive report concerning its findings.

In reviewing the trial court's decision, the Court of Appeals analyzed and explained the frank communication exemption in much detail. The Court emphasized that the goal of both FOIA and its exemptions is good government, not disclosure of records for disclosures sake. The Court explained that the purpose of the frank communication exemption is to protect the quality of governmental decisions, which are only as good as the information that informs them. There are certain special cases where nondisclosure better serves the public interest in good governments than disclosure.

The Court noted that, in some circumstances, it is clear that people who expect public dissemination of their remarks will likely temper their candor. In certain situations, this could lead to poor government and poor decision-making.

The Court held that the trial court did not commit a clear error in its findings and upheld the denial.

Action: There are three questions that must be answered to determine whether the frank communication exemption applies.

(1) Did the public body show that the requested document covers "other than purely factual materials?"

(2) Did the public body show that the document is “preliminary to a final agency determination of policy or action?”

(3) Did the public body “establish that the public interest in encouraging frank communication within the public body or

between public bodies clearly outweighs the public interest in disclosure?”

It is good practice to consult with your local counsel before exempting items from disclosure based upon the frank communication exemption.

FOIA DOES NOT REQUIRE ACCESS TO COMPUTER HARD DRIVES

In a recent unpublished decision, the Michigan Court of Appeals upheld a fire department’s refusal to permit a person to inspect and copy the hard drives on the fire department’s computer as part of a FOIA request. Ritzer v Lockport-Fadius-Park Township Fire Department, (unpublished February 8, 2005).

The fire department received six FOIA requests, including a request for the fire department’s fax drum (the long scroll of coded film that a plain paper fax machine uses to print images received onto paper, which creates an exact negative of the image received, and, therefore, provides an archive of the information received by a fax machine), and copies of the fire department’s computer discs/tapes. The fire department responded to the FOIA requests by providing substantial disclosures of information, but did not provide the fax drum or allow the requestor to inspect and copy the fire department’s hard drives on its computers.

The trial court held that the fire department violated FOIA with respect to the fax drum, but not as to the computer discs/tapes.

The Court of Appeals cited the precedent that, in general, a party responding to a FOIA request must provide the information in the form requested. The Court noted that, in this case, where the requestor is seeking access to and disclosure of computer hard drives, the hard drives would contain much information that

would be considered exempt from disclosure under FOIA, such as computer software and other information. This combination of exempt and non-exempt material on a computer hard drive would require the public body to separate the exempt and non-exempt material to make the non-exempt material available for examination and copying. The Court noted that there was no way for the fire department to separate the exempt material from the non-exempt material in order to make only the non-exempt material available to the requestor in the form requested unless the defendant were to create a new disc or tape containing only the non-exempt material. Because the FOIA does not require a public body to create a new public record, the Court concluded that, under the facts of this case, where separation of exempt and non-exempt materials would require the public body to create a new public record, it was not improper to provide paper copies of the non-exempt material contained on the defendant’s computer discs/tapes, rather than access to the hard drives themselves.

Action: In general, a school district is required to respond to a FOIA request by providing the information in the form requested by the requesting party. When a request for computer records is made in the form of seeking access to or copies of computer hard drives or tapes, consult with your counsel to determine whether it would be appropriate to respond to the request by providing the information in an alternative format.

THE DEAL WITH “DEAL”

As you may recall, in the winter issue of School Law Update, we reported on Deal v Hamilton County Board of Education, 42 IDELR 109, ___ F. 3d ___ (6th Cir., 2004). In that case, the Sixth Circuit applied a “meaningful benefit” standard for determining whether a student received FAPE, and ordered reimbursement for in-home ABA programming. In doing so, the court failed to follow several prior Sixth Circuit cases regarding the FAPE standard and methodology disputes between parents and school districts.

In January, the school district filed a petition for rehearing *en banc*. This petition sought to have the case reheard by all of the judges on the Sixth Circuit, rather than the typical three judge panel. Last month the Sixth Circuit issued an order denying the petition for rehearing *en banc*.

Following the denial of rehearing, the school board has voted (five to one) to appeal to the United States Supreme Court. To do so, the school district must file a petition for *certiorari* which is then reviewed by the Supreme Court, who will decide whether or not to hear the appeal. Merely filing a petition for *certiorari* does not guarantee that the Supreme Court will take the case.

The process of appealing to the Supreme Court will require additional time and expense. The district has come under fire by local newspapers, which report that the district has already spent 1.7 million dollars defending its position. Further appeal is sure to incur significant additional expense, time and public scrutiny.

HEARING OFFICER’S JURISDICTION OVER CONTESTED IEP EXTENDS TO “SAFETY CONCERNS”

In Lillbask v. State of Connecticut Department of Education, 397 F. 3d 77, 42 IDELR 230 (2nd Cir. 2005), the Second Circuit Court of Appeals held that IDEA’s requirement that a state implement procedural safeguards providing parents or guardians with “an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child,” 20 USC § 1415 (b) (6), includes jurisdiction to hear issues relating to a parent or guardian’s “safety concerns” in connection with an IEP. This case is significant as it seems to expand the scope of a hearing officer’s jurisdiction, and the issues that may be raised in a due process hearing.

Ingabritt Lillbask is the legal guardian of Lindsey Mauclaire, a disabled child who, as the result of a near-drowning incident during his first year of life, could not walk and suffered various visual, mental, and neurological

impairments. During the 1996-1997 school year, Lindsey was educated in a mainstream pre-kindergarten program at a public elementary school in Redding, Connecticut. However, when the Planning and Placement Team met to develop Lindsey’s IEP for the following year, the team concluded, over Ms. Lillbask’s objections, that the least restrictive environment consistent with Lindsey’s needs was in a private special education program in another city.

Ms. Lillbask challenged the IEP, objecting primarily to its private placement proposal. During 1997 and 1998, four due process hearings relating to Lindsey’s challenged IEP were conducted before four different hearing officers, yielding decisions on various issues. After the IEP was upheld at the administrative level, Ms. Lillbask appealed to federal court. On March 30, 2002, almost five years after the litigation was commenced, the court entered partial summary judgment for the district and lifted the stay-put order that had been in place

throughout the litigation. The parent appealed to the Second Circuit Court of Appeals.

The Second Circuit addressed several issues, including a potentially significant jurisdictional issue. The issue was whether the hearing officer had jurisdiction to hear certain issues raised in connection with the IEP process. Specifically, at the second due process hearing, the parent had raised various safety concerns with respect to Lindsey's proposed 1997-1998 IEP. Specifically, parent faulted the IEP for failing to address: (1) the training and availability of appropriate substitute teachers and aids for Lindsey; (2) the risks of leaving Lindsey within reach of potential dangers, such as electrical chords; (3) the need to use Lindsey's car seat when transporting him on the school bus; (4) Lindsey's need for other assistive devices, such as his prone stander, wheelchair and special seat; (5) insuring that Lindsey is fed to avoid choking hazards; and (6) avoiding placement of Lindsey on a dirty floor during physical education. The hearing officer had concluded that a special education hearing officer lacked the jurisdiction to investigate safety complaints. The federal district court had declined to reverse this conclusion, noting that the parent had offered no citation or support for her assertion that IDEA jurisdiction is sufficiently broad to incorporate safety issues related to the special education needs of a student.

On appeal, the Second Circuit reversed. The Second Circuit held:

However weakly Lillbask may have supported her claim, we conclude that her jurisdictional assertion is correct. IDEA requires a state to implement procedural safeguards providing parents or guardians with 'an opportunity to present complaints with respect to *any matter* relating to the identification, evaluation or educational placement of the child, or the provision of a free appropriate public education to such child.' 20 USC § 1415(b)(6) (emphasis added). This broad language suggests that

Congress did not intend to exclude from consideration any subject matter – including safety concerns – that could interfere with a disabled child's right to receive a free appropriate public education.

In concluding that the phrase "any matter" had an expansive meaning, the Court reversed the lower court's decision and remanded the case for entry of declaratory judgment in favor of the parent. The Court did so to assure the district "understood that safety concerns may be considered in the development and review of future IEPs. . ."

Action: The jurisdiction of due process hearing officers has been a subject of dispute over the past few years. In this case, the jurisdictional issue before the court pertained to safety concerns that the parent wanted addressed in the IEP. The court's language, however, could also be used to support an argument for a more expansive interpretation of the jurisdiction afforded a hearing officer in due process hearings under IDEA. Although districts must be allowed to correct any deficiencies in a student's educational program before a parent can file suit in federal court, this decision stands for the proposition that any matter that could interfere with a student's right to receive FAPE should not be excluded from consideration in an IEP, and ultimately by a hearing officer. In Michigan, the U.S. District Court for the Western District of Michigan has twice ruled that hearing officers have jurisdiction over "complaint" (compliance) issues. See, Lewis Cass ISD v. M.K., 40 IDELR 8, 290 F. Supp. 2d 832 (WD MI, 2003); Grand Rapids Public Schools v. P.C., 41 IDELR 7, 308 F. Supp. 815, vacated, 104 LRP 42255 (WD MI, 2004). Compare, however, Kuszewski v. Chippewa Valley Schools, 131 F. Supp. 2d 926, 34 IDELR 59 (ED MI, 2001). Parent attorneys will argue that this decision supports the position that due process hearings are the proper forum for presenting all complaints or "concerns".

NO FUNDAMENTAL RIGHT TO WALK AT GRADUATION

The United States District Court for the Western District of Michigan recently upheld a district's decision to suspend a high school senior at the end of the school year, which included prohibition against the right to participate in various senior activities, including commencement. Posthumus v. Mona Shores Public Schools, (Jan. 27, 2005).

A high school senior was preparing to participate in an honors assembly two days before the end of the school year. As the assistant principal walked down the line of students to make sure they were ready to proceed, he noticed that the student was holding a package of graham crackers. The assistant principal confiscated the graham crackers from the student and continued walking. The student left his place in line and followed the assistant principal down the hall, demanding to know why the assistant principal took his crackers and when they would be returned. The student eventually stepped in front of the assistant principal to block the assistant principal's progress. The student's forearm then met the assistant principal's chest (there was, of course, a dispute as to who was really running into whom). The dean of students then intervened and told the student to drop the matter. As the assistant principal walked away, the student loudly referred to the assistant principal as a "dick" and then returned to his place in line to participate in the honors assembly.

Following the honors assembly, the assistant principal and the dean of students met with the principal to discuss the incident. Later in the day, the dean of students met with the student to advise him of the charges and give the student an opportunity to respond. During the course of their meeting, the student once again became very agitated, was generally uncooperative, and used profanity at the dean of students. The principal explained to the student that he would not be allowed to participate in commencement, the senior breakfast, senior mock elections, senior banquet, etc. The district suspended the student for the remainder of the year. The district informed the student's mother that the

student would be charged with trespassing if he entered school grounds during the course of the suspension.

The student challenged the district's actions as violating his procedural due process rights, his substantive due process rights, and his First Amendment free speech rights. The Court rejected all three arguments, and further found that the substantive due process claim and the First Amendment claim were frivolous. The Court held that because the district imposed essentially a ten day suspension, the process required was the same process for short term school suspensions as explained by the United States Supreme Court in Gross v. Lopez. Because the student was given notice of the charges against him and an opportunity to present his side of the story to the dean and principal, the school provided the due process. The Court held that the fact the student was going to be suspended and barred from his once-in-a-lifetime opportunity to participate in his high school graduation ceremony did not give rise to an unusual situation, and, therefore, would not require more process to be followed by the district. The student received his diploma on time, was enrolled in college and did not suffer any adverse consequences.

The Court also rejected the student's substantive due process claim. The student conceded that he did not have a fundamental right to either attend school or to attend the commencement ceremony or other graduation events. As such, the standard of review is whether there is a rational relationship between the punishment and the offense committed by the student. The Court found that in light of the student's conduct towards the assistant principal, there was a rational relationship between the punishment and the offense.

Finally, the Court rejected the student's First Amendment claim. The Court analyzed the issue under the Fraser standard adopted by the United States Supreme Court, which allows the school district to discipline students for "lewd and indecent speech" because schools have an

interest in teaching students about the boundaries of social and appropriate behavior. The Court found that the district was able to discipline the student for referring to the assistant principal as a “dick”, a term that is widely considered to be lewd or vulgar and, disrespectful, especially when used towards a person in authority. The Court noted that judgments regarding what speech is appropriate in school matters should be left to the school rather than the courts. School districts are entitled to make the point to pupils that vulgar

speech and lewd conduct is wholly inconsistent with the fundamental values of a public school education.

In a subsequent case, the Court held that the school district was entitled attorney fees for its defense of the frivolous portion of the lawsuit (involving the substantive due process and First Amendment claims). The Court held that the student and the student’s attorneys would be jointly liable for \$2,100 in attorney fees.

LEGISLATIVE CORNER

The Michigan Department of Education has posted a number of Special Education related documents for review and public comments. These documents include a proposed revised IEP manual and proposed revised IEP documents, IFSP documents, policies regarding placement of students in private schools, procedural safeguards and the Continuous Monitoring System. Public comment will be received from April 15 through June 15, 2005. We encourage you to provide your comments. These documents can be accessed at the departments web site, www.michigan.gov/mde.

Representative Lipsey has again introduced legislation to revise the corporal punishment statute. HB 4255. This bill was also proposed last year, and has been reintroduced with the same revisions proposed, which include significant limitations on the use of force, time-out and restraints. School district employees are encourage to review the text and submit your comments to your state representative. The bill has been referred to the Committee on Education.

HB 4276, introduced on February 15, 2005, proposes to revise MCL 388.1625c to delete certain conditions necessary (i.e., that the district

be a school district of the first class, that the student was a resident in the district on the cont date, and that there be at least 25 students meeting these criteria) in order for an educating district to receive a prorated amount of state aid for students transferring from another district after the membership count date.

HB 4026 and SB 44 have been introduced, both dealing with the implementation of bullying policies by school districts and public school academies. Both have been referred to the Committee on Education.

SB 69 has been introduced and referred to the Committee on Education with revisions to MCL 380.1311g, regarding strict discipline academies, to permit student who have suspended to be enrolled in a strict discipline academy.

HB 4049 recommends amending the compulsory attendance provisions to include students from age 6 until age eighteen. The bill has been referred to the Committee on Education.

HB 4339 and 4340 would add sections to the school code regarding truancy, which would include, among other things, a requirement that the secretary of state suspend the drivers license of a student who is determined to be truant.