



LABOR TRUMPS TENURE

The Michigan Court of Appeals recently ruled that the State Tenure Commission did not have jurisdiction in a matter where teachers argued that they were "demoted" when the school district required the teachers to pay a portion of their health care premiums. Ranta v. Eaton Rapids Schools (Michigan Court of Appeals June 6, 2006).

During negotiations with the Eaton Rapids Education Association, the school district was unable to resolve the issue regarding payment of health insurance premiums. Under the prior contract, the school district paid the entirety of premiums in full. The school board adopted a resolution declaring that the parties had reached an impasse in the negotiations. The school board then unilaterally implemented its last proposal, which capped its obligation to pay health care premiums and required employees to bear any excess premium costs above the cap. The insurance premiums increased in the following school year and exceeded the capped amount. The school district deducted an amount from each employee's paycheck to cover the excess amount according to each employee's elected health care plan. The teachers' salaries were also increased in the following school year, between \$2,000-\$2,500.

The union filed a charge with the Michigan Employment Relations Commission (MERC) alleging an unfair labor practice under the Public Employment Relations Act (PERA), which was settled when a successor collective bargaining agreement was reached. The individual teachers filed charges with the State Tenure Commission (STC) asserting that requiring them to contribute to the health care insurance premiums constituted a reduction in wages, and therefore was a demotion as defined in the Teachers' Tenure Act (TTA).

The district argued that the teachers were not demoted and that the STC lacked jurisdiction because the issue was a labor dispute governed by PERA and subject to MERC's exclusive jurisdiction. The hearing referee agreed with the

district and entered a decision and order dismissing the claim. The full STC reversed that decision, stating:

The issue raised in this case is whether appellants have been improperly demoted. Such claims traditionally rise under the Teachers' Tenure Act.

* * *

The fact that a teacher's salary is not reduced does not necessarily establish that a teacher has not been demoted. The total compensation package must be considered in determining whether there has been a reduction equivalent to three days' compensation.

The district appealed the decision of the STC to the Michigan Court of Appeals. The Court of Appeals originally denied the application for leave to appeal. The district appealed that decision to the Michigan Supreme Court, which, in lieu of granting leave to appeal, remanded the matter back to the Court of Appeals for reconsideration. The Supreme Court specifically directed the Court of Appeals "to pay particular attention to whether the State Tenure Commission has jurisdiction over this dispute."

The Court of Appeals reviewed the relevant provisions of both PERA and the TTA. The court acknowledged that PERA is "the dominant law regulating public employee labor relations." Under PERA, MERC has the exclusive jurisdiction over unfair labor practices. The STC is "vested with such powers as are necessary to carry out and enforce the provisions of the Teachers' Tenure Act. The Teachers' Tenure Act is not intended, either in contemplation or design, to cover labor disputes between school boards and their employees."

The court acknowledged that health insurance benefits are a mandatory subject of bargaining under PERA. If, after the parties have met in good faith and bargained over a mandatory subject of

bargaining, they are not able to agree on the terms of that mandatory subject of bargaining, they have reached an impasse. Under PERA, when good faith bargaining has reached an impasse, the employer may take unilateral action on an issue if that action is consistent with the terms of its final offer to the union. The court found that is what the district did in this instance.

Rather than just determining that PERA was controlling in this dispute and that the STC did not have jurisdiction, the Court of Appeals also specifically ruled that the cap on the payment of health insurance premiums could not be considered a demotion. The court noted that all teachers received salary increases between \$2,000 and \$2,500. The allegation of a demotion was the result of having to pay for insurance premium increases to the extent they exceeded the capped amounts paid

by the school district pursuant to the contract as properly implemented. The court found that this would not constitute a reduction in compensation when their compensation was actually increased and not reduced. The court stated: "The failure to satisfy an employee's 'reasonable expectation' based on an employer's prior action does not amount to a demotion." This is especially true, according to the court, when the alleged demotion arose due to an unrelated third party (i.e., health insurance provider) increased the cost of health care premiums. The school district actually paid more in health care benefits in the following year, but required the teachers to pay a portion of the premiums as well due to increased rates. This was not a demotion under the Tenure Act.

MICHIGAN SUPREME COURT VACATES AUXILIARY SERVICES ACT DECISION

In Michigan Department of Education v. Grosse Pointe Public Schools, 266 Mich App 258 (2005) the Court of Appeals held that the Auxiliary Services Act (ASA) and the Michigan Mandatory Special Education Act (MMSEA) required that a public school provide an independent educational evaluation (IEE) to a student enrolled in a private school. As you may recall, in May 2005, the Michigan Court of Appeals ruled that the ASA includes the procedural safeguard of an independent educational evaluation where a parent of a student attending a private school disagrees with an evaluation performed by a public school under the Act. See, School Law Update Spring 2005. The Court of Appeals held that the ASA and the MMSEA must be read in harmony, and reasoned that when the ASA had been amended in 1976 to include the phrase "ancillary services," but did not contain a definition in that Act or Rules, the intent of the legislature was to include the services defined as "ancillary services" in the Special Education Rules. Since a school district is required to provide diagnostic services to pupils attending non-public

schools under the ASA, if a parent disagrees with the evaluation, the Court of Appeals reasoned they are entitled to the procedural safeguard of an independent educational evaluation as provided by Michigan Special Education Rules.

On April 26, 2006, the Michigan Supreme Court entered an order vacating the judgment of the Court of Appeals. Michigan Department of Education v. Grosse Pointe Public Schools, 2006 Mich LEXIS 702 (April 26, 2006). The Supreme Court found that the Court of Appeals erred in considering the substantive issues because the case had become moot when Grosse Pointe Public Schools paid the cost of the independent evaluation.

Action:

By vacating the Court of Appeals' judgment, the case opinion no longer carries precedential value. It does, however, clearly identify the likely decision if this issue were ever presented to the Court of Appeals in the future.

SURVEY SAYS: QUALIFIED IMMUNITY FOR DISCIPLINING PRINCIPAL

The Michigan Court of Appeals held a superintendent had qualified immunity in a case involving the disciplining of a principal who was engaging in speech activities. Maygar v. Clio Area School District and Latture (unpublished, April 27, 2006).

The principal was directed to add two additional hours to an examination schedule. In the past, the school had scheduled six exams over two days. The school district changed that schedule so students would only be required to take one or two examinations a day, spread out over a week. The principal solicited input from department heads, who suggested going back to the old schedule. The principal then sent a memorandum to homeroom teachers asking the teachers to survey students about going back to the former schedule. This prompted a series of complaints from students and parents to board members and the superintendent. After the principal was subsequently transferred to the position of community education director, he sued the school district and the superintendent, alleging that the action violated his civil rights and right to free speech.

The school district and superintendent sought to dismiss the case on the grounds of qualified immunity. A three-part test is generally used to determine whether qualified immunity is available:

(1) whether, based upon applicable law, the facts viewed in light most favorable to the plaintiff shows that a constitutional violation has occurred;

(2) whether the violation involves a clearly established constitutional right of which a reasonable person would have known; and

(3) whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.

The principal claimed he was disciplined (removed as principal) in retaliation for exercising his right to free speech protected by the First Amendment. A three-part test is also used to establish a *prima facie* case of First Amendment retaliation:

(1) the plaintiff must be engaged in a constitutionally protected activity;

(2) the plaintiff must be subjected to adverse action or deprived of some benefit; and

(3) the protected speech must be a substantial or motivating factor in the adverse action.

The court noted that while public employees enjoy the right to free speech, a school district is afforded greater leeway to control speech that threatens to undermine the school district's ability to perform its legitimate functions. To determine whether a school district violates an employee's right to free speech, courts engage in a three-step inquiry. First, the court determines whether the relevant speech addresses a matter of public concern. If so, the court then balances the interests of the employee "as a citizen" commenting on a matter of public concern with the interests of the school district as an employer in promoting the efficiency of the public services it performs through its employees. Finally, the court determines whether the employee's speech was a substantial or motivating factor in the decision to take adverse employment action. If the plaintiff establishes a *prima facie* case, the burden shifts to the defendant to show, by a preponderance of the evidence, that there are other reasons for the adverse action and that the same result would have occurred even if the plaintiff had not engaged in the protective activity.

The court noted that the principal's speech was a matter of public concern, essentially because the principal made it one when he raised the issue of the examination schedule first to the department heads, then to all teachers, and then ultimately to the students. The court found, however, that the principal's interests in speaking out were outweighed by the school district's interests in promoting the efficiency of the public services it performs. The court noted that the principal's attempts to implement a schedule that had been rejected and abandoned by the school district in the past had the effect of challenging the district's earlier decision to change the schedule, and was therefore a form of insubordination. The court found that the principal created unnecessary stress

and anxiety among the students and parents, and had the effect of creating disharmony among all parties involved, because the students' interests conflicted with their teachers' interests. The court found that the superintendent's decision to transfer the principal because of the detrimental effect his actions had on the school outweighed the principal's interests in speaking out about a proposed change in the examination schedule. The court went on to state that if the principal's speech played any role in his transfer, it was only because he was insubordinate by presenting the issue to the teachers and students after the matter had been previously resolved by the school board, and by proposing a change that was directly contrary to what the school board had earlier decided.

The court also noted that a principal is a confidential or policy-making employee within a school district. When a confidential or policy-making employee is disciplined for speech related to their political or policy views, the court's balance typically favors the government (school district) as a matter of law. Because a principal must implement the policies of the school board and superintendent, the court found that the principal was a confidential employee.

The court also found that a reasonable official in the superintendent's position would not have believed that her conduct was unlawful. The superintendent suspended and transferred the principal primarily because she believed the principal was insubordinate. The court noted that it was not inappropriate for the superintendent to take adverse action against a policy-making or confidential employee who speaks out against a policy adopted by the school board.

Finally, the court held that it was not objectively unreasonable for the superintendent to reassign the principal to a new position. The court held that the superintendent had qualified immunity.

Action:

Public employees should think first about the potential effect their speech may have on the operation of the school system before they engage in expressive activities. Administrators should consult with counsel before disciplining public employees as a result of the employees' expressive activities.

FOIA FEES

The Michigan Court of Appeals recently reversed a ruling of a trial court that had awarded the Detroit Free Press nearly \$16,000 in attorney fees and costs in an action under the Freedom of Information Act. Detroit Free Press, Inc. v. State of Michigan Department of Attorney General (unpublished May 16, 2006).

The Free Press requested documents from the Attorney General's office. The Attorney General sent a letter granting the request in part and denying the request for certain exempt records. The Attorney General advised the Free Press that it would charge \$20 per hour for 3 hours of labor to search, review, and separate the documents, as well as charge 25¢ per page to copy approximately 541 pages plus mailing costs. The Free Press asked the Attorney General to reconsider the copy fees, argued that the labor fees are unnecessary because the request was not unduly burdensome, and asked the Attorney General to clarify its decision to exempt certain documents from disclosure. The Attorney General declined.

The Free Press filed an action in Oakland County Circuit Court alleging that the Attorney General violated FOIA when it constructively denied its request through the imposition of labor charges and excessive copying charges. The Free Press did not assert any claim with respect to the Attorney General's partial denial of its FOIA request on the basis that the specified documents were exempt from disclosure.

The trial court ruled in favor of the Free Press, citing MCL 15.234(3), which provides in relevant part: "A fee shall not be charged for the cost of search, examination, review, and the deletion and separation of exempt from non-exempt information . . . unless failure to charge a fee would result in unreasonably high costs to the public body because of the nature of the request in the particular instance, and the public body specifically identifies the nature of these unreasonably high costs." The trial court found that the Attorney General failed to show that if it did not charge the \$60 labor fee, it would result in unreasonably high labor costs. The trial court denied the Free Press' claim that the 25¢



per copy fee was not within the appropriate parameters of FOIA. The Free Press then filed a motion for attorney fees and costs in the amount of \$33,830.60. The court reduced this amount because the Free Press prevailed only in part, but awarded the Free Press \$15,989.75 in fees and costs.

The Attorney General's office appealed to the Michigan Court of Appeals.

The Court of Appeals held that the trial court erred in awarding attorney fees to the Free Press. The court noted that attorney fees are available under Section 10 of the FOIA if a public body, in a final determination, denies an information request and the circuit court orders production of the documents. The Court of Appeals noted that the Free Press did not bring an action under Section 10 of the FOIA, that the Attorney General actually granted the information requested and made special efforts to accommodate the Free Press' request at minimal cost, and that the trial court did not order the Attorney General to disclose any of the requested documents because they had already been freely disclosed. The Free Press brought the lawsuit against the Attorney General's office not to challenge the failure to deliver any of the requested documents, but rather to challenge the labor and copying costs charged by the Attorney General. The Court of Appeals held the Free Press did not prevail under Section 10 of the FOIA, but rather prevailed, in part, under Section 4 of the FOIA. Section 4 of the FOIA contains no provision for awarding attorney fees or costs. The Court of

Appeals found that the trial court therefore had no basis for awarding the nearly \$16,000 in fees and costs to the Free Press.

Action:

Section 4 of the FOIA allows public bodies to charge reasonable fees for public record searches, the necessary copying of public records for inspection, and for providing a copy of the public record. While the fee is limited to actual mailing costs, incremental costs of duplication or publication including labor, the cost of search, examination, review, and deletion and separation of exempt from non-exempt information, the fee charged for labor involved in searching, examining, reviewing, deleting and separating exempt from non-exempt information should only be done if the fee would result in an unreasonably high cost to the public body and the public body identifies the nature of these unreasonably high costs. Any fee must be done pursuant to procedures and guidelines.

Review your FOIA policies, procedures and guidelines with respect to FOIA fees. Make sure that you are not charging fees for labor involved in examining, reviewing, and deleting or separating exempt from non-exempt information unless such fees would result in unreasonably high cost to your public body.

NEW GRADUATION REQUIREMENTS

As you know, the State Board of Education unanimously approved a set of increased high school graduation requirements for all Michigan students last December. On April 20, 2006, Governor Granholm signed into law a rigorous new set of statewide graduation requirements (Public Acts 123 & 124, which amends Section 1280 and adds Sections 1278a and 1278b of the Revised School Code). The new graduation standards will be required starting with the Class of 2011, next year's eighth graders.

For more information regarding the new graduation requirements, please contact one of our school law attorneys or view the Michigan Department of Education's website. The following page has links to the new law. <http://www.michigan.gov/mde/0,1607,7-140-38924---,00.html>

REEVALUATIONS NOT SUBJECT TO “30 SCHOOL DAY” TIME LIMIT

A state review officer affirmed the decision of a local hearing officer finding that Michigan's 30 school day time limit for completion of initial evaluations does not apply to reevaluations, and that a district does not waive its right to complete its reevaluation when such evaluation is not completed within 30 school days. Rochester Community Schools, _____ IDELR _____ (SEA MI, 2006).

Rochester Community Schools (RCS) initiated the due process hearing procedures in response to a parent request for an independent educational evaluation (IEE). The parents disagreed with the school district's reevaluation finding the student eligible as learning disabled (LD), believing that the student more properly was determined eligible as traumatic brain injured (TBI). RCS had agreed to complete an evaluation regarding TBI, but the parents had failed to make the student available for medical examination. Instead, the parents sought eligibility based upon evaluations from their private psychologist and a letter from their family physician agreeing with that psychologist's determination that the student was TBI. RCS initiated the due process procedures to show that its evaluation regarding learning disabilities was correct, and asking the hearing officer to direct that the parents make the student available for a medical evaluation regarding TBI. RCS also sought review of a determination made by the Michigan Department of Education (MDE) in a part 8 complaint filed by the parents against RCS that the 30 school day time line set forth in Michigan special education rules regarding initial evaluations was applicable to reevaluations. In response to the Due Process Complaint, the parents claimed the district had waived its right to perform its medical evaluation since the evaluation had not been completed within 30 school days of the district receiving consent. The parents also asked the hearing officer to determine that the student was eligible as TBI based upon the information the parents had provided to the district.

The local hearing officer issued an initial ruling finding that the 30 school day time limit regarding completion of initial evaluations was not applicable to reevaluations. Instead, reevaluations must be completed within a "reasonable" amount of time, and the district did not waive its right to complete a medical evaluation of the student merely because it

did not complete such evaluation within 30 school days of receiving consent. Following this initial ruling, a hearing was held regarding the appropriateness of the school district's evaluation regarding learning disabilities, and whether the district was entitled to an order requiring the parents to make the student available for a medical examination. During the hearing, the parents agreed to make the student available for examination, thus the hearing proceeded regarding the appropriateness of the school district's evaluation and the applicable time lines for reevaluation. Following the hearing, the hearing officer issued a final decision finding that the school district's evaluation was appropriate and reiterated that the 30 school day time line does not apply to reevaluations. Instead, the hearing officer ruled a reevaluation must be completed within a "reasonable" time. See, Rochester Community Schools, 45 IDELR 203 (MI, 2006).

The parents sought review of the local hearing officer decision by a state review officer. On appeal, the parents asserted five allegations of error by the local hearing officer: (1) the hearing officer erred in finding that the 30 school day time line did not apply to reevaluations, (2) that a "reasonable" time should be determined by MDE's finding that 30 school days was the controlling time limit, (3) that based on the district's assurance letter to MDE the district was "estopped" from claiming the 30 school day time limit did not apply, (4) that the hearing officer erred in retaining jurisdiction over the eligibility issue of the student following completion of evaluations, and (5) that the hearing officer erred in finding that the district's evaluation was appropriate.

After addressing each of these arguments, the state review officer affirmed the local hearing officer decision in all respects. First, the state review officer noted that the hearing officer's ability to retain jurisdiction over the eligibility issue following evaluations was appropriate. Secondly, the SRO also agreed with the hearing officer that the 30 school day time limit for completing initial evaluations did not apply to reevaluations. Instead, the SRO agreed that a reevaluation must occur within a "reasonable time," citing to Herbin v. District of Columbia, 362 F Supp 254 (D.C., 2005). The SRO rejected the argument that a "reasonable"



time should be based on the MDE determination that 30 school days was the controlling time limit. Instead, the SRO found that the determination of a reasonable amount of time would depend on the circumstances of the case, including the student's unique needs, the presence or absence of other needs and the existence of current educational programming. Ultimately, whether a district complied in completing an evaluation within a "reasonable" time would be within the discretion of the "trier of fact" (e.g., hearing officer). Further, the SRO also rejected the parents' claim that the district "waived" its right to complete its evaluation by not doing so within 30 school days, or that the district was "estopped" from asserting that the 30 school day time limit did not apply based upon an assurance letter to the MDE. Lastly, the SRO affirmed the hearing officer determination that the school district complied with the requirements of the regulations in performing its evaluation and that the district's evaluation was appropriate. The parents did not challenge the validity of the evaluation instruments, the administration of those instruments or the adequate training of the personnel performing the evaluation. Instead, the parents claim that the evaluation results were incorrect since the student's scores may have been adversely impacted by his off-task behavior. The SRO found that the evaluators specifically noted this off-task behavior in the evaluation reports, and testified that the student was able to be brought back to task. The reports also include suggestions

for use in the classroom to address on-task behavior. Given this, the SRO found the evaluation was not flawed, and that the evaluation performed by the school district was appropriate. Thus, the local hearing officer decision was affirmed in all respects, and the parents were not entitled to an IEE at public expense.

Action:

Michigan special education rules do not identify a specific number of days for completion of reevaluations. They do, however, identify the length of time for completing an initial evaluation, namely 30 school days. Similarly, IDEA 2004 sets forth a requirement that initial evaluations be completed within 60 calendar days, but does not identify a time limit for reevaluations. While a district may utilize the time limits for an initial evaluation as a "rule of thumb," there may be circumstances where a reevaluation may take longer to complete, or where consent for the reevaluation is procured at an annual review IEP meeting prior to the due date of the three-year reevaluation. A reasonable amount of time will be fact dependent. Where a parent seeks further evaluation in order for a student to receive services which he is not currently receiving, a "reasonable" time will likely be shorter than other situations. Similarly, a reasonable amount of time may be longer if the district must contract with outside evaluators over which they exercise no control regarding scheduling.

FINAL IDEA PART B REGULATIONS SENT TO OMB

The long awaited final IDEA regulations were sent by the Department of Education in mid-May to the Office of Management and Budget for final review. It is anticipated that the final regulations will be released in August, in time for the 2006-2007 school year. The Office of Management and Budget has 90 days to review the regulations for compliance with regulatory principles and to complete a cost benefit analysis. After the review, the regulations will be released or sent back to the Department of Education for further revision if they are not complete or in compliance.

LESSONS LEARNED: GOALS, OBJECTIVES, AND FAPE

While IDEA does not require a district to provide the best imaginable education for a student or to create an ideal IEP, recently decided cases have emphasized the significance of goals and objectives in determining whether a student has received FAPE.

In Penn Trafford School District v. M.F., 106 L.R.P. 17406 (WD PA., 2006), the federal court for the Western District of Pennsylvania found that a district's IEPs were "flawed" because they contained vague goals and immeasurable objectives. Similarly, in Minnesota, the federal district court found that goals and objectives were so vague "that they failed to demonstrate that the IEP had been reasonably calculated to result in education benefit." Independent School District No. 701, Hibbing Public Schools v. J.T., 45 IDELR 92 (DC MN., 2006). In contrast, however, the federal court for the Eastern District of Pennsylvania found in Brett S. v. West Chester Public Schools, 45 IDELR 121 (ED PA., 2006), that the numerous goals and objectives of a student's IEP were sufficiently specific and measurable and offered the student FAPE.

Penn Trafford dealt with a student with numerous developmental delays and a diagnosis of pervasive developmental disorder (PDD), who had received services before he began kindergarten. After he entered school, during the 2001-2002 school year, the district presented the parents with two proposed IEPs, neither of which was objected to by the parents. Following a reevaluation in August 2002, which determined that the student was cognitively impaired as well as PDD-NOS, the district proposed an IEP which the parents rejected. In November, the IEP team presented another proposed IEP which included annual goals and short-term objectives related to the student's performance in math, language arts and spelling, handwriting, communication, organization, science, social studies, reading and language content. The parents accepted the IEP and did not dispute its contents. However, they did question whether the goals were sufficiently specific and measurable to provide the student with FAPE.

In May 2003, the IEP team met again to revise the student's IEP and offered a proposal for a new IEP, which the parents rejected, and ultimately requested a due process hearing. Following the due

process hearing, the local hearing officer (LHO) found that the district had provided FAPE for the student during the 2002-2003 school year, that the proposed IEP of May 2003 was appropriate. The parents appealed the decision of the LHO and the appeals panel reversed the LHO's decision. The appeals panel found the August 2002, November 2002 and May 2003 IEPs were all flawed in that they lacked appropriate goals and objectives. Thus, the appeals panel held the student was entitled to compensatory education for the 2002-2003 and 2003-2004 school years. The district appealed to federal court.

When considering whether the district provided the student with FAPE, the court first reviewed IDEA's requirements for developing an IEP and stated,

The IEP takes the form of a detailed written statement summarizing the child's abilities, outlining the goals for the child's education, and specifying the services the child will receive...The IEP must include, among other things, a measure of the child's current level of educational performance, annual goals for the child, measurable, intermediate steps or major milestones to monitor progress, specific educational services to be provided, and a statement of the extent to which the child will participate in regular education programs. 34 CFR § 300.347.

The court further explained that an IEP must be "reasonably calculated to enable the child to receive educational benefits" (quoting Rowley, 458 U.S. at 206-207) and that the IDEA "calls for more than a trivial education benefit" and that "an appropriate IEP should provide 'significant learning' to and confer 'meaningful benefit' upon a student" (quoting Polk v. Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir., 1988)).

The court agreed with the appeals panel determination that the November 2002 IEP failed to provide the student with FAPE because the annual goals, the short-term objectives, and the specially designed instructions were flawed. Regarding annual goals, the court stated:

Goals such as '[C.F.] will complete the fourth grade curriculum in the areas of



science, social studies, and reading' and '[C.F.] will improve his organizational skills so that he fulfills expected levels of achievement attached to short term objectives' do not provide an objectively measurable basis for tracking C.F.'s progress. 'Completing' a curriculum is an extremely vague goal for a developmentally disabled child and does not provide sufficient guidance for providing FAPE.

The court explained that the short-term objectives contained in the IEP were not "sufficiently specific" and that "vague statements" such as "[C.F.] will write a correct sentence; [C.F.] will improve the rate he writes with 80% accuracy; and [C.F.] will complete the work necessary to be successful in fourth grade science with 70% accuracy," are so vague that they provide no meaningful educational program.

Similarly, in Independent School Dist. #701 v. J.T., *supra*, the federal district court in Minnesota agreed with an administrative law judge who found that the district failed to provide FAPE for a 9th grade student with ED and SLD because the "goals and objectives were 'so vague and general as to fail to demonstrate that the IEP was reasonably calculated to result in educational benefit.'"

The IEP team, including the parent, reached consensus on a program for the student that focused on "functional" reading, math, and writing skills. The team also concluded that there was no need for a behavior intervention plan. The written IEP contained two annual goals, one behavioral ("the student will increase the ability to express anger and frustration in socially acceptable ways from arguing, confronting, and refusing to work, to calmly discussing solutions to problems with others") and one academic goal ("the student will improve his functional academic skills from a level of not completing assignments independently to a level of being able to read, write, and do basic math skills independently"). Each goal was supported by three short-term objectives (e.g., "given a school setting, [Student] will increase his behavior of expressing his anger calmly from becoming physically aggressive to verbalizing his anger clearly and calmly as measured by teacher observational records," and, "given functional spelling and language assignments, [Student] will complete the assignments with at least 80%

accuracy average as measured by teacher grade books").

Two months later, in February, the IEP was revised to add ROTC to the student's program. The academic goals remained the same, but the behavior goal was slightly revised and one of the short-term objectives was re-written. The parent signed the revised IEP. Another IEP team meeting was convened at the request of the parent, to review the functional curriculum since the parent had expressed concerns about the student's lack of academic progress. The curriculum was changed to include a consumer math and life skills curriculum, but no revisions were made to the IEP and the "functional learning goal" remained the same. The parent filed for due process and requested an independent educational evaluation.

In affirming the ALJ's conclusion that the goals and objectives were inadequate, the court stated:

The wording of each goal and the three short-term objectives that follow each goal could define a broad range of conduct. For example, it is unclear what reading, writing, and math skills are required for independence. Further, although the short-term objectives provide that the academic goal will be met according to certain percentages, the short-term objectives do not provide objective criteria against which achievement can be measured. The Court finds that the goals and objectives are vague and immeasurable.

The district argued that the student's greatest needs were in the social/emotional domains and that any academic difficulties were primarily attributable to his social/emotional issues, along with his low IQ and slow processing. Further, even if the student had made no academic progress, making behavioral progress satisfies the FAPE standard requiring "some" educational benefit. The court rejected these arguments, finding behavioral progress alone did not establish educational benefit, especially when lack of academic progress was the parent's primary concern and the primary focus of the IDEA.

However, contrast these two cases with Brett S., *supra*, where the parents claimed that the student's IEP lacked appropriate measurable goals

and that the IEP lacked a behavior management plan. In this case, the court found that the 11 goals and numerous objectives contained in the IEP for a student with unspecified learning and emotional disabilities were sufficiently specific and measurable and provided the student with FAPE. Finding that the goals, when coupled with the objectives, were appropriate, the court stated:

Given the multitude of educational and behavioral goals within the IEP, the Court disagrees with plaintiff's claim that these goals 'were not measurable and failed to address Brett's actual educational needs.' Among the eleven (11) goals in the IEP were objectives such as improving Brett's reading comprehension (goal #2), further developing his encoding and decoding skills (goal #3), and improving his math skills (goal #5). Each of these goals is broken down into tangible sub-goals.

As an example, the court noted that the short-term math objectives contained in the IEP included things such as: "Brett will pay attention to operation signs by choosing the appropriate sign while solving addition and subtraction problems"; "Brett will pay attention to operation signs by choosing the appropriate sign as he solves multiplication and division problems"; "Brett will complete 100 problems composed of mixed addition and subtraction facts within 3 minutes with 85% accuracy to improve fluency"; Brett will complete 100 multiplication facts (for 1s, 2s, 5s, 7's, 9s, and 10s) within 5 minutes with 85% accuracy to improve fluency"; Brett will solve simple word problems requiring multiplication"; and "Brett will solve simple word problems requiring division" and that the other goals within the IEP contained similar objectives.

The court found that the 11 goals and numerous objectives were designed to meet all of Brett's educational needs, including both academics and behavior. Also included in the IEP were numerous educational program modifications and supports to promote Brett's learning behavior and attention to task, social skills, transition difficulties, and feelings of anxiety were included. The proposed IEP would have placed Brett in a learning support class for the majority of the day, and included speech therapy, occupational therapy, psychological services and social skills group

sessions. With respect to a behavior plan, the court noted that neither the IDEA, nor the Pennsylvania regulations require that every IEP include a specific behavior plan and that "[s]imply because the many behavioral techniques in the IEP were not organized as a separate document entitled "Behavior Management Plan" does not render the IEP inadequate." See following article on written behavior plans.

Action:

These cases make it clear that writing specific, objective and measurable goals is key for any IEP. The common denominator in these cases was the lack of specificity in the goals; vague educational aspirations such as "improve writing skills," "improve math calculation skills" or "improve reading comprehension" are just simply inadequate. While IDEA 2004 no longer requires objectives or benchmarks, Michigan rules still do. Where the annual goal may not be as specific and measurable as it should, if the short-term objectives are sufficiently specific and measurable, the IEP may be saved. In both Brett S. and Penn Trafford, the court discussed the need for the IEP and its goals and objectives to be specific enough to provide sufficient guidance to the teachers on how to implement the student's educational program. While the annual goals in Brett S. were somewhat broad, the objectives were quite specific and measurable, and addressed the academic, behavioral, and social needs of the student.

Though specificity is important, the collection of hard empirical data to show progress on the goals is absolutely imperative when attempting to defend the IEP and show progress. IEPs fail even with good goals if there is no progress data to back them up. Teacher observation and opinion, without written data, will likely not survive attack through due process.

Also, in devising goals and objectives, be sure to link each goal to evaluation data (present levels) and to identified areas of educational need. Further, address *all* of the student's identified disability related needs. In D.H. v. Manheim Twp. Sch. Dist., 45 IDELR 38 (ED PA., 2005) the court found that the IEP of a student who was LD in reading and math, but only had reading goals, denied the student FAPE.

**IDEA 2004 LESSONS LEARNED:
MANIFESTATION DETERMINATION REVIEW MEETINGS**

IDEA 2004 made several changes to the procedures required when disciplining students with disabilities. Significant in these changes were the changes made in manifestation determination review meetings (MDRs) and interim alternative educational settings (IAES). Several hearing officer decisions have now been issued addressing questions regarding these changes.

"Caused By" or "Direct and Substantial Relationship"

The most significant change under the discipline provisions of IDEA 2004 related to the standards applied during a manifestation determination review meeting. Previously, these questions included examination of the appropriateness of a student's IEP, whether the IEP was implemented, the student's ability to control his conduct and the student's ability to understand the consequences of the conduct. Many times examination of these factors resulted in manifestation determination review teams finding that a student's disability impacted, if even slightly, a student's ability to control or understand his behavior, and thereby resulted in the student not being able to be disciplined. In amending the statutory language, Congress clearly intended to require a very direct causal connection between the student's disability and the specific behavior. Thus, IDEA 2004 requires that the relevant members of the IEP team determine whether the conduct in question was "caused by, or had a direct and substantial relationship to the child's disability," or whether the conduct was the direct result of the district's failure to implement the IEP. *See*, 20 USC 1415(k)(1)(E).

In Tehachapi Unified School District, 106 LRP 22450 (SEA CA, 2006) the school district used the IDEA 97 standards, rather than the "caused by" standard of IDEA 2004. Nonetheless, the hearing officer found the error harmless. A student with a learning disability and ADHD was involved in a fight. The incident began when the student's girlfriend reported to him that another student ("Student A") had sexually assaulted her during a party. The student was initially shocked and angry. The following day at school, the student confronted

Student A, who denied the allegations. The student hit Student A in the head, causing a concussion. Student A did not hit back. While this occurred, a second student (B) confronted the student, who then turned and punched Student B in the face. The district scheduled a manifestation determination review meeting, where the IEP team reviewed previous evaluations and information relating to the student's disability and misconduct. The team then determined that the student's IEP was appropriate, that it had been implemented, that the student's disability did not impair the student's ability to control his behavior and that the student's disability did not impair the student's ability to understand the nature or consequences of his behavior, and therefore the behavior was not a manifestation of the student's disability. The parent disagreed and sought a due process hearing. The hearing officer determined that the manifestation team applied the incorrect legal standards when making its manifestation determination regarding the implementation of the IEP and the causal connection with the disability. However, the hearing officer found the error harmless since "by evaluating numerous relevant factors, the district by implication, answered in the negative the narrower, more specific question of whether the student's conduct was caused by or had a direct and substantial relationship to his disability." In support of the determination that the "caused by" standard is more narrow than the IDEA 97 MDR questions, the hearing officer quoted the Ninth Circuit Court of Appeals' decision in Doe v. Maher, where the court stated that conduct which is caused by or has a direct and substantial relationship to the child's handicap "does not embrace conduct that bears only an attenuated relationship to the child's handicap." The hearing officer found that while the student's ADHD and other related impairments may have had "some distant role in influencing his choice to confront the pupils and physically interact with them...no evidence was presented to support a finding that the student's OHI disability caused his conduct, as in being the core reason for that conduct under the new federal standard, or that the OHI disability had a direct and substantial relationship to that conduct."

Similarly, in Parkway C-2 School District, 106 LRP 26298 (SEA MO, 2006) the hearing officer

determined that the parents bore the burden of proof in proving that the student's disability was the direct cause of his conduct. In that case, a student with a behavior disorder was being disciplined for possession and use of marijuana. In finding that the parents had failed to carry their burden of proof and upholding the manifestation determination review meeting determination, the hearing officer relied upon the Committee on Education and the Workforce publication IDEA Guide to Frequently Asked Questions (FAQ). In response to a question "what does the term manifestation of a child's disability mean?" the committee stated:

This term has been significantly changed in this reauthorization. Previously any tangential or attenuated relationship between the discipline infraction and the child's disability was sufficient to determine that the infraction was a 'manifestation' of the child's disability. In the new IDEA, the bipartisan consensus acknowledged that 'it is the intention of the Conferees that the conduct in question was caused by, or has a direct and substantial relationship to, the child's disability, and is not an attenuated association, such as low self-esteem, to the child's disability.' Accordingly, it is now clear in the new IDEA that the disciplinary infraction must be caused by or be the direct result of a child's disability, and not a mere correlation or attenuation." (FAQ, at 18).

In the same FAQ document, the Committee indicated that a parent can appeal the decision of a manifestation, but "the obligation is on the parent to show that the child's action resulting in the discipline infraction was the direct result of the child's disability." (FAQ, at 19). Relying on these two passages, the hearing officer found that the parent had failed to show that the student's behavioral disorder caused him to possess and use marijuana. *See also, Muskegon Public Schools*, 106 LRP 32205 (MI, 2006) ["The parents did not begin to meet their burden of proof that [students] conduct [of assaulting a staff person] was even remotely related to his disability in reading or written expression."]

In a Michigan case, Okemos Public Schools, 45 IDELR 115 (MI, 2006) the hearing officer found that a student's drug dealing was not caused by his ADHD, even though the parents' expert testified that given the student's ADHD he is "more likely to

be susceptible to those issues as a result of an ADHD diagnosis" or "have a tendency to be in more trouble with the law." The hearing officer cited to the House Conference Report which stated that an "attenuated association, such as low self-esteem" is insufficient to deem the conduct a manifestation of a child's disability. The hearing officer found that the expert's assertion that "ADHD kids engage in risky behavior, which leads to criminal activity" was too attenuated and not sufficiently direct to be considered a manifestation of the student's disability.

In Penn-Delco School District, 106 LRP 30209 (SEA PA, 2006), during a routine sweep of the school parking lot, the specially trained dogs "hit" on the student's car. The student was contacted, and consented to a search of the vehicle. The search turned up a three inch "butterfly" knife (along with a cell phone, unused baggies, empty bottles, and a video recorder belonging to the school) in the car. The student was disciplined for possession of the knife. The student had a learning disability and was "somewhat forgetful and not always well organized." After the manifestation determination found the behavior of possessing a knife not to be a manifestation of the disability, the parent sought due process. The LHO found the behavior was a manifestation, but the appeals panel reversed, holding that the student's learning disability in mathematics was not the direct cause of the student's possession of the knife. The student claimed he had forgotten the knife was in the car, and the parents' expert testified that there was a "nexus" between the student's disability and the conduct. The appeals panel found that while the student's forgetfulness may have played a role in his "lack of awareness" of the knife in his vehicle, such connection was too attenuated to form the appropriate causal connection.

Scheduling the Meeting

On the other hand, in Mars Area School District, 106 LRP 26461 (SEA PA, 2006) the appeals panel found that a school district committed procedural and substantive errors in making its manifestation determination review. In that case, a student was being disciplined for making threatening statements including "Let's have a Kill [pupil's name] day" and "If you do not believe me, I will strangle you to death." The student had a learning disability and had previously been diagnosed as having ADHD. The district scheduled



the manifestation determination review meetings for each incident within ten school days. The parent indicated that she and her attorney could not attend on the second day. The district proceeded to hold the MDR without the parent. The district found that the behavior was not related to the student's learning disability, and the parent appealed. The LHO found in favor of the parent. The district appealed. The state appeals panel held that the district denied the parent meaningful input into the manifestation determination review. With respect to scheduling the MDR meeting, the district indicated that it had to go forward with the meeting to comply with the ten school day time line. The hearing officers indicated that the school district should have scheduled the meeting beyond the ten day time line, and obtain written consent from the parent to extend those time lines.

The panel also credited the testimony of the parent's psychiatrist and school psychologist that the student's impulsivity, social imperceptions, and inability to reason the probable outcomes of his statements were manifestations of his disability. As the district apparently considered the "student's label rather than student's actual needs," the appeals panel found that the statements made by the student were a manifestation of his LD and ADHD disabilities.

Services During Removal

School districts must also remember the obligation to provide services to students with disabilities who are removed for disciplinary reasons. In Baltimore County Public Schools, 106 LRP 18905 (SEA MD, 2006) a school district suspended a student for 15 school days during the school year. While the parent did not challenge the manifestation determination review, the parent filed a complaint alleging that the school district violated the provisions of the IDEA by failing to provide the student services beginning on day 11 of removal. Finding that a school district can remove a student without services for up to 10 school days, the hearing officer found that the district had violated the IDEA since it did not provide services beginning on the 11th day of removal. The district was ordered to provide compensatory education.

IAES

In the Penn-Delco School District, *supra*, case, the appeals panel found that the school district was

correct in determining that a student's learning disability and forgetfulness did not cause the student to bring a knife in his vehicle to school. That case also examined the school district's use of an interim alternative educational setting (IAES). As you know, school districts may unilaterally change the placement of a student who brings a dangerous weapon to school to an IAES for up to 45 school days. In this case, the school district imposed the IAES based upon the student's possession of the knife. The school district administration had decided to impose the IAES (which is permissible) but when determining where that program would be provided, the administrators did not involve the IEP team or the student's teachers. While administration may decide to impose an IAES, it is the IEP team which must determine where that program is provided. Further, the IAES must provide the student with the opportunity to progress in the general curriculum and to continue progress on goals and objectives. In Penn-Delco, the school district did not provide any special education services, and the student was assigned to a homebound program where the teachers providing service were not provided a copy of his IEP for more than a month. The parent challenged the IAES, and the appeals panel found in favor of the parents and ordered 45 days of compensatory education.

Action:

When faced with making a manifestation determination review, it is important that the proper factors be considered. While it is appropriate to consider, in terms of defining the student's disability, his or her ability to control behavior or understand consequences, these factors are not determinative. Unless the misconduct is the "direct result" of the inability to control or understand, it will not result in a finding that the behavior is a manifestation of the student's disability. Some relationship to the disability, or "nexus," is simply not enough.

Remember to count days! IDEA 2004 still requires the provision of services beginning on the 11th day of removal, as determined by school personnel and at least one of the student's teachers. Further, while administration may invoke an IAES, IDEA 2004 still requires an IEPT to determine the services provided, which will include any special education services.

STATE BOARD OF EDUCATION STILL CONSIDERING SECLUSION AND RESTRAINT STANDARDS

At the March 14, 2006 meeting of the State Board of Education, the Board considered the proposed policy on the use of seclusion and restraint. The proposed policy, “Supporting Student Behavior: Standards for the Emergency Use of Seclusion and Restraint” is available on the Department's website at http://www.michigan.gov/documents/Item_A_151900_7.pdf. The Office of Special Education and Early Intervention Services presented the Proposed Policy, which revised earlier drafts. The Board asked for further revisions, which are expected to be presented to the Board for approval during one of the Board's summer meetings. Some of the Board member comments that may be reflected in a revised policy were that (1) the Revised School Code is more permissive than the Proposed Policy, thus raising a conflict with the “reasonable physical force” permitted under the School Code, (2) the policy should more strongly emphasize a preventative approach with positive behavior support policies, and (3) the “emergency” circumstances under which seclusion and restraint may be used should be more clearly defined.

As currently drafted, the Proposed Policy appears to conflict with the Revised School Code since it would prohibit conduct permitted under the Revised School Code. Section 1312 of the Revised School Code, MCL 380.1312, prohibits “corporal punishment” in schools, which is defined as “the deliberate infliction of physical pain by hitting, paddling, spanking, slapping, or any other physical force used as a means of discipline.” However, Section 1312 (4) of the Revised School Code provides that:

A person employed by or engaged as a volunteer or contractor by a local or intermediate school board or public school academy may use reasonable physical force upon a pupil as necessary to maintain order and control in a school or school-related setting for the purpose of providing an environment conducive to safety and learning. In maintaining that order and control, the person may use physical force upon a pupil as may be necessary for 1 or more of the following:

(a) To restrain or remove a pupil whose behavior is interfering with the

orderly exercise and performance of school district or public school academy functions within a school or at a school-related activity, if that pupil has refused to comply with a request to refrain from further disruptive acts.

(b) For self-defense or the defense of another.

(c) To prevent a pupil from inflicting harm on himself or herself.

(d) To quell a disturbance that threatens physical injury to any person.

(e) To obtain possession of a weapon or other dangerous object upon or within the control of a pupil.

(f) To protect property.

Under the Proposed Policy, “seclusion” or “restraint” may be used only in an emergency if necessary to address behavior that either poses an “imminent risk to the safety” of an individual student or others. Of course, neither intervention may be used as a form of punishment or discipline.

The Proposed Policy defines “seclusion” and “restraint.” “Seclusion” is the confinement of a student alone in a room or an area from which exit is prevented. The Proposed Policy provides that “seclusion” is an emergency safety intervention and an opportunity for the student to regain self control. The Proposed Policy identifies two types of restraint: physical and mechanical. Mechanical restraint is always prohibited and only certain physical restraint is permitted. “Physical restraint” is defined as involving “direct physical contact that prevents or significantly restricts a student’s movement.” Similar to the definition of “seclusion,” “physical restraint” is further defined as an emergency safety intervention and an opportunity for the student to regain self control. Activities excluded from the definition of “physical restraint,” thus presumably permissible, include the brief holding by an adult in order to calm or comfort, the minimum contact necessary to safely escort a student from one area to another, the breaking up of a fight, or assisting a student in completing a task/response if the student does not resist or resistance is minimal in intensity or duration.

Under the Proposed Policy, seclusion or restraint may be used only if it is the least restrictive appropriate intervention. Staff are to immediately call for help within the building at the onset of the emergency requiring the use of the seclusion or restraint, and these interventions are not to be used any longer than necessary to allow a student to regain control of his or her behavior. Seclusion generally should be no longer than 5 minutes for preschool children, no longer than 15 minutes for elementary school students, and no longer than 20 minutes for students in middle school through high school. Restraint should generally be no longer than 10 minutes regardless of the student's age.

The Proposed Policy further provides that when using either seclusion or restraint, staff must (1) involve at least two appropriately-trained staff to protect the care, welfare, dignity, and safety of the student, (2) continually observe the student in seclusion or restraint for indications of physical stress and seek medical assistance if there is a concern, and (3) document observations. Each use of the seclusion or restraint intervention should be documented and reported to the building administration immediately, and attempts should be made to reach the parent or guardian immediately or as soon as possible. A written report of each such intervention should be given to the parents within 24 hours.

Action:

The policy is intended to be utilized with the Department's manual on "Positive Behavior Supports for All Michigan Students: Creating Environments that Assure Learning" (February 2000) and its supplement, "Positive Behavior Supports for Young Children" (June 2001) which are both available on the Department's website. If approved, school districts will need to review (and possibly revise) their training of staff and document such training.

If a pattern of behavior "emerges" or is anticipated which requires the use of seclusion or restraint, a district will need to complete a functional behavioral assessment and develop a positive behavior support plan. In addition, an "emergency intervention plan" will need to be developed for the student.

Remember, while the IDEA does not require a behavior plan to be written, the Department (and best practice) describes these plans as being written. Further, the policy would require documented steps in creating the plan, including "peer review by knowledgeable staff." A district is well advised to begin planning to implement a process for training of staff and developing guidelines for preparing written plans.

**MICHIGAN DEPARTMENT OF EDUCATION DOCUMENTS AVAILABLE
FOR REVIEW AND PUBLIC COMMENT**

On June 1, 2006, the Michigan Department of Education posted the revised Addendum to the Individualized Educational Plan and Manual, Procedures for Approval of Transition Coordinators and the Intermediate School District Plan Criteria for the Delivery of Special Education Programs and Services. These documents will be open for public comment until June 30, 2006. The documents can be downloaded from the Department's website at www.michigan.gov/mde/0,1607,7-140-6530_6598-144348--,00.htm. Comments must be submitted before 5:00 p.m. on June 30.

Public hearings will be held at Traverse Bay ISD on June 12 and 13, at the Center for Advance Technologies in Detroit on June 15 and 16, Kent ISD on June 15 and 16, and at Marquette RESA on June 15 and 16.

COURTS EXAMINE REQUIREMENTS FOR WRITTEN BEHAVIOR INTERVENTION PLAN

Three recent federal court decisions examine whether a district is required to have a written behavior intervention plan in order to provide a student with FAPE. Two of the courts hold that a student is not denied FAPE merely because the behavior intervention plan is not a separate written document. One court finds the opposite.

In School Board of Independent School District No. 11 v. Renollett, 45 IDELR 117 (8th Cir., 2006), the 8th Circuit Court of Appeals held that a high school student still received a free appropriate public education (FAPE) even though the student's IEP did not include a written behavior intervention plan. The student had multiple disabilities, including a mental impairment, microcephaly, sensory issues, oral apraxia and a behavior disorder. The student utilizes a device known as a "Dynamyte" to communicate. In the spring of 2001, the parents requested a due process hearing contesting the student's IEP. In June, the parties entered into a settlement agreement which provided that a written behavior plan would be created which would focus on the appropriate use of communication, including the Dynamyte, and social skills. This behavior intervention plan was to be completed by August 1, 2001. While the parties worked throughout the summer, they did not meet the August 1 deadline.

On August 6, the parents requested that the due process hearing be "reopened." The hearing officer ultimately issued a decision finding that the district had provided the student with a FAPE in all areas, except the district had failed to implement all aspects of speech and occupational therapy. Accordingly, the hearing officer awarded compensatory education for the period of time when the student was not provided appropriate speech or occupational therapy services. In all other respects, the hearing officer affirmed the district's IEP. The parents appealed the decision to a state review officer, who affirmed the local hearing officer's decision regarding compensatory education, and reversed the hearing officer finding that the student had been denied FAPE. The state review officer concluded that the behavior plan needed to be in writing and determined that the

evidence did not support that the student had made progress towards goals and objectives. Ultimately, the state review officer found that the district had violated both procedural and substantive requirements of the IDEA and awarded additional compensatory education.

The district appealed to federal court which reversed the state review officer and reinstated the local hearing officer determination that the student had received FAPE. The parents appealed to the 8th Circuit.

While the 8th Circuit determined that the student's IEP had not been "perfectly executed," it found that the IEP provided FAPE. The court stated that neither state nor federal law requires the behavior intervention plan to be in writing, and that the school district had responded to the student's inappropriate behavior with "well documented" procedures and had used a variety of behavior interventions.

The parents had also argued that the district utilized aversive procedures without following state requirements. The school district had utilized a paraprofessional to escort the student to a room where he could calm down. The court concluded that the use of this "calming room" was not an aversive procedure triggering the state law notice and meeting requirements. The court determined that the district had implemented appropriate behavioral interventions, and affirmed the district court decision in favor of the school district.

In another case, Brett S. v. West Chester Public Schools, 45 IDELR 121 (ED PA., 2006), a federal court found that specific goals and objectives set forth in the student's IEP, as well as specific recommendations to "provide positive reinforcement for appropriate behavior" and to "model and facilitate coping strategies to deal with frustration/anxiety" provided adequate guidance to teachers and others working with the student on how to address problematic behaviors. The court found that simply because the behavioral techniques set forth in the IEP were not organized and written as a separate document entitled "behavior



management plan," the IEP was not rendered inadequate. The court focused on the extensive description of supports and intervention set forth through the student's IEP in his goals and objectives and supplemental aids and services in finding that a behavior intervention plan was not necessary to be a separate written document.

On the other hand, in Penn Trafford School District v. MF, 45 IDELR 156 (WD PA., 2006), a federal court in the same state found that where the IEP failed to provide a behavior management plan even though the student had significant behavioral issues was "a serious omission." The 4th grade student had mild/moderate cognitive impairments (FSIQ 53) PDD-NOS, and a history of behavior problems dating back to preschool. The IEP proposed by the district had goals addressing mathematics, language arts and spelling, handwriting, communication, organization, science, social studies, reading and language content, but nothing regarding behavior. In that case, the court found that the IEP denied the student FAPE.

Action:

The IDEA does not require a separate written behavior intervention plan. The comments to the 1999 regulations indicate that positive behavior supports can be included in the student's IEP, and this would suffice as the student's behavior plan. *See*, 64 Fed Reg 12620 (March 12, 1999). Comparing the last two cases, the school district in

the Brett S. case included a significant number of goals and objectives addressing behavior, anxiety and frustration, as well as several supports and interventions set forth within the IEP. On the other hand, the IEP at issue in Penn Trafford did not have such detail within the IEP document.

The IDEA requires that a student's IEP team consider whether or not the student's behavior impedes his learning or that of others. If the student's behavior does impede learning, the team is required to develop strategies and supports to address those behaviors. Thus, while the IDEA does not require that a separate written behavior plan be devised, some form of behavioral supports must be documented, either in a written plan or the student's IEP.

In Michigan, the Department of Education has described behavior intervention plans as being "written, individualized behavior support plan that is based on a functional assessment of a student's behavior" which incorporates positive behavior supports to address identified behavioral concerns. See, Positive Behavior Supports for All Students: Creating Environments that Assure Learning (February 2000). In addition, districts must be aware that the State Board of Education will be considering adoption of standards relating to the use of seclusion and restraint which will be considered at an upcoming board meeting, which will also require written documentation.

NEW DUE PROCESS RULES IN EFFECT JULY 1, 2006

As you may know, beginning July 1, 2006 the special education due process procedures in Michigan will change. Currently, Michigan has a "two tier" special education due process procedure. The parties mutually agree to a local hearing officer, and an aggrieved party may appeal the local decision to a state review officer, formerly appointed from a list maintained by the Department of Education. Oversight and administration of the due process hearing procedures has now been transferred to the State Office of Administrative Hearings and Rules (SOAHR). The new process will eliminate the "mutual selection" of the hearing officer and the state review, making it a "one tier" system, with appeal to a court of competent jurisdiction (state or federal). Under the system to become effective July 1, special education hearing officers will be employed by the SOAHR, and are to receive appropriate training in special education law. Upon notification of a due process hearing, SOAHR will assign a hearing officer. SOAHR currently has at least one hearing officer acting as a state review officer, and has hired two additional hearing officers to hear special education hearings. The costs of the hearing are allocated between the state and local school district. A copy of the due process rule which becomes effective July 1 is available on the Department's website at http://www.michigan.gov/documents/2005-015DueProcessProcSpecialEdHearings_125921_7.pdf.