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# SCHOOL LAW UPDATE

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## SIXTH CIRCUIT ADOPTS "TEST" FOR IDEA CHILD FIND VIOLATION AND COMPENSATORY EDUCATION AWARDS

The Sixth Circuit Court of Appeals recently adopted a "test" for determining what a parent must show to prove a district violated its child find obligation. *Bd. of Educ. of Fayette County v L.M. o.b.o. T.D.*, 47 IDELR 122 (6<sup>th</sup> Cir. 2007).

The parents claimed that the district should have identified the student as a student with a disability as early as kindergarten because he had learning and behavioral problems. At the due process hearing, all experts agreed that the student's learning and behavior problems were not necessarily indicative of a disability and that it would be inappropriate to rush to identify the student as disabled. During kindergarten and early elementary grades, the district provided support for the student, including Reading Recovery program and behavioral supports in the general education setting. By the end of kindergarten the student was meeting academic expectations. During his Second grade year, the student began falling below grade level and by the end of his Third grade year his teacher suggested he repeat the Third grade. Until Second grade, the ALJ found that the school district did not ignore "clear signs" of a disability. The administrative appeals board determined that the district should have evaluated the student at the end of his Second grade year, that the failure to do so resulted in a denial of FAPE for his Third and Fourth grade years, and awarded compensatory education services. This was affirmed by the district court and the Sixth Circuit.

The Sixth Circuit adopted a "test" of what a parent must prove to sustain a claim that the district violated its "child find" obligations. Adopting the analysis in *Clay T. v. Walton County Sch. Dist.*, 952 F. Supp. 817 (M.D. Ga., 1997) the Sixth Circuit stated that the parent "must show that school officials **overlooked clear signs of disability** and were negligent in failing to order testing, or that there was **no rational justification for not deciding to evaluate.**"

With respect to the award of compensatory education, rejecting the parents' request for hour-to-hour compensation for each year their child was denied FAPE, the Court instead adopted the standard articulated in *Reid ex rel Reid v Dist. of Columbia*, 401 F.3d 516 (D.C. Cir. 2005), which held that "compensatory education awards should aim to place disabled students in the same position they would have occupied but for the school district's violation of IDEA" and must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Id.* The Sixth Circuit held that an ALJ or State Review Officer is not permitted to allow an IEP team to determine the amount of compensatory education or when to terminate such services. Rather, this task is for the ALJ or Court, and the termination of such service may not be delegated to the IEP team. The matter was remanded to the lower court to determine the appropriate award of compensatory education.

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### **Action:**

Districts have an affirmative obligation to identify, locate and evaluate students suspected of having a disability. This obligation extends even to students who may be advancing from grade to grade. This case is clearly illustrative that a district may face a child-find violation if it fails to respond to or monitor a child's deficits. School personnel should watch for "red flags" such as teacher recommendations for "outside" tutoring, repeated referrals to in-school tutoring programs or child study team, recommendations for retention, and "outside" services or evaluations obtained by the parents. Poor or declining academic or social performance or a combination of factors may be construed as "clear signs of disability" and a district must take care not to overlook these kinds of signs.

## POOR ACADEMIC PERFORMANCE AND DISCIPLINE REFERRALS DO NOT PROVIDE NOTICE OF POTENTIAL FOR SEXUAL ASSAULT

The federal district court for the Western District of Michigan recently ruled that a school district was not liable in a Title IX action based upon student-to-student acts of sexual harassment. *Doe v Porterfiled et al.*, No. 1:05-CV-769 (W.D. Mich. Jan. 8, 2007).

All eighth grade students were required to participate in "Career's Class," where they would "work" for another teacher regardless of their academic record and without any type of screening for suitability. A kindergarten student reported to an aide that the eighth grade student assigned to her class brought her into the bathroom, made her pull down her underwear, and inappropriately touched her in the "privates." The district immediately investigated and the principal suspended the eighth grader. Two weeks later, the eighth grader was expelled and the apprenticeship part of the "Career's Class" was permanently discontinued. An investigation by law enforcement revealed additional claims of actual or attempted instances of sexual contact by the eighth grader against six other kindergarten girls. However, it was undisputed that no agent of the district knew of these events until the first reported incident, and that the additional allegations were only uncovered as a result of the district's follow-up to the first report.

The parents of the kindergarten student argued that the district should have been on notice regarding The eighth grader's propensities due to his history of poor academic performance and prior discipline problems. The court rejected these arguments, finding that none of the

evidence offered established a prior incident of sexual misconduct or even a "tendency or proclivity for such conduct." Instead, the court stated that the eighth grader's academic difficulties were irrelevant to the matter at hand and his previous four instances of misconduct (not following directions, tardiness, bus problem and kicking another student) did not involve any inappropriate sexual conduct.

Schools are not liable for under Title IX "unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has 'actual knowledge' of the discrimination in the recipient's programs and fails to adequately respond." Here no school employee knew of or even suspected the eighth grader's conduct prior to the first reported incident. In the context of student-on-student harassment, the term "discrimination" means that the harassment is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victim's educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." Further, the school's failure to screen eighth grade students or to train them appropriately for apprenticeship positions was insufficient to prove that school officials should have been aware of a potential for student-on-student harassment. "Actual knowledge" of student-on-student harassment is required. Because there were no records of complaints by any students of sexual harassment, the school did not have "actual knowledge" prior to the first report. Although the district was aware of the eighth grader's poor grades, bus misconduct, tardiness and kicking another

student, these facts did not provide any notice of a serious risk of sexual assault. Further, once the district had notice of the alleged sexual misconduct, the eighth grader was immediately removed from the kindergarten class, initially suspended from school and subsequently expelled. The court found the district's response to be "forceful and appropriate" and thus, the district did not demonstrate deliberate indifference to the situation.

Finally, the district did not have a "policy" that resulted in discrimination. The district's "policy" requiring all students to complete the apprenticeship, regardless of grades, background or disciplinary record, and the district's failure to adequately train and supervise the eighth grade students, did not result in discrimination. The court stated that the details of the program were not known to the school board or other officials such that the apprenticeship was driven by official school policy.

### **Action:**

Prompt response to allegations of student-on-student sexual harassment. (or for that matter, any type of harassment or bullying) is the key to avoiding liability. Once a district has actual knowledge of sexual harassment, school officials must take immediate and decisive steps to investigate and remedy the situation. In the present case, while the eighth grade student Districts should be aware of "red flags", which may include discipline problems that might provide sufficient notice of the potential for sexual harassment. Staff training should be provided relative to district anti-harassment and anti-bullying policies.



## FOIA: GIVE ME SOME PRIVACY

In an unpublished decision, the Michigan Court of Appeals recently held that public employees' names, addresses and telephone numbers are not generally considered to be exempt under the Freedom of Information Act as information of a personal nature that if disclosed would constitute a clearly unwarranted invasion of an individual's privacy. *Michigan Federation of Teachers and School Related Personnel, AFT, AFL-CIO v University of Michigan* (3/22/07). Following the Supreme Court precedent of *Bradley v Saranac Community Schools Board of Ed.*, 455 Mich 285 (1997), the Court of Appeals found that home addresses and telephone numbers of public employees are not items of per-

sonal information for purposes of FOIA because they do not reveal intimate or embarrassing details of an individual's private life. Because the Michigan Supreme Court has recognized that for a few individuals, disclosure of their names, addresses or other seemingly impersonal information could be extremely harmful, the Court remanded the matter back to the trial court to determine whether for any individuals, there are truly exceptional circumstances such as an imminent threat of physical danger as opposed to a generalized and speculative fear of harassment or retribution.

### **Action:**

School districts cannot use the personal privacy exemption to redact

the names, addresses and telephone numbers of public employees absent a showing of truly exceptional circumstances, such as an imminent threat of physical danger to the individual employee. Justice Wilder in a concurring opinion, requested the Michigan Supreme Court to consider revising the *Bradley* precedent to address two concerns: first, to determine whether certain information could be considered ordinarily impersonal but might take on an intensely personal character such that the privacy exemption might be properly asserted; and second, to modify the *Bradley* test in light of the no call registry and identity theft implications of present technology.

## MDE ISSUES RULES PACKAGE

The Michigan Department of Education has issued the first package of special education rule revisions. While the revisions are intended to more adequately align Michigan's special education rules with the federal regulations implementing IDEA 2004, some of the rules are in addition to the federal regulations, or have different requirements, based on state law.

MDE has also proposed a rule revision which would provide an opportunity for teachers of students with speech and language impairment who hold any Michigan teaching certificate with an endorsement in speech and language impairment to attain tenure.

MDE and Department of Labor and Economic Growth have co-promulgated proposed rules relating to dual enrollment and 5<sup>th</sup> year high school students. The proposed rules would establish criteria and procedures for dual enrollment for pupils enrolled in high school more than 4 years but not more than 5 years.

All proposed rules can be accessed through links at:

<http://www.state.mi.us/orr/emi/admincode.asp?admincode=Department&Dpt=ED>



## FIRST AMENDMENT FRUSTRATIONS: DISTRIBUTIONS AND SUBSTANTIAL DISRUPTIONS

We don't envy school officials who are on the front lines having to balance school policies with student's free speech rights under the First Amendment. Maintaining appropriate discipline, order and safety in the school is rarely easy and often frustrating when dealing with student expression. In a past *School Law Update*, we discussed how to address the issue of student internet speech ("When My Space affects Your Space"). In this article, we want to discuss a situation that arises on school grounds: the distribution of literature.

Distribution of literature by students on school grounds is subject to First Amendment protection. Unfortunately, the federal courts have issued conflicting opinions regarding the appropriate test to analyze the constitutionality of restrictions on such distribution, including time, place and manner restrictions. While some courts have applied a *Tinker* analysis (e.g., *Rivera v East Otero School District*, 721 F. Supp. 1189 (D. Colo. 1989), others have applied the public forum analysis (e.g., *Hedges v Wauconda Community Unit School District No. 118*, 807 F. Supp. 444 (N.D. Ill. 1992)). Until recently, many attorneys and commentators thought that a school policy that was content-neutral and merely restricted the time, place and manner of distributing literature would be constitutionally permissible. For example, the Seventh Circuit Court of Appeals held that prohibiting the distribution of literature in the school hallways between classes was a reasonable time, place and manner restriction because the school was a non-public forum. *Muller v Jefferson Lighthouse Schools*, 98 F.3d 1530 (7<sup>th</sup>

Cir. 1996). The Eastern District of Michigan recently utilized the *Tinker* analysis in striking down a policy as being overbroad and a violation of a student's First Amendment rights. *M.A.L. v Kinsland*, -- F.Supp.2d -- (No. 07-10391) (E.D. MI, Jan. 30, 2007).

In *M.A.L.* an eighth grade student joined a nationwide group of middle and high school students participating in the "3<sup>rd</sup> Annual Pro-Life Day of Silent Solidarity" at his school in October of 2006. The protest is organized by the national "Stand True" organization. On the designated day, students on campuses throughout the country would express their views against abortion by remaining silent throughout the school day, wearing red armbands, distributing literature detailing various facts about abortion, and wearing red tape over their mouths to symbolize that they speak for unborn children. In October, the school prohibited the student from engaging in several of those activities. The student wanted to participate in the same type of protest in January of 2007, and sued the principal, and the school district, to ensure his ability to engage in the protest. The parties entered into a stipulated agreement which allowed him to engage in many of the protest activities. The school and the student agreed that he could not wear tape on his mouth, but rather could wear tape on his wrists; that the student could wear a black hooded sweatshirt with the caption "Pray to End Abortion;" that the student could distribute flyers and other literature during the lunch hour at a table and post flyers in the hallways and on student bulletin boards; and that the school would retain the

right to control conduct if there are any material or substantial disruptions or the reasonable forecast of such disruptions. The parties could not agree on whether the student would be permitted to distribute his anti-abortion literature in the school hallways.

The school argued that it could place reasonable content-neutral restrictions on the time, place and manner of distributing the literature. The student's attorney argued that such restrictions would be inappropriate without objective evidence of the likelihood that the distribution of the material would cause a material disruption of the school environment.

The Court noted that there are essentially three categories to justifiably regulate student speech in schools:

- (1) School sponsored speech under the *Hazelwood School District* analysis;
- (2) Vulgar, lewd, obscene and plainly offensive speech under *Bethel School District* analysis; and
- (3) Speech that falls into neither category, but causes a material disruption, is reasonably likely to do so, or interferes with other students' rights under the *Tinker* analysis.

The Court noted that "these three categories are an attempt to balance students' rights to free expression and the ability of schools to carry out their educational mission while refraining from endorsing particular viewpoints."

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**continued... FIRST AMENDMENT FRUSTRATIONS: DISTRIBUTIONS AND SUBSTANTIAL DISRUPTIONS**

The Court agreed with the student's attorney and applied the *Tinker* analysis. Because there was no evidence that a material and substantial disruption occurred in October of 2006, and no evidence that a material and substantial disruption would likely occur in January of 2007, the Court held the policy was unconstitutionally overbroad.

**Action:**

Generally, a school is considered a closed or non-public forum, unless it

has been purposefully opened by school officials as a limited open forum. The forum analysis used to be applicable in distribution of literature cases, allowing schools to impose reasonable, content-neutral restrictions on the time, place and manner of the distribution of literature. However, the recent decision of the Eastern District Court of Michigan means that school districts should also consider whether the distribution of literature

is reasonably likely to cause a material disruption or interfere with other students' rights. Based on *M.A.L.*, if there is no disruption or interference, there should be no restriction on the distribution of literature. This case may likely be appealed to the Sixth Circuit, and, depending on the result there, could make its way to the Supreme Court in order to resolve the conflicting opinions as to the applicable analysis to be applied.

**UNFAIR LABOR PRACTICE FOR RETALIATION**

Districts should be careful when they respond to union grievances, and should be particularly careful not to retaliate against such protected conduct. In a recent unpublished decision, the Michigan Court of Appeals reversed the Michigan Employment Relations Commission (MERC) decision that dismissed an unfair labor practice charge against the Warren Consolidated Schools. *Warren Education Association and James R. Fouts v Warren Consolidated Schools* (unpublished April 12, 2007).

During a heated conversation in the Superintendent's office, the school board president went on a violent tirade and used profane language towards Mr. Fouts, a member of the union. It appears that the outburst may have been prompted by Mr. Fouts repeating a statement made to him by a third party, which alleged the board president used steroids and cocaine. The school district did not immediately take any action against Mr. Fouts for making the statements regarding the school board president. The employee and the union filed a grievance against the school board president approximately one month

after the incident occurred. A week after the grievance was filed and shortly before the board discussed whether to defend that grievance, the board decided to investigate the employee's statements, which were made six weeks earlier.

At the administrative hearing, the administrative law judge (ALJ) found that the actions of the school district were in retaliation for the employee and union filing a grievance. The ALJ inferred that the district acted with animosity toward the employee, given the suspicious timing of the district's decision to investigate the statements made by the employee, the irregularity in the investigation, and the ultimate four-month delay in disciplining the employee. The district did not follow its usual practice of verbally notifying the teacher of pending investigations or informing him of his right to union representation. Rather, the district had its attorney essentially interrogate the employee at the step 2 hearing on the employee's grievance. Further, the district delivered a written reprimand to the employee on the date of the employee's step 3 grievance meeting. The ALJ found this as persuasive evidence of

the district's hostility to the union's pursuit of a grievance on the employee's behalf.

The Court of Appeals agreed with the ALJ that ample evidence in the record supported that the employee would not have been reprimanded absent his protected conduct (i.e., pursuing a grievance against the school board president). Additionally, the Court of Appeals found that the credibility findings and thorough analysis of the ALJ were much more plausible than MERC's and thus agreed that the teacher and union had established a prima facie case of discrimination.

**Action:**

Districts must take care not to engage in conduct that might constitute retaliation against an employee for engaging in protected conduct. As this case illustrates, timing is an important factor when deciding to impose discipline on an employee, especially if the employee has recently filed a grievance or been outspoken about a particular issue.



## REVISIONS FOLLOWING IEP MEETING DO NOT VIOLATE IDEA

The United States District Court for the Northern District of California found that a school district did not violate the IDEA when it revised the IEP goals for a 10-year-old student one week after meeting with the child's parents. *N.R., a minor, by and through B.R., his Guardian Ad Litem v San Ramon Valley Unified Sch. Dist.*, No. C 06-1987MHP (N.D.Ca. Jan. 27, 2007). Finding that the student's parents and teachers were actively involved in creating the IEP and that the revisions were not the result of a separate meeting from which parents and teachers were excluded, the court concluded that the district did not violate the procedural requirements of IDEA.

This case involved a 10-year-old boy diagnosed with autism, severe mental retardation and mild cerebral palsy. His conditions rendered him non-verbal and subject to severe behavioral deficits. His special education and related service needs included social skill training, independent living skills, functional academics, speech/language and occupational therapy, behavioral services and augmentive communication services. In 2003, the student filed a complaint against the district, which was resolved via a settlement agreement that set forth the student's plan for the 2003-2004 school year and included a provision that a "transition team meeting" would be held to develop a plan for the student's transition out of a home program. Early in the 2004-2005 school year the district convened an IEP meeting to discuss the district's proposal to change behavior support services from one outside provider to another and to include behavior support from district staff. The district sought parent approval of the plan during October and reconvened an IEP meeting in November where the parents and district agreed upon services to be provided through at least March 2005. In Feb-

ruary however, the parents removed the child from his district classroom placement in response to stoppage of the outside behavior support services provided for the child, due to a billing dispute between the district and the service provider. In April, the student's annual IEP meeting took place. When the district refused to contract with a specific behavior support service, the parents would not agree to the IEP. The IEP team met again in May and a revised IEP was developed, which the parents again declined. The IEP team met again in June. At that meeting, academic goals were agreed upon, but the district and the parents disagreed on the behavioral support provider. The district again provided the parents with prior written notice refusing the parent's request for a specific provider. The IEP behavioral goals set forth in the June IEP meeting were later revised by the district's behavior analyst, at the request of the parents' attorney, and were included with the proposed IEP for summer 2005 and the 2005-06 school year. After the parents rejected district's offered classroom program, home program and behavior goals and services, the district filed a due process complaint action to establish that it offered FAPE to the student.

In analyzing the case, the court noted that the IDEA requires specific efforts to include a child's parents and teachers in the development of the IEP and that although the ALJ had used the wrong standard in determining that the district complied with the procedural requirements of IDEA, his conclusion was nonetheless correct. Here, the district provided numerous opportunities for input, as well as clearly written IEP offers, as the district staff worked with the parents to develop the student's IEP. Moreover, the revisions made by the district's behavior analyst one week following the

June IEP meeting were made at the request of the parents' attorney. The court also noted the fact that the parents involvement in further formulation of the IEP for ESY and 2005-2006 appeared to be a result of the parent's "conscious decision to stop cooperating with the district in June 2005." The court stated that the district should not be held accountable for the parent's lack of cooperation and that here, the district made every effort to include the parents in formulating the June IEP.

### *Action:*

Generally, once an IEP has been completed, unilateral changes or revisions are not permitted. However, in this case, the changes made to the goals and objectives one week after the IEP was held were not necessarily unilateral changes. District staff and parents had met repeatedly over the school year to discuss the services that the student needed and to formulate an appropriate IEP. In June, although the parents and the district agreed on the academic goals, the behavior goals were still somewhat in dispute, due to the ongoing battle between the district and the parents about who would provide behavior support services. Indeed, although the district proposed behavior goals, the parents' attorney suggested that the goals be revised. As such, it was improper for the parents to allege that the revised goals were made without their input. Districts must take steps to include parents in the development of an IEP. Here the clearly written prior notice, the documented attempts to discuss concerns with the parents and the repeated IEP meetings all supported the district's claim that the goals revised one week following the IEP meeting were not improper.



## IEP IMPLEMENTATION FAILURE MUST BE “MATERIAL”

Adopting the reasoning of the Fifth Circuit and Eighth Circuit Courts of Appeal, the Ninth Circuit recently ruled that a “district’s failure to implement an IEP must be material to incur liability under the IDEA.” *Van Duyn v Baker Sch. Dist.* 5J, No. 05-35181 (9<sup>th</sup> Cir. April 3, 2007). Explaining that a material failure to implement an IEP “occurs when the services a school provides to a disabled child fall significantly short of the services required by the child’s IEP,” the Court concluded that minor deviations from the instructional support and related services identified in a student’s IEP were not material.

The IEP for a severely autistic 13-year-old student called for extensive special education services including special education instruction in reading, language arts, math, adaptive P.E., placement in a “self-contained” special education room, consultation from a regional autism consultant, augmentative communication services and 70 short-term instructional objectives that corresponded to annual goals for the student. At the due process hearing, the parents alleged that the district completely failed to provide certain services described in the IEP and also failed to implement other provisions of the IEP. However, the ALJ found only that the district failed to implement the IEP with respect to the math goals, because the student was not receiving the full 8-10 hours of weekly math instruction identified in the IEP. Finding in favor of the district on all claims except for math instruction, the ALJ ordered the district to provide the average of 5 hours per week math instruction that the student had not

been receiving.

Although the Ninth Circuit had not previously addressed the issue of IEP implementation, it reviewed decisions of other circuit courts which had addressed the issue. See, *Houston Indep. Sch. Dist. v Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000) (“de minimus” failures to implement an IEP do not amount to a violation of the IDEA, only failures to implement “substantial or significant” IEP provisions violate IDEA); *Neosho R-V Sch. Dist. v Clark*, 315 F.3d 1022 (eighth Cir. 2003) (IDEA is violated when a school fails to implement an “essential” element of the IEP, i.e., an element “necessary for the child to receive an educational benefit”). The Court reasoned

***“.. A material failure to implement an IEP occurs when the services fall significantly short of services ...required by the child’s IEP.”***

that since there is no statutory re-

quirement of “perfect adherence” to the IEP, nor any reason found in the statutory text to view minor implementation failures as denials of FAPE, the case at hand could be analyzed in a manner similar to *Rowley*, 458 U.S. 176 (1982) (procedural flaws in an IEP’s formulation do not automatically violate the IDEA, unless the IEP was not reasonably calculated to enable the child to receive educational benefit). The Court suggested that minor failures in implementation, like minor failures in following procedural requirements of IDEA, are not automatic violations of the statute. In further explaining “material failure” the Court noted that the standard does not require the child suffer “demonstrable harm” but that the child’s progress or lack thereof may be an indication of whether there has been a significant

shortfall of services. In this case, the IEP did not clearly describe how the student’s daily behavior card, social stories, or quiet room were to be used, which resulted in inconsistencies in implementation between elementary school and middle school. However, the student’s behavior continued to improve and so the Court found no material failure. In addition, although the IEP called for work “presented at [student’s] level,” and at times the student was exposed to materials too advanced for him, the Court found no evidence that this hindered the student’s progress.

### **Action:**

Although this case is not binding in Michigan and the issue of IEP implementation has not been taken up by the Sixth Circuit Court of Appeals, it is instructive with respect to when failure to fully implement an IEP would result in a denial of FAPE. Interestingly enough, the dissent in this case noted that “[g]iven the extensive process and expertise involved in crafting an IEP, the failure to implement any portion of the program to which the school has assented is necessarily material.” The dissent argued that allowing a school district to disregard already agreed-upon portions of the IEP “would essentially give the district license to unilaterally redefine the content of a student’s plan by default.” This case represents the Ninth Circuit’s willingness to allow districts some flexibility in implementing an IEP. However, as the dissent points out, the IEP represents a plan that was developed to address a student’s educational needs and if something was included in the IEP and agreed upon by the team, then it is necessarily something that the student needs and it should not just be disregarded.



## IFSP SERVICES DO NOT FALL UNDER PART B "STAY PUT" PROVISION

The Eleventh Circuit Court of Appeals ruled that the IDEA does not require a school district to continue to provide services under an IFSP where a dispute arises regarding the initial services under a Part B IEP. Instead, the proper placement was the public school program, not the services under the IFSP, unless the parents and the district agreed otherwise. *D.P. o.b.o. EP, et al v School Board of Bonard County*, 47 IDELR 181 (11th Cir., 2007).

The dispute arose over the proper programming to be provided to triplets with autism. Pursuant to Part C, the triplets had been receiving 1:1 services under an IFSP. When the triplets turned three and "aged out" of Part C services, an IEP had not yet been devised. Two days after the triplet's third birthday, their parents filed a due process complaint alleging the school district was "contemplating" participation of the students in programs, and seeking to invoke IDEA's "stay put" provision to require the district to continue the services under the IFSPs. During a conference call, the parties agreed that no evidentiary hearing was needed as the only issues presented were matters of law and could be resolved on the pleadings. After the submission of briefs, the ALJ ruled that the stay put provision did not require the school district to continue services under the IFSPs, denied reimbursement for privately obtained services, and denied attorney fees. The parents appealed and the district court affirmed.

While the district court action was pending, the parents filed another due process complaint alleging that the district failed to have IEPs in place on the triplet's third birthday and that the belated "temporary" IEPs proposed by the district was invalid since the par-

ents refused to consent to the IEPs. The district's proposed "temporary" IEPs would have placed the triplets in a contracted private preschool program for students with autism. The parents again requested the ALJ to determine that the initial, temporary IEPs were invalid since the parent had refused to consent and to order the district to continue to provide services under the IFSPs until valid IEPs were developed. The ALJ found the IEPs were not valid, since the parent had not consented, but also found that neither the IDEA, nor state law, required the district to continue services under the IFSPs where a parent refuses consent to an initial Part B IEP. The parents appealed to the district court, which affirmed. The parents appealed both district court decisions to the Eleventh Circuit, which consolidated the cases for appeal.

The parents argued that the IDEA required the continuation of services under the students' IFSPs until valid, consented to, IEPs were developed. The district asserted that the IDEA does not require continued services pursuant to an IFSP under Part C beyond the age of three, and that the proper placement under "stay put" was the public school program since the students had not previously received services in a public school.

The Eleventh Circuit agreed with the school district. Relying on the plain meaning of the IDEA, the Court held that there were two mutually exclusive alternatives in regard to "stay put." The language of the IDEA "stay put" provision provides that during the pendency of any proceedings, unless the parent and district agree otherwise, "the child shall remain in the then-current educa-

tional placement of the child, or, if applying for initial admission to a public school shall, with the consent of the parents, be placed in the public school program...." The Court disagreed with the parents' argument that this language provided two options for students moving from Part C to Part B: either the triplets could remain in their "then-current" program under the IFSP, or with the parent's consent, in the public school program. Instead, the Court found the options to be mutually exclusive. There was no disagreement that the triplets had never been admitted to a public school program and therefore, the Court held they were applying for initial admission to a public school. As such, the statute provided that the only "stay put" available was the public school program. The fact that the parents withheld consent for the public school program did not create another option. The Court observed that without the consent of the parents, the triplets "cannot be placed in the public school program; but, they are not entitled to an alternative placement pursuant to the statute." The Court observed that this interpretation is consistent with the language of the regulations, the public comments to the regulations and the U.S. Department of Education's discussion, which were issued at the time the regulations were promulgated.

### **Action:**

The Sixth Circuit has not yet addressed this issue, and while persuasive, the Eleventh Circuit decision is not binding in Michigan. Further, as the dissent pointed out, the decision conflicts with an earlier decision of the Third Circuit which held that since Congress understood there would be "significant overlap" between Part B

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**continued.... IFSP SERVICES DO NOT FALL UNDER PART B "STAY PUT" PROVISION**

and Part C, when a child is in transition between the two, the district must maintain services under the last agreed upon IFSP, during the pendency of the administrative hearing. *Pardini v Allegheny Inter. Unit*, 420 F.3d 181, 105 LRP 41793 (3d Cir. 2005).

In Michigan, Part C services are provided through our "Early On" programs. Michigan is a "birth mandate" state where special education services are required to be provided to eligible

students from birth through age 25. Thus, unlike the federal law, Michigan law may provide students with disabilities with "special education" prior to age 3, if the student is determined to be eligible for special education services. Generally, if a child is found eligible for special education and related services and the parent consents to the initial provision of special education and related services, the public agency must continue to provide those services not in dispute. Thus, stay put

for a child with an IEP/IFSP may be the "then current" program under that IEP/IFSP.

On May 4, the U.S. Department of Education released the long-awaited proposed IDEA Part C regulations. Perhaps these proposed regulations will provide some clarification about responsibilities when a child transitions from Part C to Part B.

**U.S. DEPARTMENT OF EDUCATION ISSUES REGULATIONS**

The U.S. Department of Education recently released the final regulations under NCLB and IDEA which permit additional flexibility for school districts to more appropriately measure the achievement of students with disabilities. These regulations allow a school district to assess up to 2% of students using modified academic achievement standards if such assessment is determined necessary by a student's IEP Team. These new regulations take effect May 9, 2007, and apply to special education students who do not fall within the 1% of students so cognitively challenged that they cannot meet regular grade-level

standards in math, reading and science.

The regulations allow states to develop modified academic achievement standards for eligible students. States may not modify what students with disabilities are expected to know, but rather, how the students demonstrate that they know it. Each student's IEP team must determine whether to test the student using a modified assessment and decide what accommodation to use during the test. Such decisions must be determined subject-by-subject and must be reviewed annually. In addition, IEP goals based on grade-level content

standards must be included in the IEPs of students who are assessed based on modified academic achievement standards. For more information, go to <http://www.ideapartnership.org/homepage2.cfm>.

Proposed regulations under Part C of the IDEA were released May 4, 2007. These regulations will be open for public comment until July 23, 2007. A copy of the proposed regulations may be obtained at [www.idea.gov](http://www.idea.gov) and clicking on the link to the Part C NPRM. Public hearings will be held in four cities across the country during the month of June.

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

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## OSEP ISSUES GUIDANCE DOCUMENTS

The United States Department of Education's Office of Special Education Programs (OSEP) recently issued guidance documents relating to various parts of the IDEA implementing regulations. These documents, presented in a Q & A format, cover topics such as IEPs, Evaluations, Identifying LD and the use of RTI, Discipline, Services to Children in Private Schools, Highly Qualified Special Education Teachers, Procedural Safeguards, Secondary Transition Services and Monitoring. The documents can be obtained on-line at <http://idea.ed.gov>.

Each section discusses a topic that relates to some of the new provisions of IDEA. For example, when looking at reevaluations, OSEP indicated that a district may evaluate if a parent does not respond to a request for consent; and if a parent refuses to consent for reevaluation, the district may agree that reevaluation is not necessary, may seek override of the refusal, or may cease services if it believes that the student is no longer eligible for services. In the later instance, the district must provide prior written notice that it will cease services. See, Questions D-1 through D-4 of Q&A on IEPs, Evaluations and Reevaluations. Similarly, Questions A-1 through A-4 of the Secondary Transition document address secondary transition services, including measurable post-secondary goals.

Examples of discipline issues addressed include the following: Question A-5 addresses written notice to parents when removals do not constitute a pattern of removals (notice not required if removals **do not constitute a change in placement**). Question A-6 addresses writ-

ten statements by teachers or other school personnel who are concerned that a child may need special education and related services (no requirement for a written statement expressing concerns about a pattern of behavior); Question B-1 addresses options available to school personnel when a student with disabilities commits a serious crime, such as rape, at school or a school related function (rape may meet the definition of serious bodily injury); and Question F-3 addresses when an IEP team is required to hold a manifestation determination ("within 10 school days of any decision to change the placement of a child with a disability

because of a violation of a code of student conduct" and "a change in

placement occurs if the removal is for more than 10 consecutive school days, or if the public agency determines, on a case-by-case basis, that a pattern of removals constitutes a change in placement").

The guidance documents also provide useful information relative to the use of an RTI process and identification of students with learning disabilities. When discussing RTI and identification of students with LD, OSEP indicated that a school district may require all students to participate in RTI before being determined eligible as learning disabled (Question C-2), but this cannot delay the evaluation being completed unless the delay is agreed to by the parent. The Q&A document makes clear that the use of RTI does not eliminate the need for a comprehensive evaluation utilizing standardized tests, or other assessment

measures. For example, Question C-6 states that an eligibility determination may not be made using only information that was collected through an RTI process and that a public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining eligibility and not use any single measure or assessment as the sole criterion for determining eligibility. The results of an RTI process may be one component of the information reviewed as part of the evaluation procedures required under 34 CFR §§300.304 and 300.305.

Just as the guidance documents reiterate that the RTI process does not replace the need for a comprehensive evaluation, a recent letter issued by OSEP clarifies this idea. In *Letter to Zirkel*, 107 LRP 12479 (OSEP March 6, 2007), OSEP indicated that States may prohibit or make optional the use of severe discrepancy and require RTI, and that States may also permit more than one "research based" model.

### *Action:*

In addition to providing Q&A documents to assist in implementing the IDEA and its regulations, training modules which include hand out materials and power point presentations have been produced by NICHCY. These materials can be accessed through a link on the above OSEP website, or at <http://www.nichcy.org/training/contents.asp>.

*"...the use of RTI does not eliminate the need for a comprehensive evaluation utilizing standardized tests, or other assessment measures."*



## MORE GUIDANCE FROM US DOE

In addition to the recent guidance documents issued by the United States Department of Education Office of Special Education Programs (OSEP), several letters have been released by OSERS and OCR that address current issues.

In *Letter to Guess*, 47 IDELR 135 (OSERS 2007), OSERS concluded that LEAs do not need to obtain parental consent each time they access public funds or insurance to pay for special education services provided to Medicaid-eligible children. Instead, LEAs only need to obtain consent when the services to be provided exceed those identified in the child's IEP. "For example, if it is known that a child is to receive three hours per week of occupational therapy (OT) for 36 weeks, parents could be asked to consent to the [LEA's] billing of the parents' public benefits or insurance for 108 hours of service," OSERS wrote. If, however, an LEA seeks to use public benefits or insurance to pay for additional hours of services resulting from changes in the student's IEP, OSERS noted, the LEA must obtain parental consent for the new charge. OSERS indicated that LEAs must also seek parental consent when the amount charged for related services increases. Each district must determine the most effective method for obtaining parental consent. A district may choose methods such as obtaining consent at an IEP meeting, using a form, via a mass-mailing, or by inserting language into an IEP form.

In *California Department of Education*, 47 IDELR 45 (OCR 2006), the Office of Civil Rights, in a Q & A format, clarified Section 504 and ADA requirements regarding reporting modification of classes on transcripts and report cards. In part, OCR stated:

That a standards-based report card, or any report card issued for a child with a disability by a local educational agency, may identify special education or other related services or resources being provided for the student. For example, the report card can provide a box to be checked if the student is receiving speech/language services, is in a resource program or special day class, or makes reference to an IEP, so long as the report card also indicates the student's level of achievement/progress.

A report card can assign grades for a child with a disability based on the student's grade-level standards.

If the LEA assigns grades to non-disabled students participating in regular education classes using grade level standards that reflect progress in the general education curriculum. The grades on a disabled student's report card for classes with a different course content and classes taught using a modified or alternate education curriculum must be based on standards established by the state or LEA.

Asterisks or other symbols or coding on a report card of a child with a disability may be used to indicate that the student has had a modified curriculum in general education.

However, a student's transcript cannot indicate that the student has been enrolled in a special education program, has received special education

and/or related services, or has a disability.

While a transcript may not disclose that a student has received special education or a related service or has a disability, a transcript may indicate that a student took classes with a modified or alternate education curriculum.

Generally, report cards are provided to parents so that they can monitor a child's progress or achievement. Transcripts on the other hand, may be shared with potential employees or college-admissions offices, and the way that student information is shared can trigger compliance and discrimination concerns. Under IDEA and Section 504, LEAs are prohibited from disclosing that a student received special education services, to help prevent misinterpretation of what the transcript means.

### *Action:*

Each district must determine the most effective method for obtaining parental consent for Medicaid billing. Various forms have been prepared, either to incorporate consent in the IEP document, or as stand alone consent form. For more information, or assistance in creating a form, contact a Scholten Fant School Law attorney.

Districts have some flexibility when reporting grades and progress on official school records. The current guidance reiterates the guidance issued in *Letter to Runkel*. For assistance with developing compliant forms or question regarding what information may be included on transcripts or report cards, contact legal counsel.



## ADVERSE EDUCATIONAL IMPACT STILL CAUSES CONFUSION

The U.S. Court of Appeals for the First Circuit has ruled that a student was a “child with a disability” entitled to special education services under the Individuals with Disabilities Education Act (IDEA), even though she excelled academically, because any negative impact her Asperger's Syndrome had on her educational performance could qualify as an “adverse effect” for purposes of IDEA's eligibility test. *L.I. v Maine Administrative Sch Dist. No. 55*, 47 IDELR 121 (1<sup>st</sup> Cir. 2007). This decision affirmed the federal district court's ruling, which was discussed in *Scholten Fant School Law Update*, Winter 2006. However, the court ruled that her parents were not entitled to reimbursement for the cost of private school tuition or to compensatory education services.

L.I., a student at Cornish Elementary School (CES) in Cornish, Maine, excelled academically but began having psychological problems that culminated in a suicide attempt during sixth grade and a subsequent diagnosis of Asperger's Syndrome and adjustment disorder with depressed mood. To qualify as a “child with a disability” under IDEA, a child must: (1) have at least one of several enumerated conditions, each of which is further defined in federal regulations as “adversely affecting a child's educational performance” so as to constitute a disability; and (2) by reason of the condition, need special education and related services. A district-convened pupil evaluation team (PET), which IDEA refers to as an Individualized Education Program (IEP) team, identified L.I. as a “qualified individual with a disability” under the federal Rehabilitation Act but concluded she was ineligible for services under IDEA because her condition had “no significant adverse effect on education.” The parents, who in the interim had placed

L.I. in private school, unsuccessfully disputed the IDEA eligibility determination in a due process hearing. They then appealed the hearing officer's decision to U.S. district court, which ruled in their favor, concluding that L.I.'s condition adversely affected her educational performance in the areas of socialization and communication. Noting that neither Maine nor federal regulations qualify the term “adversely affects,” the district court ruled that “any negative effect should be sufficient” to constitute a disability under IDEA.

The First Circuit affirmed the lower court's decision and declined to adopt the school district's reasoning that a disability meets the “adversely affects” criterion “only if the student's condition imposes a significant negative impact on the child's educational performance ... limited to those areas of performance actually being measured and assessed” by the school district in accordance with law. Maine's definition of “educational performance” lists performance on assessments as just one of many indicators, both academic and non-academic, and “Maine's broad definition of 'educational performance' squares with the broad purpose behind IDEA,” the court concluded. The “adversely affects” component could include any adverse affect, no matter how slight, without opening the floodgate to IDEA claims as the school district feared, because even if a student has one of the enumerated disabilities under the first prong of the eligibility test, it does not necessarily follow that the student also fulfills the second prong.

The First Circuit next determined that the lower court had not committed clear error in applying this legal standard. Under the first prong, the lower court had not erred by relying

solely on state content area performance indicators to assess L.I.'s “educational performance” but, rather, had found that Asperger's impaired L.I.'s “communication,” an area incorporated in Maine's definition of “educational performance,” and that L.I.'s “adverse effect” also rested on other difficulties implicating “the career preparation component of the Maine general curriculum.” Under the second prong, the district court correctly defined as “special education,” the services agreed to by the PET as part of its Rehabilitation Act plan and thus were “special education” services within the meaning of IDEA. Further, the court observed that “the district has not adequately explained to us why [L.I.] does not need special education.” The district court had properly denied reimbursement for L.I.'s private school tuition, as a private placement is not “reasonably calculated to enable the student to receive an educational benefit” under IDEA where the private school offers none of the special education services recommended by the experts or the PET. The district court's denial of compensatory services also was proper because the IEP the court had ordered the district to formulate for L.I. would necessarily resolve this question.

However, even with the decision of the 1<sup>st</sup> Circuit, confusion in eligibility determinations still abounds. In *Bd. of Educ. of the East Islip Union Free Sch. Dist.*, 47 IDELR 210 (SEA NY 2007), a state review officer found that a kindergarten student with a diagnosis of Asperger's Syndrome, ADHD and social pragmatic difficulties did not meet the eligibility requirements for special education services under IDEA. The student performed well in class, had excellent work habits and easily transitioned



**continued.... ADVERSE EDUCATIONAL IMPACT STILL CAUSES CONFUSION**

(Continued from page 12)

The teacher testified that any inappropriate behaviors exhibited by the student were “not unique to him” but rather, were typical of other students his age and could easily be managed within the classroom. As such, the hearing officer found no adverse impact on the child’s ability to learn and therefore, he did not qualify for special education services.

Similarly, in another case from New York, the court affirmed a school district’s determination that a high school student who had endured years of sexual abuse by a relative, but whose overall academic performance was satisfactory, was not eligible as a student with an emotional disturbance. *Mr. and Mrs. N.C., on behalf of their son, M. C. v Bedford Central Sch. Dist.*, 43 F. Supp. 2d 532, 47 IDELR 95 (S.D. NY, 2007). Although the student was described at times as disruptive, inattentive, lacking in self-control, and had received a number of suspensions, he was nonetheless well-liked by his peers, served as a mentor for other students and had a satisfactory academic performance, with a B-C average. The court concluded that academic performance commensurate with cognitive ability and the student’s successful relationships with peers and teachers did not meet the threshold requirement for emotional disturbance. The problem behavior exhibited by the student (e.g. drug use and aggressive behavior) were socially mal-adjusted behaviors, not an emotional impairment.

In *High Tech Middle Media Arts School*, 47 IDELR 114 (SEA Ca., 2007) a hearing officer discussed the

various criteria for determining eligibility as a learning disabled student and found that delayed reading fluency scores alone were not sufficient for LD eligibility. In reaching his conclusion, the hearing officer noted that the initial threshold determination for a learning disability is that the student does not achieve adequately with grade level expectations. Therefore, underachievement (in academics) is required, and the student was appropriately exited from special education. The hearing officer found that a low reading fluency score, even coupled with low processing speed, was not enough to determine the student eligible as learning disabled under the new regulations as the student was meeting all grade level expectations. The hearing officer stated that RTI is one method of identifying underachievers and appropriateness of instruction. But where a student received all As and Bs, and was achieving at grade level, the student was not eligible as LD, notwithstanding a superior IQ. The hearing officer stated:

In Student's case, the evidence shows that Student's reading fluency score on the WJ-III subtest should not be considered in isolation. When considered in connection with Student's high grade point average, her exemplary class work, her excellent scores on state standardized tests and the comments from her teachers, the reading fluency score is not sufficient to show that Student has an SLD in the area of reading.

Thus, in this case, the hearing officer concluded that “adverse affect” would necessarily be manifested by underachievement in academics and a student who was performing satisfactorily would not be eligible.

**Action:**

Unlike the Second Circuit, most courts and hearing officers have not gone to the extreme finding that “any” educational impact, however slight, is sufficient for IDEA eligibility. The Sixth Circuit, of which Michigan is a part, has not directly ruled on what level of “impact” is necessary. Cases arising out of Michigan have, many times, focused on academics, but this is by no means universal.

As these recent cases illustrate, there is still wide variation in how different states define “educational performance.” State law and local curricular requirements will help shape the contours of what a district must consider with respect to a disabling condition's adverse affect on a student's performance. Eligibility criteria of the different disabling conditions under the IDEA will also impact how a district defines and considers “educational performance” since some disabling conditions may include social aspects of “education” while others do not, as these cases exemplify. Every eligibility determination must be based on the impact of the particular disability on the individual child.

**Got PD?**

Scholten Fant School Law attorneys can help with your professional development needs. Topics may include legal issues from General Educators Role in the IEP Process, State Board Seclusion and Restraint Document, Michigan Merit Curriculum and the Personal Curriculum to Discipline of Students with Disabilities and Teacher Evaluations under the Tenure Act. Contact one of the Scholten Fant School Law attorneys to assist in your PD needs.





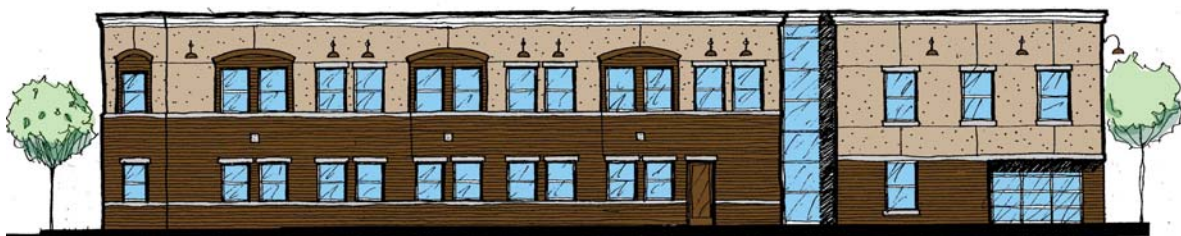
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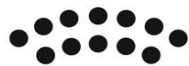
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