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## SCHOOL LAW UPDATE

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### SUBSTITUTE TEACHER STATUTE INAPPLICABLE

Wolfe v Wayne-Westland Community Schools, a recent Michigan Court of Appeals decision, involved several In-School Suspension (ISS) employees (employees who supervised students serving in-school suspensions variously referred to as “ISS supervisors,” “suspension room teachers,” etc.). Because the ISS program allowed the students to receive credit in their regular classrooms for school work completed in the ISS program, the ISS employees were expected to assist students with their assignments and were encouraged to tutor them. The ISS employees were required to possess the qualifications needed to serve as “substitute teachers” and were compensated at prevailing “substitute teacher” rates.

The ISS employees claimed that status as “substitute teachers” entitled them to the benefits and protections of Section 1236 of the Revised School Code (MCL 380.1236 as amended), which provides in part:

. . . if a teacher is employed as a substitute teacher with an assignment to 1 specific teaching position, then after 60 days of service in that assignment the teacher shall be granted for the duration of that assignment leave time and other privileges granted to regular teachers by the school district, including a salary not less than the minimum salary on the current salary schedule for that district.

The ISS employees claimed entitlement to the minimum salary protection and other benefits afforded long-term substitute teachers under Section 1236 because (a) they worked in the position for more than 60 days, (b) they were

required to possess “substitute teacher” qualifications, (c) they were compensated at “substitute teacher” rates, and (d) they were assuming ISS teaching responsibility on behalf of the regular classroom teachers while some of the regular classroom teachers’ students were in the ISS program.

The Court of Appeals determined, allegedly based on a plain reading of Section 1236, that the ISS employees did not qualify as “substitutes” under Section 1236 because these employees were not “substituting” for or replacing any specific teachers or teaching positions. The Court of Appeals reflected upon the legislature’s apparent intent under subsection (1) by considering the definition of “day” in subsection (5). As used in subsection (5), the term “day” is defined as “the working day of the regular, full time teacher for whom the substitute teacher substitutes.”

Because the ISS employees were not deemed by the Court of Appeals to be “substituting” for anyone (i.e. the regular teachers were not absent from the district even though some of their students were absent from their classrooms during the time spent in the ISS program), the Court of Appeals held that Section 1236 did not apply and that the ISS employees were not entitled to the compensation or other protections afforded, by Section 1236, to certain long-term “substitute teachers.”

As always, every case is fact dependent. Consult with your counsel in how to appropriately handle your situation.

## **OKAY TO CHIP AWAY AT HEALTH CARE BENEFITS UNDER RETIREMENT PROGRAM**

The Michigan Supreme Court addressed two issues involving health care benefits for retirees under the recent amendments to the Michigan Public School Employees' Retirement System, which increased the deductibles retirees are required to pay for health care and the co-pays and out-of-pocket maximums payable by retirees for prescription drugs. Studier, et al. v Michigan Public School Employees' Retirement Board, et al.

The first issue was whether such health care benefits constituted "accrued financial benefits" protected against diminishment or impairment by Article 9, Section 24 of the Michigan Constitution of 1963. The second, but related, issue was whether the statute (MCL 38.1391(1)) which established these benefits created a contractual obligation which could not be diminished without violating U.S. Constitution Article I, Section 10 and Michigan Constitution Article 1, Section 10, both of which prohibit the impairment of existing contractual obligations.

The majority opinion disposed of the first issue by holding that health care benefits (payable under the Public School Employees' Retirement Act), unlike the monthly retirement income payments themselves, do not constitute "accrued financial benefits." The majority concluded that these health care benefits were

not subject to the constitutional provisions (appearing in Article 9, Section 24 of the Michigan Constitution) which prohibit the state or a political subdivision from diminishing or impairing the "accrued financial benefits" of its pension or retirement plan.

As to the second issue, the majority opinion concluded that the legislative establishment of health care benefits for retirees, by amendment of the Michigan Public School Employees' Retirement Act, did not create a contractual obligation. Therefore, the subsequent amendments which increased the health care benefit co-pays and deductibles did not violate either the Michigan Constitution (Article 1, Section 10) or the U.S. Constitution (Article I, Section 10) which prohibit legislative enactments which impair an existing contractual obligation. In reaching this conclusion, the majority relied in part on the fundamental principle that one legislature cannot typically bind the power of a successive legislature.

Given the court's majority opinion, it is not unreasonable to assume that, as the cost of health care coverage continues to increase, a portion of the increases may continue to be shifted to public school retirees in the form of still higher insurance deductibles and co-pays.

## **FEDERAL COURTS UPHOLD SCHOOL DISTRICTS AUTISM PROGRAM; DENY ABA REIMBURSEMENT**

Federal courts around the nation continue to address parental requests for reimbursement of ABA-style programming. The Winter 2005 School Law Update, discussed the case of Deal v Hamilton County Schools (6<sup>th</sup> Cir. 2005), where the Court ordered the school district to prepare an IEP which included ABA in-home programming, as well as reimburse the parents for the costs of previously provided ABA in-home programming. The school district sought rehearing *en banc*, which was denied in June

2005. A Petition for Certiorari to the U.S. Supreme Court was filed, and is currently pending. The parents' response to the Petition for Certiorari is due on August 8, 2005.

Since Deal, other federal courts have addressed ABA programming requests by parents. In Brown v Bartholomew Consolidated School Corporation, 43 IDELR 60 (S.D. Indiana 2005), the court found that the district's IEP was appropriate even though the IEP did not include

ABA instruction. In that case, the student had been diagnosed with autism and had previously attended the District's early childhood special education program. The parents began providing an ABA in-home program through a privately contracted tutor. In the fall of 2000, the school district proposed an IEP which provided for one on-one-assistance and a full-time aide trained in various methodologies to work with the student. The parents rejected this IEP because it did not provide for one-on-one ABA instruction provided by trained ABA instructors for eight hours a day, five days a week. The IEP team reconvened following a reevaluation. The parties were again unable to reach agreement and the parent requested a due process hearing. While the due process hearing was pending, the parties reached a settlement that provided the student with the early childhood special education program and a regular half-day kindergarten. Additionally, the district agreed to provide three hours of in-home ABA instruction in the mornings, three hours of ABA instruction at school, and two additional hours of one-on-one ABA instruction at home after school. On Fridays, six hours of in-home ABA was provided for the student. The district also agreed to hire the parents' ABA trainer to provide training to its staff. This resolved the first due process hearing request, and was provided from the spring of 2001 until spring of 2002.

In May 2002, the IEP team met to discuss the program for the 2002-2003 school year. The school district proposed an IEP which provided a full day kindergarten program with one-on-one assistance for the student, as well as speech and occupational therapy, but did not include providing in-home or at-school ABA instruction. The parents rejected the IEP and requested a due process hearing. The local hearing officer ruled in favor of the school district, finding the proposed IEP was reasonably calculated to confer educational benefits. The parents appealed, and the state review officer upheld the local decision. The parents appealed to federal court.

The parents raised a number of issues in federal court including a claim that the IEP was

“predetermined,” lacked an appropriate transition plan, lacked objective measurable criteria and was not reasonably calculated to enable the child to receive educational benefits in the least restrictive environment. After hearing additional evidence, the court ruled in favor of the district on all counts.

When addressing the issue of predetermination, the court distinguished the facts from those involved in Deal. Similar to Deal, there were various e-mails and memoranda prepared by school district personnel prior to the IEP which discussed the student's program. However, in this case the court found that these e-mails and memoranda were appropriate preparatory activities conducted by the school personnel because they merely discussed various placement options but left the final determination to the IEP team. When comparing these facts to Deal, the court noted that the school district in Deal had made an “informal but broad policy decision” against ABA, regardless of student need. In the present case, the school district had provided ABA instruction and had trained its personnel in that methodology. Further, unlike Deal, the school district had not decided prior to the IEP meeting what placement or program would be appropriate. Lastly, the cost of ABA programming was not an issue in the present case as it was in Deal. Based on these factors, the court found that the school district had not predetermined the outcome of the IEP. The court stated that “The school district's unwillingness to yield on the particular issue of placement does not by itself establish predetermination or any other denial of the parental right of involvement. School districts are required to recommend what they believe is appropriate for the child, as long as they can listen to parents' views with open minds.”

When addressing other components of the IEP, the court found that the IEP contained the required elements. The court held the IEP was “reasonably calculated” to confer educational benefits. The parents asserted that the only way the student could be educated was with the use of an in-home ABA program. While the parents were able to show that the student had

progressed under this program, and even the school district's experts credited the ABA program with some of the student's progress, the court stated that this alone does not establish that ABA was the only way for the student to be educated. The court acknowledged that the difference between the parties came down to "an honest disagreement among professionals" as to the appropriate methodology, but that the court must defer to the decisions of the state and local education agencies in such disputes. In doing so, the court noted that the district had specifically indicated in the IEP reasons for discontinuing his at-home ABA instruction such as: (1) the belief that the student would benefit from being with typical peers, (2) more opportunity in a full day program to meet goals and objectives, (3) the home program prevented generalization of skills, and provided fewer opportunities to interact with peers and adults. Based on these reasons, as well as the opinions of experts, the court found that at the time the IEP was created, it was reasonably calculated to confer educational benefits.

In a similar situation, the United States District Court for the Western District of North Carolina found that a school district's IEP provided FAPE even though it did not include one-on-one, in-home ABA programming. In KA v Charlotte Mecklenburg Board of Education, 43 IDELR 160 (WD NC 2005) the court found that the district's proposed IEP was appropriate. The student attended a school-based program under an IEP devised in January 2002 through the balance of that school year. In the four months the student attended the school program, he made significant progress on goals and objectives and progressed from a "zombie-like state" to being able to participate in individual and group activities. When the parent was informed that the student would likely not qualify for extended school year services due to the extent of his progress, the parent sought a private ABA program. The parent provided the student this private program throughout the summer months and then limited the student's participation in the school program in the fall. The IEP team was reconvened on five occasions through the fall of 2002 and January 2003. When the district did not provide one-on-one,

in-home ABA training, the parents requested a hearing.

Both the local hearing officer and state review officer found in favor of the district. The parents appealed to federal court.

In finding that the district's program was appropriate, the court focused on the student's progress under the IEP developed by the school. Noting that the student had achieved 10 out of 18 goals between January and May 2002, the court determined that the student had made significant progress. Further, the student had made progress in participating in individual and group classroom activities. Stating that the IDEA required "meaningful access to the educational process" which must be "reasonably calculated to confer some educational benefit," the court found that the progress made by the student showed that he had received meaningful benefit. The court further found that an in-home ABA program was not the least restrictive environment for the student.

**Action:**

Both of these cases highlight the need for a district to collect appropriate data regarding student progress in its programs. In both cases, the courts spent time analyzing the expert opinions and data supporting student progress. While progress alone is not determinative, the courts seem to focus most on a student's progress when analyzing whether the student received "meaningful educational benefit." In KA v Charlotte Mecklenburg, the court was clearly impressed that the student had achieved 10 of 18 goals and objectives in approximately one-half year. In order to defend its chosen methodology, districts must collect hard data which will show progress. On the other hand, if the data does not show that the student is achieving goals and objectives, the district should reconvene the IEP meeting to modify the IEP.

A significant portion of the opinion in Deal discussed predetermination. Simply put, predetermination of an IEP will be a fatal procedural error. In Deal, the parents were able to submit evidence including e-mails, internal

memoranda and testimony showing that the school district had adopted an “informal” policy against ABA. Comparing this to Brown, the court found that the memoranda and e-mails supported a finding that the district had not predetermined the outcome of the meeting. The difference between the cases is the wording in the various memoranda and e-mail. It is important to note that the same attorney represented the parents in Deal in the 6<sup>th</sup> Circuit and the Browns in Indiana (the 7<sup>th</sup> Circuit). The “formula” apparently adopted by the parents and the attorney in these cases seems to focus on issues of predetermination and progress. While the district prevailed in Brown, in other cases, the same formula has worked in favor of the parents. See Deal, *supra*. See also, DF v Ramapo Central School District, 43 IDELR 56 (SD of NY 2004) (district’s full-day classroom program found inappropriate where student made “minimal progress” and “limited progress.” Such is not evidence of “meaningful” access to education, but is the opportunity for only trivial advancement. District ordered to provide one on one in-home ABA.)

It is also important that districts fully explain the rationale for choosing one methodology over another in the IEP. Typically this information is included in the IDEA’s requirement of “prior written notice.” Michigan’s IEP form, however, is limited in its ability to provide the required information. Further explanation of rationale for accepting certain methods or programs, while rejecting others, not only assists in fulfilling the district’s obligation to provide prior written notice, but will aid in the defense of the IEP.

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**IHO, CITING *DEAL*, HOLDS THAT THE EDUCATIONAL BENEFITS PROVIDED PURSUANT TO IDEA ARE TO BE PROVIDED WITH THE GOAL OF SELF-SUFFICIENCY**

In Board of Education of the Dearborn Heights School District No. 7, 43 IDELR 152 (March 8, 2005), the IHO rejected the parents’ claim that the appropriate educational setting for their child remained the general educational setting rather than a “center-based” special education program. The student at issue was almost 16 years old, with Down’s Syndrome and an IQ of 36. He made only “marginal” academic progress in the general educational curriculum, even with the help of a full-time aide, and the District proposed to place the student in a center-based setting in which the focus would be less on academic skills and more on job-training and functional skills. The family rejected this proposal, based on their belief that

job-related and self-sufficiency-related skills ought to be taught by them at home and that the District ought to continue to focus on academic skills. In holding that the center-based setting was the appropriate and the least restrictive setting in which to provide services, the IHO specifically cited the Sixth Circuit’s recent case, Deal v. Hamilton County Board of Education, 42 IDELR 109 (6<sup>th</sup> Cir. 2004). The IHO held, citing Deal, that in passing IDEA, it was the intent of Congress “to require a program providing meaningful educational benefit towards the goal of self-sufficiency, especially where self-sufficiency is a realistic goal for a particular child.”

## **PREPARATION OR PREDETERMINATION? CAUTION IS WARRANTED WHEN PRESENTING INFORMATION AT IEP MEETINGS**

As the school year begins, districts must be circumspect when preparing for and presenting information at IEP meetings. While it is clear that school authorities may engage in preparatory activities such as developing a draft IEP, Ellenville Central Sch. Dist., 43 IDELR 145 (OCR, 2004); In re: Student with a Disability, 103 LRP 8554 (SEA MI, 2002), districts may not make decisions for students with disabilities based on policy, budget, or logistical concerns. Socorro Indep. Sch. Dist., 43 IDELR 177 (SEA TX, 2005). Recent decisions by the Texas State Education Agency and OCR are illustrative of both sides of the issue.

In Socorro, the hearing officer ruled that a school district did not violate IDEA when it prepared a draft IEP for a high school student with a learning disability without first discussing the contents with the parent. The hearing officer noted that there was no indication that the district presented the IEP as anything other than a draft. As such, the parents were not deprived of meaningful input into the development of the IEP.

In this case, a 17 year-old student with learning disabilities was sent home after the assistant principal concluded that the student was under the influence of marijuana. The assistant principal completed a student code of conduct report and sent a copy home to the parents. Two days later, the parent's attorney contacted the principal and requested an appeal of the assistant principal's determination that the student was under the influence. Three days after that, the student's mother came to visit the principal, who was unable to meet with her at that time. Instead, the parent was directed to a conference room to meet with the assistant principal and other school personnel for the purpose of conducting a manifestation determination review (MDR). The parent objected to the lack of advance notice regarding the MDR. By agreement, the meeting was adjourned and rescheduled for a later date. Before the parent left the meeting, she was provided with a copy of the parent's rights

brochure. A copy of the notice regarding the rescheduled MDR was forwarded to the parent's attorney.

Before the rescheduled MDR, the assistant principal met with the special education director and they drafted proposed changes to the student's IEP that reflected the disciplinary action contemplated by the administration. At the MDR, the parent and her attorney walked out, complaining about inadequate notice of the issues to be discussed at the MDR, including the proposed changes to the IEP. The district continued the meeting, determined the marijuana incident was not a manifestation of the student's disability, and adopted the recommended disciplinary schedule proposed by the administration.

The hearing officer explained that so long as school authorities make it clear to the parent that the draft IEP is for discussion only, preparation of a draft IEP did not violate IDEA. A full explanation and discussion of the content of the draft IEP provided parents an opportunity to meaningfully participate in the development of the student's IEP. The hearing officer also found even though the written notice provided to the parents regarding the MDR was "sketchy" and may have lacked detail, it did not cause any significant adverse consequences to the student's education or deprive the parent of meaningful input in the development of the IEP.

However, on the other end of the spectrum, in Ellenville, OCR recently found that a district improperly decided services it would offer students with disabilities based on budgetary and logistical concerns, rather than on the individual needs of the students. In this case, when a recommendation was being developed for student placement, the special education director would meet one-on-one with the special education staff and give them a pre-printed list of placement options from which to choose. The outcome of that meeting was then presented to the parent as the district's recommendation for placement.

OCR found that the district failed to individualize program offerings based on the needs of the students and that an unwillingness of the special education director to allow discussions regarding placements violated 34 C.F.R. § 104.35(c) which requires that decisions be made by a group of persons knowledgeable about the student, the meaning of evaluation data, and placement options. As part of the placement decision making process, persons knowledgeable about the student include the parents and their input must be considered.

**Action:**

Preparing a draft IEP is permissible, so long as it is clear that it is for discussion purposes only. However, merely presenting the information to the parents is not sufficient. As OCR found, failing to allow a full discussion

about a student's individual needs, but instead just selecting a student's placement from a "menu" of approved options is a violation that could result in a denial of the parent's ability to meaningfully participate in the development of the IEP.

When presenting a draft at an IEP meeting, any documents presented should be dated (month, day, and year) and clearly marked "draft." Discussions must be specific, thorough, and focused on the individual needs of the student rather than district concerns such as budget, logistics, or personnel. Input from all participants must be solicited, considered, and reflected in the final IEP.

**CALIFORNIA RULING ALLOWS DISTRICTS TO PROVIDE COPIES OF TEST PROTOCOLS TO PARENTS OF STUDENTS WITH DISABILITIES**

A U.S. District Court in California recently ruled that a California statute requiring copies of test protocols to be provided to parents of special education students falls within acceptable "fair use" under federal copyright law and that the federal copyright law does not preempt a state statute that gives parents the right and opportunity to examine and receive copies of all school records for a child. Newport-Mesa Unified School District v. State of California Department of Education, 43 IDELR 161 (C.D. Ca. 2005).

The parent of a 7-year-old child with special education needs requested copies of the test protocols from his son's evaluation before an IEPT meeting. The District declined to provide the copyrighted test protocols for the Woodcock-Johnson III and the parent filed a complaint with the California Department of Education. The department found the district out-of-compliance with the California Education Code Section 56504 by failing to provide the records within 5 days of the parent's request. The department ordered the district to revise its policies and procedures on student records to comply with Section 56504. The district

claimed that United States copyright laws prevented it from providing copyrighted test protocols and sought an injunction preventing the California Department of Education from enforcing its compliance report. At the court's invitation, the publishers and copyright owners of the Woodcock-Johnson III and the Weschler Intelligence Scales for Children-III intervened in the suit to assert the copyright interest.

Section 56504 of the California Education Code (which is similar to FERPA) expressly provides that the "parent shall have the right and opportunity to examine all school records of the child and to receive copies pursuant to this section...within five days after such request is made by the parent, either orally or in writing." The competing interests between the federal copyright laws and the California Education Code were analyzed by the court under the "fair use doctrine." The court considered factors such as: (a) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used, in relation to the work as a whole, and (4) the effect of the use on the market for or value of the copyrighted work. The court found that the

distribution of copyrighted test protocols is a fair use under copyright laws. Giving a copy of the test protocols to parents falls within the fair use doctrine because it is a noncommercial use and broadens the parent's understanding of their child's educational needs. The court further explained that copies containing the student's answers had a different character than copyrighted material standing alone, since the only copies at issue were those identifiable with the student after the student had taken the test.

In this case, the parties all agreed that the test protocols sought by the parent were "school records" because test protocols became personally identifiable with the student after the student wrote the answers on them. The California Education Code Section 56504, and the federal regulations implementing the Individuals with Disabilities Education Act (IDEA) both contain provisions that permit parents to inspect and review any education records relating to their children. 34 C.F.R. § 300.562(a). This right to inspect and review includes the right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records. *Id.* § 300.562(b)(2). Finding that providing a copy of test protocols did not violate federal copyright laws, the court denied the District's request for an injunction and upheld the department's order directing the District to provide a copy to the parents.

**Action:**

Though the analysis of this case was under federal copyright laws, the decision is consistent with previous interpretations regarding a parent's right to review test protocols under both FERPA and IDEA. Whether a parent has a right to review their child's test protocols under FERPA depends on whether the protocols contain personally identifiable information and are maintained by the educational agency. Like the protocols in this case, if they contain personally identifiable information and are maintained by the education agency, then they are an "education record" and may be reviewed by the parent upon request. Letter to

MacDonald, 20 IDELR 1159 (OSEP 1993). Similarly, under IDEA, a district is required to provide, upon request, an explanation or interpretation of any answer sheet or other education records related to the tests a student has completed, as well as the right to a description of any test, record, or report the school district used as a basis for any proposed action.

In Michigan, districts are required to comply with all federal regulations implementing the Individuals with Disabilities Education Act, including the right to access student records. See Special Education Rule 340.1701. Once a student has written an answer on a test protocol, it becomes identifiable with the student and part of the student's education record. As an education record, test protocols are subject to the right of access under both federal and state law and a district must permit parents, or a parent's representative (e.g., advocate, attorney, etc.), to inspect and review any education records relating to their children that are collected, maintained, or used by the agency. 34 C.F.R. § 300.562. However, unlike the California statute, where the district had five days to comply with a request for access, districts in Michigan must comply with requests for access "without unnecessary delay" and before any meeting regarding an IEP or any due process hearing, but no more than 45 days after the request has been made.

The parent's right to access education records includes the right to request that the district provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records. 34 C.F.R. § 300.562(b)(2). Since providing copies of student's test protocols has been found not to be a copyright violation, districts will need to either comply with parent requests for access to test protocols, or should find a way to record student responses, such as a separate answer sheet, that will not make the test protocol an education record.

**DISTRICT NOT REQUIRED TO PROVIDE SERVICES WHEN THE PARENT IS  
UNABLE TO ESTABLISH RESIDENCY**

A California district was not required to reimburse a parent for private education services she obtained for her son after the hearing officer determined that the student did not reside within the district boundaries. Victor Elementary School, 43 IDELR 179 (SEA, CA 2004). The hearing officer found that the mother was not credible in proving her son's residency within the district boundaries such that the district was required to provide services for the student.

Following a dispute with the student's district of residence over her son's IEP, the parent informed the district, by letter, that she would be removing her son from their program. Shortly thereafter, she went to the Victor Elementary School District (VESD) and requested a transfer into the district. Due to space limitations, the mother was informed that no transfers of non-resident students were being accepted. Three days later, the mother returned to the school to enroll the student, but this time attempted to enroll him as a resident student. She was given a list of what types of documents the district would consider for proof of residency. On review of the documents submitted by the mother, a district official noted several items that caused her to doubt whether the mother actually lived in the district. The district requested further information to demonstrate residency and sent a probation officer to verify whether the mother lived at the address provided. The probation officer was unable to verify residency and the documentation provided by the parent contained numerous inconsistencies so the district refused to accept the student as a resident of the district.

The parent filed a complaint with the State Department of Education and the complaint investigator found "convincing evidence" that the student was not a resident of the district and therefore, the district was not obligated to implement a placement for the student. The hearing officer agreed, basing his decision on information presented by the parent and the

discrepancies contained in that information such as: (1) inconsistent dates on rental agreements, (2) separate residential and mailing addresses, (3) no written evidence that the district had ever received copies of rental agreements or utility documents, (4) inconsistent account numbers on utility documents, and (5) inconsistent and simultaneous representations of residency in correspondence to two different schools regarding the education program for the parent's daughter and for her son.

**Action:**

In most cases, residency for a student with a disability is determined by the location of the parent's residence. Rule 340.1732 provides that, "A student with a disability is a resident of 1 school district in which the student has enrolled, and in which at least 1 of the student's parents resides." In the case of a student whose parents are divorced or legally separated and reside in different districts, then the student may enroll in 1 of the school districts where the parent resides, regardless of who has custody. The school district in which the student has enrolled remains the student's resident district when either (a) the student sleeps, keeps personal effects, and regularly lodges in a school district other than the school district in which a parent resides, for an educational purpose, not for the purpose of securing a suitable home, or (b) the student is lodged in a school district other than where the parent resides as directed by an agency or institution under the auspices of the court.

As this case reveals, districts must carefully review the residency status of students moving into the district. Here, the district was not required to reimburse the parent for privately obtained services because they had done a thorough job of investigating and establishing that the student was not a resident of the district. Lease or purchase agreements, rent receipts, or utility bills are all acceptable for proof of residency. If there is any doubt, the district should make every effort to verify the information provided by the parents.

**COURT RULES THAT THERE IS NO ORIGINAL JURISDICTION IN FEDERAL COURT TO HEAR SCHOOL DISTRICT’S APPEAL FROM ADVERSE SECTION 504 ADMINISTRATIVE HEARING DECISION**

In *Board of Education of Howard County v. Smith*, 43 IDELR 84 (U.S. Dist. Md. 2005), the United States District Court for the District of Maryland ruled that it did not have original jurisdiction to hear the school district’s appeal from a decision by a state administrative law judge in a 504 hearing. The defendants in this case, the Smiths, were the parents and student who had requested a due process hearing under IDEA and Section 504 of the Rehabilitation Act, asserting that the student was denied FAPE. At the school district’s request, the hearing had been bifurcated into two separate hearings—a Section 504 hearing and an IDEA hearing—and two administrative records had resulted. The ALJ had ruled in favor of the Smiths in the Section 504 hearing. The school district then filed the present action in federal district court, essentially seeking to appeal the ALJ’s adverse ruling against it in the Rehabilitation Act hearing.

The United States District Court for the District of Maryland granted the Smiths’ motion to dismiss, holding that there was no original jurisdiction for a federal court to review the decision in a Section 504 administrative hearing against a school district. The court contrasted IDEA with the Rehabilitation Act, noting that while IDEA specifically provides for an aggrieved party to file an action for review of a due process hearing in a district court of the United States, Section 504 does not have a similar provision. The court acknowledged that there is an extensive list of cases in which federal courts have reviewed state-level administrative decisions involving IDEA and Section 504 issues. However, the court

distinguished these cases by noting that in all of them, unlike in the case before it, there was one administrative hearing and not two separate administrative records. The court held that while an individual can assert the original jurisdiction of a federal court on a claim under the Rehabilitation Act (i.e., an original claim, not an appeal), the institution alleged to have violated the provisions of Section 504 cannot seek to assert an appeal from a decision by a state administrative law judge directly to federal court by asserting original jurisdiction.

**Action:**

This case is significant to the extent it suggests that a school district in a Section 504 administrative hearing does not have the right to appeal an adverse administrative decision to federal district court. When districts are presented with requests for administrative hearings that involve both IDEA and Section 504 issues, consideration might be given as to whether it might be desirable to move to bifurcate the hearing into one hearing for the IDEA issue (both parties could later file an action in federal court to review the decision) and one hearing for the Section 504 issue (where the school district likely could not file an action in federal court to review the decision). If the issues are not bifurcated, this case suggests that both issues heard in the administrative hearing could later be reviewed through the filing of an action in federal court. The decision whether to bifurcate an administrative hearing would depend, in part, on the district’s comfort with the merits of its Section 504 case.

*“Nothing you do for children is ever wasted.  
They seem not to notice us, hovering, averting out  
eyes, and they seldom offer thanks, but what we  
do for them is never wasted.”*  
~Garrison Keillor~

## LEGISLATIVE CORNER

### FEDERAL

The United States Department of Education has announced Guidelines on how states and local school districts can exempt some special education students from grade-level standardized tests. These students can comprise up to 2 percent of all students tested, and would be assessed on modified, below grade level standards, if that is the best measure of what they have learned. According to the Department of Education Guidelines, the following is a list of criteria that states need to meet in order to be eligible for this flexibility:

- At least 95 percent of students with disabilities must participate in statewide tests for the purposes of calculating annual yearly progress (AYP);
- Appropriate accommodations must be available for students with disabilities;
- Alternate assessments and reading/language arts and mathematics must be provided to students with disabilities who need them; and
- A state subgroup size for students with disabilities must be equal to that of other student subgroups. This last option only applies to schools or districts that did not make AYP based solely on their scores of their students with disabilities. Eligible states that assess students based on modified achievement standards will be able to use those assessments for AYP calculations this year.

The Department of Education has also extended the deadline for paraprofessionals to establish “highly qualified” status under the No Child Left Behind Act (NCLB). Teachers are required to demonstrate competency by the end of the 2005-2006 school year, but previously paraprofessionals were required to show competency not later than four years after the law’s enactment or January 8, 2006. The

Department of Education has extended this to the end of the 2005-06 school year, making the deadline consistent with the deadline for teachers.

Please visit the Department of Education’s website at [www.ed.gov](http://www.ed.gov) for more information.

### STATE

The Michigan House recently passed a number of bills affecting criminal history checks for school employees and the disclosure of criminal charges for listed offenses. (See House Bills 4402, 4928, 4930, 4931, 4932, and 4933.) These six bills were passed by the House on June 29, 2005. The State Senate passed substantially similar bills on June 30, 2005 (see Senate Bill 601, 609, 610, 611, and 612).

The bills are in response to a recent state audit that discovered 222 individuals with criminal records working in the schools, while only 44 of those individuals’ files contained information regarding their criminal background checks or a description of their criminal charges and convictions. The remaining 178 individuals’ files were incomplete. Five of those individuals were sex offenders.

The bills would amend the Revised School Code, the Teacher Tenure Act, the Code of Criminal Procedure, and the Sex Offenders Registration Act to require background checks for any applicants for school employment and individuals assigned to work under contract in a school and would prohibit schools from employing people who have been convicted of listed offenses under the Sex Offenders Registration Act. Teacher’s tenure rights would be subject to the requirements of teacher certification or state board approval regarding license suspension for certain convictions and notifications of those convictions.

One significant difference between the bills passed by the Senate and the House is that the Senate would require criminal history background checks on each person who is employed by the board or who is assigned to regularly and continuously work in any of its schools, including current employees who have not previously had a criminal background check.

Copies of the bills and detailed explanations can be obtained from the Michigan Legislature website at [www.legislature.mi.gov](http://www.legislature.mi.gov).