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SCHOOL LAW UPDATE

Summer 2006

RETIREMENT INCENTIVE BUYOUTS SUBJECT TO FICA

The U.S. Court of Appeals for the Sixth Circuit ruled, on June 7, 2006, that payments received under various retirement incentive or severance programs, involving Michigan public school districts and their tenured teachers, constituted "wages" taxable under the Federal Insurance Contribution Act ("FICA").

Appoloni, et al. v. United States was filed in the U.S. District Court for the Western District of Michigan, while Klender, et al. v. United States was filed in the U.S. District Court for the Eastern District of Michigan. In each case, the issue was whether or not payments made by Michigan public school districts to public school teachers, as part of a retirement incentive program or severance plan and in exchange for the teachers' relinquishment of their statutorily granted tenure rights, were considered "wages" taxable under FICA. While the Western District concluded that such payments were taxable, the Eastern District concluded that they were not. Both decisions were appealed to the Sixth Circuit Court of Appeals where they were consolidated and decided together.

Appoloni involved an "employee severance plan" offered by the Dowagiac Union Public School District to its most senior teachers. As a condition of participating in this voluntary program and receiving the program's substantial severance payments, eligible retiring or resigning teachers were required to waive and release their tenure rights with the district. The district withheld FICA taxes from the installment payments made under its "employee severance plan." The teachers sought FICA refunds from the IRS

and, upon denial, sued to recover the FICA taxes.

Klender involved similar retirement incentives offered by the Pinconning Area School District and the West Branch-Rose City Area School District. These programs also provided lucrative payments to more senior tenured teachers in exchange for the teachers' resignations and their relinquishment of all claims and tenure rights pertaining to the district. The school districts treated these buyout payments as being subject to FICA taxes, which were withheld. Upon being denied IRS refunds, these teachers also filed suit.

The Court of Appeals considered the definition of "wages" for FICA purposes. According to pertinent provisions of the Internal Revenue Code ("IRC"), the term means: ". . . all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." The IRC further provides that ". . . remuneration for employment" generally "constitutes wages even though at the time paid the relationship of employer and employee no longer exists. . . ."

The plaintiffs relied in part upon an Eighth Circuit case (North Dakota State Univ. v. United States), decided in 2001, which held that similar severance payments made to certain university professors were not "wages" for FICA purposes.

The Sixth Circuit, however, distinguished the North Dakota case and chose instead to construe the statutory definition of "wages" very broadly for purposes of determining whether the

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voluntary severance incentive payments made in Appoloni and Klender were subject to FICA taxes.

In summary terms, the Sixth Circuit rejected the plaintiffs' claims that the payments made under these voluntary severance benefit or retirement incentive plans were made for the purpose of securing the teachers' relinquishment of their tenure rights. The court held instead that such payments were a form of employment remuneration and therefore "wages" subject to FICA taxes.

It remains to be seen whether this issue will ultimately be addressed by the U.S. Supreme Court. In the meantime, teacher buyouts by Michigan public school districts, like those in Appoloni and Klender, are subject to FICA taxes.

KEEP MINUTES OF CLOSED SESSIONS

Common sense says an attorney who represents himself has a fool for a client, but the Michigan Court of Appeals says he is entitled to an award of attorney fees if he succeeds in an Open Meetings Act lawsuit. Omdahl v. West Iron County Board of Education, et al. (2006 Mich App 2152, July 13, 2006).

A local attorney represented himself against the West Iron County Board of Education in a lawsuit claiming the board violated the Open Meetings Act ("OMA") when it failed to record the minutes of two closed meetings. After the trial court found in his favor, he requested an award of attorney fees and court costs. The trial court denied the request, and he appealed to the Michigan Court of Appeals.

In contexts other than the OMA, Michigan appellate courts have reached mixed results on whether an attorney representing himself may recover attorney fees. The issue of whether an attorney who represents himself is entitled to reasonable attorney fees under the OMA was a case of first impression. The OMA provides

in relevant part as follows:

If a public body is not complying with this Act, and a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further non-compliance with the Act and succeeds in obtaining relief in the action, the person shall recover court costs and **actual attorney fees** for the action. (Emphasis added.)

The majority of the court refused to read the term "actual attorney fees" narrowly. The majority stressed that an attorney's time is his stock and trade, and acknowledged that he engaged in opportunity costs by giving up other billable activity to pursue the OMA litigation. The majority held that the attorney was entitled to fees notwithstanding the fact that he represented himself in the litigation.

The dissenting opinion stressed the phrase "actual attorney fees for the action." The dissent reasoned that since there were no attorney fees paid, that no such fees had existed in fact or real-

ity, and thus no actual attorney fees should be awarded.

Action:

First, it is important to prepare and keep minutes of a closed session. If an individual (such as a bored attorney) challenges the propriety of the closed session in court, these minutes will be reviewed by the court. Without minutes, you will most likely lose. Minutes of a closed session may be brief, merely indicating the time the board entered into closed session, the purpose for the closed session (e.g. discussed student disciplinary issue at the request of student's parent), and the time the board reentered open session. Minutes do not need to be a transcript of, or contain significant detail regarding, the discussion held during the closed session.

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Second, review future publications of this newsletter to see if this case is overturned by the Michigan Supreme Court.

FEDERAL JUDGE FINDS HALF-TIME GENERAL EDUCATION PLACEMENT TO BE LRE

A federal district judge for the Eastern District of Michigan recently ruled that the least restrictive environment for a student with Down's syndrome was half-time general education and half-time special education. In doing so, the court rejected the parents' argument that the student required "full inclusion" and denied reimbursement of private school tuition. Leon "Danny" Dick-Friedman v. Board of Ed. of West Bloomfield Public Schools, 427 F. Supp.2d 768,

45 IDELR 181 (ED MI 2006).

Danny, diagnosed with Down's syndrome, is eligible for special education services as a student with a cognitive impairment. He was "fully included" in general education classes throughout his elementary years, with supplemental supports in the general education setting, a modified curriculum, a full-time paraprofessional and teacher consultant services to the general education teacher. Throughout elementary school Danny made continuous pro-

gress toward his goals and objectives and did not present behavior problems.

When Danny entered middle school, the IEP team proposed an IEP which included time in a categorical special education classroom. Over the years, the amount of time in special education amounted to approximately half of Danny's school day. During this time, Danny's mother, Ms. Fried-

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man, felt that Danny had regressed socially, academically and in his speech and language skills. She believed the regression was due to Danny's modeling of other special education students in the segregated classroom, and believed that he would benefit from more time with non-disabled peers. Ulti-

mately, in June 2003, as Danny was to move to the high school setting, the IEP team proposed a placement for 17-1/2 hours in special education and 15 hours in general education. Ms. Friedman, however, requested that Danny be "fully included." Ms. Friedman refused to sign the IEP, enrolled Danny in a private school, and requested a due process hearing seeking reimbursement for the private school costs. The issues at the hearing focused on whether the IEP provided a placement in the least restrictive environment, whether the school district considered a continuum of placements, whether the benefits that the student received from participation in general education outweighed the benefits received in special education, and whether Ms. Friedman was entitled to reimbursement of the costs for the private school placement.

The local hearing officer found in favor of the school district, which was affirmed by the state review officer. Specifically, the state review officer found that Danny would not benefit academically from taking core courses utilizing the general curriculum, and that being instructed in core academics in the special education classroom was the only way Danny could realistically achieve his goals and objectives. Further, the state review officer found that any social benefits gained by attending core classes in general education were

far outweighed by Danny's inability to achieve his goals, and that Danny would have other opportunities to socialize with non-disabled students in the general education setting during non-core academic classes. Thus, the state review officer upheld the local hearing officer's decision in favor of

"Following the submission of additional evidence, the court determined that the IEP was appropriate..."

the school district, and denied reimbursement. The parents appealed to federal court.

The parents requested that the federal court hear additional evidence to "supplement" the administrative record, which was granted. Following the submission of additional evidence, the court determined that the IEP was appropriate, and that the least restrictive environment for the student was the split program proposed by the school district.

The court began its analysis with the familiar two-part test of FAPE set forth in Hendrick Hudson School District v. Rowley. First, the court must determine whether the state has complied with the procedural requirements of the IDEA. Secondly, the court must decide whether the IEP is "reasonably calculated to enable the child to achieve educational benefits." The court also noted that, in Michigan, the IEP must be designed to develop the "maximum potential" of the child in order to meet the FAPE requirement. The court stated that if the district has complied with the procedures set forth in the IDEA, its placement decision is afforded more deference.

The parents claimed that the district violated the procedural aspects of the IDEA by failing to consider a continuum of placements and by failing to give consideration to parental concerns

for enhancing the education of the student. In examining the IEP document, the court found that the document itself showed that the parents' concerns were expressed and considered, and that the parents' desires that the student be "fully included" were noted. Going beyond the form, the court relied upon testimony from the due process hearing that established the IEP was developed over an extensive meeting during which a continuum of educational placements were discussed, including general education, resource support and categorical classroom support. Further, the testimony supported that the IEP team considered the parental concerns for enhancing the student's education and the potential harmful effects of the student's placement. Thus, in these aspects, the court found that the district did not violate the procedural mandates of the IDEA.

The parents also claimed that the IEP team failed to have appropriate background, experience and training in order to formulate a program to meet Danny's needs. Examining the composition of the IEP team, the court found that the IEP team members included persons knowledgeable about the child, the meaning of evaluation data and placement options, as required by regulations, and that, taken as a whole, the IEP team had appropriate background experience and training to formulate a program to meet the student's needs.

The court also found, however, that the IEP team failed to document reasons why less restrictive options, which may have been considered by the team, were rejected. While finding that this failure to document reasons for rejecting the parents' pro-

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continued: FEDERAL JUDGE FINDS HALF-TIME GENERAL EDUCATION PLACEMENT TO BE LRE

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posal was a procedural violation, the court found it to be merely technical in nature and not a basis for invalidating the IEP.

Turning next to the question of least restrictive environment, the court relied upon the "feasibility" test set forth in Roncker v. Walter. Under this test, the court reviews three factors: (1) whether the disabled student would benefit from inclusion in general education, (2) whether such benefits would

be outweighed by benefits that are not provided in an inclusive setting, and (3) whether the disabled child disrupts the general education setting. Examining the last consideration, neither party contended that the student would be disruptive in the general education setting. Thus, the court focused on the benefit which would be received by placement in the integrated setting.

The evidence established that the student could not participate in the regular education curriculum and would not take similar tests or achieve at a level comparable to other ninth grade students. Instead, Danny would work in isolation and would need to be provided a personal aide to present him with a separate curriculum at the first or second grade instructional level, with materials completely different from those other ninth graders would be working on. The parents argued that Danny had been "successfully educated in general education courses" while attending the private school. However, the testimony showed that the student did not attend a single core academic class while in the private school, and attended

"directed study halls" which the court described as nothing more than study halls focused on a particular subject during which students worked on individual assignments with no class-wide instruction or participation. Finding that this was far from being "fully included," the court determined that the benefits received by the student from the specialized classroom setting outweighed the benefits which would be received in general education. In affirming the decision of the local hearing officer and state review officer, the court stated: "Plaintiff's belief that full

inclusion in core academic classes would be best able to develop Danny's potential does not mean that it was the only FAPE that the school system could offer under the IDEA, or the least restrictive environment that was appropriate for Danny's needs." Since the district had offered the student FAPE, the court denied reimbursement of private school costs.

Action:

While reiterating that deference given to school district placement decisions where the procedures of the IDEA are followed, the court noted that the IEP failed to appropriately document various placement considerations and the reasons they were rejected. Documentation of these aspects is required by the IDEA's "prior written notice" provisions. A school district must provide "prior written notice" of any proposal or refusal to initiate or change the identification, evaluation, educational placement or provision of FAPE to a student. Increasingly, parents allege that districts fail to provide appropriate prior written notice. In Michigan, we have historically utilized the IEP document itself to

convey the information required in "prior written notice." As is apparent from this case, the IEP document does not always do a good job of providing this information. While the IEP certainly sets forth the proposals being made by the school district, it typically fails to adequately identify other options that were considered, and the reasons those were rejected.

Districts should become increasingly aware of the information which must be provided under "prior written notice." Identifying the various program and placement considerations, as well as the evaluations and other information relied upon in accepting or declining such options, should be included in the written IEP documentation if this document is to be used to provide the parent prior written notice. Further, in the event a due process hearing is requested, the same information that is required in prior written notice must be provided in the district's response to the due process complaint. Without detailed documentation regarding an IEP team's deliberations and reasons for decisions, it becomes increasingly difficult to do so, especially given the short time line within which a district must respond to the complaint.

While the court found that the failure to document the various placement options and the reasons why they were rejected was merely a "technical" violation in this case, which did not invalidate the IEP, other courts have found procedural violations sufficient to deny a student FAPE, as did the Sixth Circuit in Deal v. Hamilton County School Board. The best advice is to fully document (either in the IEP itself or in additional pages) the reasons and information relied upon by the district in refusing a parent's request and in making its placement decision.



PARENTS MAY NOT RECOVER EXPERT WITNESS FEES UNDER THE IDEA

In the second IDEA case considered by the United States Supreme Court within the last year, the Court ruled that a parent may not recover expert witness fees as part of the costs that may be awarded a prevailing party pursuant to the IDEA. Arlington Central School District Board of Education v. Murphy, 2006 U.S. LEXIS 5162, 45 IDELR 267 (2006). The parents of a student with dyslexia and other cognitive limitations sought a due process hearing challenging the IEP. The parents sought reimbursement for private school costs, claiming that the district had failed to provide FAPE. The parents prevailed at the local level hearing and state review. While the state review was pending, the parents sought an order from federal court directing the district to fund the private school placement. The federal court ultimately ordered the district to pay the private school tuition. The parents sought reimbursement of costs as a prevailing party, which included the fees of an educational consultant (\$29,350) and various mileage expenses (nearly \$8,000). The district court denied fees for mileage, and awarded a reduced amount of \$8,650

for expert consultant fees. The Second Circuit Court of Appeals affirmed, finding that the legislative history of the IDEA and *dicta* from various other cases supported a determination that expert fees were compensable as part of the costs under the IDEA.

The Supreme Court granted *certiorari* to resolve a split among the circuits as to whether expert witness fees are recoverable in an IDEA action.

Relying on the "plain language" of the IDEA, the majority of the Supreme Court found that the IDEA's attorney fee provision does not extend to expert fees. The Court reasoned that the language of the IDEA specified that a prevailing parent may receive, as part of the costs, reasonable attorney fees. However, nothing in the plain language of the IDEA would extend recovery of fees to expert witness fees. The Court found the IDEA's use of the word "costs," as opposed to "expenses," important. Justice Alito, writing for the majority, explained that "costs" are defined by various statutes, and do not include recovery of witness fees. Focusing on the fact that the IDEA is a spending clause statute, Jus-

tice Alito reasoned that while Congress may have broad authority to set the terms on which it disburses federal monies to states, such conditions to a state's acceptance of the federal funds must be set out "unambiguously." The IDEA does not "unambiguously" notify states that expert witness fees are recoverable.

The parents focused on legislative history and various comments made by members of Congress during the passage of the attorney fee provisions of the IDEA. While the dissent (as well as the Second Circuit) found these statements to be persuasive, Justice Alito noted that "In a spending clause case, the key is not what a majority of the members of both Houses intend but what the states are clearly told regarding the conditions that go along with the acceptance of those funds." Finding that nothing in the IDEA clearly or unambiguously informed states that they could be liable for expert fees, as well as attorney fees, the Court held that expert fees were not recoverable by parents under the IDEA.

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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MICHIGAN'S NEW DUE PROCESS PROCEDURES IN EFFECT

The Michigan Department of Education (MDE) and the State Office of Administrative Hearings and Rules (SOAHR) promulgated rules changing the special education due process procedures. In May 2005, rules were issued to eliminate the two-tier system of hearings and replace it with a single-tier system. These rules were to become effective July 1, 2006.

Concerns arose regarding the promulgation process of

the rules. In addition, Michigan Protection and Advocacy Service, Inc. filed two separate lawsuits challenging the new procedures. On June 30, 2006, SOAHR rescinded two of the administrative rules published in May 2005, specifically Rule 340.1881 and Rule 340.1882. These rules dealt with the state due process hearing procedures and its effective date. Also on June 30, 2006, MDE promulgated four new emergency rules relating to special education hearings. These emergency rules are in effect until December 31, 2006. MDE has also promulgated five rules for public comment until August 14, 2006, which are to take effect when the emergency rules expire.

The first emergency rule provides that the rules will become effective July 1, 2006, and will apply to all special education hearings and state-level reviews, including those required by judicial orders of remand.

The second emergency rule provides that the due process hearing procedures will be administered by the MDE. It also provides that a hearing may be initiated by filing a written due process hearing complaint with the MDE and by providing a copy of the complaint to the other party. The areas identified as being subject to a hearing include: identification, evalua-

tion, educational placement, the provision of a free appropriate public education, the provision of appropriate Part C services, the assignment of financial obligations for Part C services to parents, a determination that a student's behavior was not a manifestation of the student's disability, a determination of an appropriate interim alternative setting by

an IEP team, or the placement of a student in an interim alternative educational setting for not more than 45 school days. The rule provides that upon receipt of the due process complaint the MDE will forward the request to SOAHR who will appoint an administrative law judge to conduct the hearing. A party aggrieved by the decision of the hearing may not seek a state-level review, but rather may appeal to a court of competent jurisdiction within 60 days of mailing of the final decision. If the decision is not appealed, the decision must be implemented by the school district within 15 school days of the receipt of the decision.

The third emergency rule clarifies that a state-level review is still available for decisions issued in due process hearings which were filed prior to July 1, 2006. The state review will be administered by the MDE, who upon receipt of a request for state review will forward the request to SOAHR for the appointment of an administrative law judge to conduct the review. The review will be conducted (to the extent consistent with these rules) by Rule 340.1724(6) and Rules 340.1883 to 340.1885 (of the May 2005 rules).

The last emergency rule provides that MDE and SOAHR will assure that the administrative law judges assigned to conduct hearings are appro-

priately trained. Initial training was provided to ten administrative law judges and/or supervisors of SOAHR during the month of June. Assignment of cases to these administrative law judges is purportedly done on a "blind draw" method; however, assignment will take into consideration the geographic location and current caseload of the judge.

The emergency rules do not address the provision of costs of the administrative hearing. As you may recall, the rules promulgated in May 2005 provided that the district of residence would reimburse the special education hearings unit 75 percent of the costs related to providing the hearing. This rule, however, was rescinded. On June 16, 2006, Governor Granholm signed Senate Bill 1184, which provides statutory basis for the "bill back" of local districts for 75 percent of the hearing costs (Public Act 186 of 2006). Under the rules promulgated and open for public comment, Rule 340.1724(i) specifically provides that the district of residence or a public school academy shall reimburse the state 75 percent of the cost related to providing the due process hearing.

The rules open to public comment are scheduled to become effective on December 31, 2006. Public hearings have been scheduled for two locations on August 14, 2006. Public hearings will be held at Marquette-Alger RESA from 2 p.m. until 5 p.m. and at Clinton County RESA from 2 p.m. until 5 p.m. Public comment may be provided to the Office of Special Education and Early Intervention Services of the MDE. You may obtain a copy of the emergency rules and the notice of public hearings on the MDE website at www.michigan.gov/mde and clicking on "Special Education."



PARDON ME: NO LIABILITY FOR TERMINATING CONVICT

The Michigan Court of Appeals found in favor of a school district that terminated the employment of a probationary teacher for misrepresenting information pertaining to his criminal background check. Schied v. Lincoln Consolidated Schools, et al. (unpublished June 29, 2006).

In 1977, Schied pled guilty to and was convicted of aggravated robbery in Texas. In 1979, a court order discharged his term of probation and also set aside his guilty plea and conviction. In 1983, the Governor of Texas granted him a pardon and restored his full rights of citizenship. Schied subsequently became a teacher, and eventually moved to Michigan in 2003. In September of 2003, when Schied applied for a teaching job, he signed the criminal history disclosure form and placed a checkmark next to the statement: "I have not been convicted of, or pled guilty or *nolo contendere* (no contest) to any crimes." The disclosure form also indicated that until a report was received from the Department of State Police, Schied would be regarded as a conditional employee, and furthermore, that if the report was not the same as his representations, his contract would be voidable at the option of the school

district.

The district hired Schied in September of 2003. The FBI criminal background report revealed that Schied had been convicted of aggravated robbery in Texas in 1977, contrary to his representation on the disclosure form.

"The school district ... did not breach the individual's contract by dismissing him for misrepresenting his criminal history."

The FBI background report contained no indication that the conviction had been set aside or that he received a pardon. The school district terminated his employment in November of 2003.

Schied sued the school district for breach of contract, and sued the superintendent for defamation because she suggested that he had misrepresented his criminal history.

The court examined Texas law pertaining to the setting aside of convictions and pardons by the Governor. The court found that under Texas law, a record of the order of conviction still exists together with the subsequent order setting aside the conviction. An opinion of the Texas Attorney General previously indicated that an order setting aside a conviction restored civil rights that had been suspended, like the right to vote or to serve on a jury, but does not entirely erase the exist-

tence of the prior conviction such that it would permit an individual to deny the prior conviction on an employment application.

The court found in favor of the school district, indicating that it did not breach the individual's contract by dismissing him for misrepresenting his criminal history. Likewise, because the court found that as a matter of law Schied had mischaracterized his criminal history, the superintendent did not defame him.

Action:

This case will have an impact on school districts' actions when receiving criminal history reports. If a criminal history report discloses that an applicant or employee has been convicted of a listed offense or felony, the school district must take action regardless if the conviction was set aside or if the person was pardoned. If the conviction was a listed offense, the person cannot be employed or allowed to work under contract in any school. If the conviction was a felony other than a listed offense, the person cannot be employed or allowed to work under contract in any school unless both the superintendent and school board each specifically approve the employment or work assignment in writing.

IDEA PART B REGULATIONS

The OMD is expected to send the Part B regulations to the Department of Education in August, with an anticipated release date in mid to late August.

Scholten Fant will be providing an in-service to our clients in early fall.

More information regarding the date and location will be provided soon.



FOIA FOLLIES

Nearly every issue of our *School Law Update* has contained an article pertaining to the Freedom of Information Act ("FOIA"). It's not our fault there is so much litigation over this law. Because school districts frequently receive FOIA requests, you need to be current on the law in order to avoid unintentional violations of FOIA that could result in having to pay the opposing side's attorney fees. This issue will address three recent cases.

Frank Communication Exception

In the first case, the Michigan Supreme Court affirmed the Court of Appeals' decision that EMU did *not* violate FOIA by exempting a letter from the vice president of finance to a university board member as a "frank communication." Harold Company d/b/a Booth Newspapers, Inc. v. Eastern Michigan University Board of Regents (July 19, 2006). [See our Spring 2005 Edition of *School Law Update*, page 10, for a discussion of the lower courts' rulings.] The Supreme Court clarified the appropriate standard of review of a trial court's determinations in FOIA cases. When a challenge concerns factual findings of the trial court, the appeal courts must use the clear error standard: an appellate court must defer to a trial court's view of the facts unless the appellate court is left with a definite and firm conviction that a mistake has been made. When the parties do not dispute the underlying facts but rather challenge the trial court's exercise of discretion, the appellate courts must use the abuse of discretion standard: an appellate court will find that the trial court has abused its discretion when the trial court decision results in "an outcome falling outside the principal range of outcomes."

A document may be considered a "frank communication" if it: (1) is a communication or note of an advisory

nature made within a public body or between public bodies, (2) covers other than purely factual materials, *and* (3) is preliminary to a final agency determination of a policy or action. If any one of these three threshold questions is not met, the frank communication exemption will not apply. If all three are met, the court must then consider how the unique circumstances in the particular instance affect the public interest in disclosure of the document versus the public interest in encouraging frank communication.

The trial court looked at the particular circumstances in this case and decided that the public interest in encouraging frank communication outweighed the public interest in disclosure of the documents, in part because EMU released a "voluminous and exhaustive report" concerning its investigation to the paper. The Supreme Court held that since the circuit court reached a decision that was within the principal range of outcomes when it determined the balance of competing interests favored non-disclosure of the letter in question, the trial court did not abuse its discretion. The Supreme Court remanded the case back to the trial court to require EMU to separate the exempt material contained within the letter from the non-exempt material, and make the non-exempt material available to the newspaper.

FOIA Fees - Public Employees

In the second case, the Michigan Supreme Court held that a public body may not charge fees under Section 4 of FOIA for the labor costs of an attorney who reviews documents and separates exempt material when the attorney is an independent contrac-

tor rather than an employee of the public body. Coblentz v. City of Novi (July 19, 2006). When calculating the cost of labor incurred in the examination, review, separation, and deletion of exempt from non-exempt material, a public body "may not charge more than the hourly wage of the lowest paid *public body employee* capable

"... consider how the unique circumstances in the particular instance affect the public interest in disclosure versus the public interest in encouraging frank communication."

of retrieving the information necessary to comply with the request under this Act."

The city was in a lawsuit that resulted in a judgment totaling tens of millions of dollars, including costs, interest and attorney fees. The city entered into a settlement agreement that

waived its appellate rights and provided real property rather than the money judgment. People who lived nearby the property to be transferred to the developer submitted a FOIA request for the settlement agreement and all exhibits, as well as site plans and other materials. The fees the city charged for responding to the request included attorney fees for time spent by the city's attorney in reviewing the request and separating exempt from non-exempt materials. The city denied various aspects of the FOIA request, in part on the grounds that the documents did not exist, and in part pursuant to Section 13(1)(f) of FOIA, which allows trade secrets or commercial or financial information voluntarily provided to the public body for use in developing policy to be exempt if certain requirements are met.

In order to meet this exemption under 13(1)(f), the confidential information must be submitted upon a promise of confidentiality by the public body, the promise of confidential-

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continued: FOIA FOLLIES*Parties Involved In Litigation**(Continued from page 8)*

ity must be authorized by the chief administrative officer of the public body or by an elected official at the time that promise is made, and a description of the information must be recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body and made available to a person upon request. The city had delayed recording a general summary of the confidential information submitted because the parties were still in the process of negotiating various aspects of the agreement. The Supreme Court found that this exemption was not applicable because the city failed to record a description of the information within a reasonable time after it was submitted.

The Supreme Court also held that the lower court erred in allowing the city to charge for the work of the city's attorney in reviewing public records and separating exempt material from non-exempt material. FOIA allows a public body to charge labor costs of the lowest paid public employee capable of doing the work; it does not allow a public body to charge for an independent contractor. To properly determine whether charges are appropriate, a court must resolve whether the person who examined the records is an employee or independent contractor. The attorney was employed by a law firm that the city retained, not the city; he did not receive a paycheck from the city; the city paid his law firm, not the attorney directly. Because the attorney was not a city employee, it was inappropriate for the city to charge the attorney fees to the requestor.

"...the lower court erred in allowing the city to charge for the work of the city's attorney in reviewing public records and separating exempt material from non-exempt material."

In the third case, the Michigan Court of Appeals held that in order for a public body to exempt material under Section 13(1)(v) of the Freedom of Information Act, the public body must prove that it is a party to a civil action with the requesting party. Taylor v. Lansing Board of Water and Light (unpublished June 27, 2006).

The Lansing Board of Water and Light was being sued by Virginia Cluley. One of Ms. Cluley's close friends, Joni Taylor, submitted a FOIA request seeking disclosure of, among other things, Ms. Cluley's and others' personnel files, e-mails, correspondence, and approval of expense reimbursement reports. The attorney who prepared the FOIA request on Ms. Taylor's behalf was none other than Ms. Cluley's trial attorney in the litigation. Ms. Cluley was present during at least one discussion concerning the FOIA request, and Ms. Taylor testified that she lacked any knowledge or memory as to why she requested specific documents. The public body denied the FOIA request stating: "It is apparent that the intended use of the requested documents is for the civil lawsuit of Cluley v. Lansing Board of Water and Light and that you are acting as the plaintiffs' agent and on their behalf in requesting the documents. Therefore, the requested items are exempt from disclosure under FOIA."

Section 13(1)(v) of the FOIA allows the exemption of "records or information relating to a civil action in which the requesting party and the public body are parties." Exemptions under the FOIA must be narrowly

construed. The party seeking to invoke the exemption must prove that non-disclosure is in accord with the intent of the legislature. The court noted that the public body exerting this exemption must prove that it is a party to a civil action with the requesting party. Because the language of Section 13(1)(v) is plain and unambiguous, the court noted that it may not depart from a literal construction even to avoid an absurd or unjust result, otherwise the court would be engaging in impermissible judicial lawmaking. The court noted that while the result in this case is distasteful, the court would not be allowed to avoid applying the unambiguous language of FOIA.

Action:

Before utilizing the frank communication exemption under FOIA, consult with your local attorney to determine whether the document qualifies as a "frank communication" and if so, whether in the particular instance it is likely that the public interest in encouraging frank communication outweighs the public interest in disclosure of the document. Do not charge as part of the FOIA fees the attorney fees unless the attorney is directly employed by the district; rather, charge the labor costs for the lowest paid public employee capable of doing the review and making the decision, most likely whoever is consulting with the attorney to make the determination. Finally, whenever a district receives a FOIA request for records or information pertaining to matters that are related to a civil lawsuit, exercise the exemption under Section 13(1)(v) only if the person making the request is a named party in the lawsuit; if the person making the request is a friend or relative, comply with the FOIA request.



WHEN MY SPACE AFFECTS YOUR SPACE

Kids used to write in a journal to vent angry emotions about classmates or teachers, to express inner feelings of devotion for the latest crush, or to reflect on personal experiences with alcohol, drugs and sex. If students desired to express such thoughts to others, they would pass a handwritten note in class, gossip in person or over the phone, scrawl graffiti on bathroom walls, or the more industrious might publish an underground newspaper to distribute among likeminded friends. Today kids use a computer or cell phone to e-mail, text message, blog or post web-pages. Social networking sites such as MySpace.com, Facebook.com, and myriad others have transformed the way kids express what was once considered fairly private thoughts.

We've all heard horror stories about the dangers involved in misusing such technology. Stories about young kids who fly to the Middle East to hook-up with adults they met on-line, who share pictures of themselves and friends engaged in various illicit activities (underage drinking, underage sex), and who make lists of people they want to be wiped off the face of the earth.

When does a school district have any responsibility or authority to discipline students for such expressive activities? In a nutshell, when a student's use of MySpace adversely affects the educational activities at school (your space), discipline may be appropriate, but you must carefully consider the students' rights under the First Amendment.

Overview of Three Landmark First Amendment Cases

Three landmark decisions of the United States Supreme Court form the

basic guidelines for school officials to follow in addressing whether to discipline a student for expressive activities.

First, students do not shed their constitutional rights to freedom of expression at the schoolhouse gate. Tinker v. Des Moines Indep Comm. Sch. Dist., 393 U.S. 503 (1969). In Tinker, students engaged in symbolic speech by wearing black arm bands in

“Social networking sites such as MySpace.com, Facebook.com, and myriad others have transformed the way kids express what was once considered fairly private thoughts.”

protest of the Viet Nam war. The Supreme Court held that a school district may not prohibit student speech merely because of the discomfort or unpleasantness of unpopular views. Instead, in order to prohibit student speech, school authorities must be able to reasonably forecast that the speech would cause substantial disruption of, or material interference with, the school's educational activities.

Second, schools may discipline students for engaging in indecent, obscene or vulgar language while at school. Bethel School District #403 v. Fraser, 478 U.S. 675 (1986). In Fraser, a student gave a speech at a school assembly that was filled with sexual innuendo and double entendre. The Supreme Court held that the “school need not tolerate student speech that is inconsistent with ‘its basic educational mission’ . . . even though the government could not censor similar speech outside the school.” The Supreme Court stated, “The undoubted freedom to advocate unpopular and controversial views in schools must be balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior. [T]o permit a vulgar and lewd

speech . . . would undermine the school's basic educational mission.”

Finally, school officials may exercise editorial control over student speech in school sponsored publications if such control is reasonably related to legitimate pedagogical concerns. Hazelwood School District v. Kuhlmeier, 484 U.S. 266 (1988). In Hazelwood, the school principal censored a school newspaper article on teen pregnancy and effects of divorce. The Supreme Court upheld the prerogative of educators to exercise editorial, content-based control, over a student newspaper which was produced as part of a school's journalism curriculum. Noting that a school district may limit student speech which is not consistent with “its basic educational mission,” it held that the school officials could regulate the content of the publication by any “reasonable” means. Because the decision to regulate the articles was based on curricular issues, the Supreme Court found that the school did not violate the student's First Amendment rights.

All of these landmark cases involved student speech that occurred on-campus. While neither the Supreme Court nor the Sixth Circuit has yet to issue a decision regarding student on-line speech, a number of lower courts have.

Lower Court Cases Involving Student Internet Speech

In O'Brien v Westlake City Schools, (E.D. Ohio, 1998), a high school junior lampooned his band teacher on a website he created on his home computer. He referred to the teacher as “an overweight middle-aged man who doesn't like to get haircuts” [OUCH!] and claimed that the teacher “Likes to involve himself in

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everything you do, demands that band be your number one priority, and favors people who kiss his ass.” School officials learned about the website and used school computers to access the material. The student was suspended for ten days. As a result of his suspension, he received an “F” in band and reduced grades in his other courses. He successfully sued the school board. His attorneys compared his website to students sitting in a coffee shop sharing comments about disliked teachers, as distinguished from a situation where a student shouts obscenities at a teacher face-to-face on school grounds in front of other students. The court ordered school officials to restore him as student in good standing. School officials ultimately settled the case, agreed to pay the student \$30,000, expunged the suspension from his record, and wrote a letter of apology.

In Beussink v. Woodland, (E.D. MO., 1998), a high school junior used his home computer to create a homepage highly critical of the school administration and which used vulgar language in commenting on the principal, teachers, and the school’s official website. He included a link to the school’s official website from his homepage. While he did not intend his homepage to be viewed or accessed at school, a classmate, after an argument with and as a means to retaliate against the student, showed the webpage to the computer teacher. Only one other student was present at that time, and that other student did not view the webpage. The computer teacher went directly to the principal, who then viewed the webpage. He decided immediately that the student must be dis-

ciplined. The principal originally suspended the student for five days, which he later extended to ten days. The court applied the *Tinker* standard and held in favor of the student. The court stressed that school officials disciplined the student because they were upset by the content, not because the homepage caused any substantial disruption at the school.

School officials settled the case by paying the student \$30,000, expunging the suspension from his record, and writing a letter of apology.

In Emmett v. Kent School District, (W.D. WA., 2000), a senior honor student (3.95 G.P.A.)

used his home computer to post a webpage that included commentary on school administration and faculty, as well as mock obituaries of two of his friends, and allowed visitors to vote on who should die next (receive a mock obituary). The webpage included a disclaimer that the site was not sponsored by the school (it was entitled “Unofficial Kentlake High Home Page”), and that it was for entertainment purposes only. The mock obituaries not only became a topic of discussion at school among students, faculty and administrators, but also the topic of a television news story which depicted the site as containing a “hit list” of people to be killed. The night the story aired, the student immediately removed the webpage. The next day, the principal placed him on an emergency expulsion, though that was later reduced to a five-day suspension. The court discussed the three landmark Supreme Court cases, noting that this was not part of an assembly (like *Fraser*) or a school sponsored publication (like *Hazelwood*). The court stated, “Although the intended audience was undoubtedly connected to Kentlake High School, the speech was entirely outside of the school’s supervision or control.” The court acknowl-

edged that school officials in the post-Columbine world are in “an acutely difficult position” when it comes to balancing the interests in student safety with student expression. But because the school officials did not present any evidence that either the mock obituaries or the voting for who should die next were intended to threaten anyone or manifested any violent tendencies whatsoever, the court found the student would likely succeed on the merits of the case. The school district ultimately settled the dispute by agreeing to pay one dollar and attorney fees, and removed the suspension from the student’s record.

In J.S. v. Bethlehem Area School District, (PA., 2002), an eighth grade student used his home computer to create a website that included many vulgar and derogatory comments about his algebra teacher (“Why Should She Die?”), the school principal (that he engaged in sexual relations with the principal at another school), and others. The web site contained a disclaimer indicating that by entering the site, the visitor was not a staff member of the school and would not disclose the site to school district employees or administration, or disclose the identity of or intend to cause trouble for the creator of the site. As for the reasons listed under “Why She Should Die?” the page offered “Some Words from the writer” and listed 136 times “F**k You Mrs. Fulmer. You Are A B**h. You Are A Stupid B**h.” A drawing of his teacher showed her head cut off with blood dripping from her neck. Visitors were asked to give him \$20.00 to help pay for a hit man. The student not only told other students about his site, he even showed it to a student while at school. The site was viewed

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by students, faculty and administrators. The principal contacted local police and the FBI, though law enforcement officials refused to press charges. The algebra teacher, after viewing the site, suffered stress, anxiety, loss of appetite, loss of weight, loss of sleep, and a general sense of loss of well being, which included an inability to go out of the house. The teacher took anti-anxiety/anti-depressant medication, and was unable to return to school to finish the school year. Three substitute teachers were used, which disrupted the educational process. According to the principal, the web site also had a demoralizing impact on the school community, causing the school to be at a low point that was worse than anything that he had encountered in forty years of education, comparable to the death of a student or staff member. During this time, the student continued to attend classes and participate in extra-curricular activities. The school district did not request that he remove the site, but he did soon his own approximately one week after the principal became aware of the site. During the summer, the school district decided to suspend the student for three days in July, which was extended to ten days in August, then in September the district ultimately voted to permanently expel the student. While the court found that the statements did not constitute a "true threat", which is unprotected by the First Amendment, the court nonetheless upheld the permanent expulsion, applying the *Tinker* standard. The court found that the student's website was specifically aimed at the school district and seemed designed to create upheaval. Further, the school district demonstrated that the website created an actual and substantial interference with the work of the school.

In Coy v. Board of Education of the North Canton City Schools, (N.D. OH., 2002), a middle school student created a website on his home computer that contained pictures and biographical information about the student and his friends, and a section entitled "losers" that contained pictures of three classmates. The "losers" section had a few insulting sentences written under the pictures, the most objectionable being a sentence describing one of the boys as being sexually aroused by his mother. The court noted that while the website contained "some profanity, and a depressingly high number of spelling and grammatical errors" and was "somewhat crude and juvenile," it did not contain any material "that could remotely be considered obscene." A group of students told a teacher about the website. After viewing the site, the teacher showed it to the principal, who took no immediate action. The following day, the student was observed by a teacher in computer class toggling between screens while supposedly doing school work. The teacher reported this to the principal, who asked the IT specialist to check the computer to determine what websites had been accessed. It was determined that the student accessed his own website from the school computer. The principal originally suspended the student for four days, and the school district subsequently expelled him for eighty days. The court found the facts in this case closer to *Tinker* than *Fraser*: the extent of the student expressive activity was "the private viewing of his own private website" that he created off-campus; there was no evidence he had displayed it to

"...while the website contained 'some profanity, and a depressingly high number of spelling and grammatical errors' and was 'somewhat crude and juvenile,' it did not contain any material 'that could remotely be considered obscene.'"

any other students at school; he did not express himself to a captive audience at school. Further, while the website was crude, it was not like the "elaborate, graphic, and explicit sexual metaphor" at issue in *Fraser*. Because his expressive activity was not in any way sanctioned by the school, nor did the school knowingly provide any material to support the expression, *Hazelwood* did not apply. The appropriate test was the *Tinker* analysis. The court noted that if the school disciplined the student because they did not like what was contained on the personal website, the student would prevail; however, if

the school disciplined him for accessing the inappropriate website while at school, the school must show that his expressive activity "materially and substantially interfered with the requirements of appropriate discipline in the operation of the school."

In Mahaffey v. Aldrich, (E.D. MI., 2002), a couple of high school students created a website entitled "Satan's Web Page" that contained various sections subtitled "people I wish would die," "people that are cool," "movies that rock," "music I hate," and "music that is cool." Near the bottom of the page, a statement suggested Satan had a mission for visitors to the site to accomplish that included stabbing "someone for no reason then set them on fire throw them off a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face." The site included the following disclaimer; "PS: Now that you've read

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continued: WHEN MY SPACE AFFECTS YOUR SPACE*(Continued from page 12)*

my web page please don't go killing people and stuff then blaming it on me. OK?" A parent notified the police about the site. The police notified the school administration. One of the students involved in the creation of the website admitted to police officers that he contributed to the website and that school computers "may have been used to create the website." That student was suspended pending an expulsion hearing. The student enrolled in a neighboring school district, and sued his former district. The court found no evidence that the student communicated the statements on his website to anyone. While other students viewed the site, there was no evidence they did so because the student communicated the website to them. The court also found that there were not threats made against any of the students named on the website. The court noted the disclaimer, and ruled that the "listing of names under the heading 'people I wish would die' did not constitute a threat to the people listed therein any more than Plaintiff's listing of names under the heading 'people that are cool' make those listed therein 'cool.'" The court held that the school's regulation of the student's protected speech without any proof of disruption to the school or on-campus activity in the creation of the website violated the student's First Amendment rights.

Summary and Guidance

There are two fundamental factors that a school should examine when

deciding whether to discipline a student for posting on a website: the connection between the student's expressive activity and the school environment, and the likelihood that the expressive activity could cause substantial disruption of, or material interference with, the school's educational activities.

In determining the connection between the student's expressive activity and the school environment, consider the following types of questions. Did the student create the website as part of a class project, or post it on the school's official website? If so, it may be considered school-sponsored speech, and the Hazelwood test would apply. Did the student use a school computer, network, or server to create, access, or update the website? Did the student distribute the material at school? Did the student electronically or otherwise send the expressive material directly to a school computer or directly to a teacher or school administrator? Did the student bring attention to the website while at school, such as by logging on and showing it off to classmates?

In determining the likelihood that the expressive activity could cause substantial disruption of, or material interference with, the school's educational activities, consider the following types of questions. Did the student bring attention to the website while at school, such as by logging on and showing it off to classmates? Did any students complain to school officials about harassment resulting from the information

posted? Has any instructional time been wasted by addressing student or staff concerns about the website? Has the website resulted in a loss of authority of the targeted staff member? Has the website resulted in a loss of control in the school? Has a targeted staff member been unable to do his job due to the emotional stress created by the website? Has a student been unable to attend school because of the emotional stress created by the website? Is the expressive activity lewd or vulgar? Could the expressive activity be considered a true threat?

Deleting Online Predators Act of 2006

On May 9, 2006, a bill was introduced in Congress that would amend the Communications Act of 1934 to prohibit anyone under 18 years of age from accessing social networking sites (such as MySpace, Facebook, etc) on a school or library computer. While it is being referred to as the Deleting Online Predators Act of 2006 (or "DOPA"), it is important to remember that it is "still just a bill" - and as you all may recall from the Schoolhouse Rock days, a bill is only a bill and does not have the force of law until passed by both the House and the Senate, and is signed by the President. There is much debate and opposition to this bill, but we'll keep you posted in the event it becomes law.

FREE SPEECH OF PUBLIC EMPLOYEES APPLIES ONLY WHEN SPEAKING AS A CITIZEN

The United States Supreme Court recently ruled that when public employees make statements pursuant to their official duties, they are not speaking "as citizens" for First Amendment purposes, and may lawfully be disci-

plined. *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006).

A deputy district attorney prepared a memo to his supervisors expressing concerns about an affidavit and search warrant, and recommended dismissing

a criminal proceeding. The deputy district attorney provided his supervisor with a subsequent memo, and also participated in a heated meeting regarding the case. The defense at-

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continued: FREE SPEECH OF PUBLIC EMPLOYEES PROTECTED ONLY WHEN SPEAKING AS A CITIZEN

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torney in the underlying case called the deputy district attorney as a witness on a motion regarding a challenge to the search warrant. The deputy district attorney claimed that in the aftermath of these events, he was subjected to a series of retaliatory employment actions, including reassignment, transfer, and denial of a promotion. He sued alleging violations of his civil rights under 42 USC §1983 and the First and Fourteenth Amendments.

The case presented the Supreme Court with an opportunity to revisit the test for public employees' speech protected by the First Amendment, as first set forth in Pickering v. Board of Education, 391 U.S. 563 (1968). Pickering involved a public school teacher who wrote a letter to a local newspaper addressing concerns about the funding policies of the school board. In that case, the Court sought to balance the interests of the teacher, as a citizen, to comment on matters of public concern, with the interests of the school district, as an employer, to promote the efficiency of the public services it performs. The Court held public employees do not surrender all of their First Amendment rights by reason of their public employment; the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. In Pickering, the Court found the teacher's speech did not impede on the teacher's proper performance of his daily duties in the classroom or interfere with the regular operation of the school. The test established in Pickering involves two questions. The first is whether the employee spoke as a citizen on a matter of public concern.

If the answer is no, the employee has no First Amendment cause of action. If the answer is yes, then there is limited First Amendment protection, giving rise to the second question: whether the government entity had an adequate justification for treating the public employee differently from any other member of the general public.

The Court acknowledged that conducting the inquiries under the Pickering test had sometimes proved difficult.

The Court held that the deputy district attorney's expressive activities (the memos) were not considered speech as a citizen because they were made pursuant to his official duties. The determining factor was not that he expressed his views inside his office, rather than in a letter submitted to a newspaper. The Court noted that employees in some cases may receive First Amendment protection for expressions made at the workplace. (For example, teachers sitting in the teachers' lounge discussing Middle East politics.) The Court also noted that while the memo concerned the subject matter of his employment, that was in itself not dispositive because the First Amendment can protect some expressions related to a speaker's job. (For example, a teacher speaking out about school district funding, as involved in Pickering.) The Court noted that the controlling factor in this case was that the expressions were made pursuant to his official duties: he wrote the memos because it was his job to do so. The Court held that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not protect

their communications from employer discipline. Restricting speech in this manner would not infringe upon the liberties an employee might have enjoyed as a private citizen, according to the Court, but rather simply reflects the exercise of employer control over what the employer has commissioned or created.

The Court rejected the notion that employers would be able to restrict their employee rights by creating excessively broad job descriptions. Formal job descriptions in reality have little resemblance to the duties an employee actually performs, and therefore would not be determinative whether any particular task is within the scope of an employee's professional duties for First Amendment purposes.

Finally, Justice Souter raised concerns in his dissent that the decision would have important ramifications for academic freedom as a constitutional value. The majority opinion acknowledged that there is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests, but since the case involved a district attorney and not a professor or teacher, the court did not specifically address that issue.

Action:

This case should not be viewed as a license to punish public school employees who are engaging in speech as part of their job. Furthermore, there may be situations where a teacher is engaged in speech as a part of their official duties that nonetheless has protection under the First Amendment and academic freedom as a constitutional value. Consult with your local attorney before disciplining a public employee based on their expressive activities.





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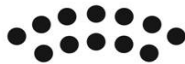
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