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SCHOOL LAW UPDATE

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TINKERING WITH TINKER? A STUDENT SPEECH UPDATE

By now, you have likely heard about the “Bong Hits 4 Jesus” case. In a nutshell, the U.S. Supreme Court held that a school may restrict student expression that the school reasonably regards as promoting illegal drug use. Because we love analyzing court decisions, we thought we’d give you a more thorough analysis of the case, along with a couple of First Amendment cases that were recently decided by the Sixth Circuit Court of Appeals.

Morse v Frederick, (US 2007)

In January of 2002, the Olympic Torch Relay was scheduled to pass along a street in front of an Alaskan high school while school was in session. The principal permitted students to participate in the Relay as an approved event. Students were dismissed from classes to watch the event from either side of the street, the band performed, and staff monitored the students. One student, Joseph Frederick, devised a plan to get on television. Along with a group of friends, he raised a large banner across the street from the high school as the torch and cameras passed. When the principal saw the message - “BONG HITS 4 JESUS” - she assumed it pertained to illegal drug use, crossed the street, and demanded that the students take it down. All but Frederick complied. When Frederick refused, the principal confiscated the banner and told him to report to her office. According to the record, Frederick was somewhat belligerent when he finally reported to the principal. The principal originally intended

to suspend Frederick for five days, but due to his defiant and disruptive behavior (he quoted Jefferson on freedom of speech, among other things), she raised it to ten days. Frederick appealed the suspension to the school superintendent, who upheld the suspension but limited it to time served (eight days), and stated that even if the banner was protected speech, the remainder of Frederick’s conduct was inexcusable. Frederick sued, seeking both monetary damages and removal of the suspension from his record.

While the justices of the Supreme Court unanimously agreed that the principal should not be liable for any monetary damages to the student, they were divided on whether the principal violated Frederick’s freedom of speech. The Court agreed with the superintendent that Frederick could not “stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.” The Court was split regarding how to properly interpret the message on the banner. Chief Justice Roberts, writing for a majority of the Court, found it was fair for the principal to interpret the banner as a pro-drug message and permissible to censor the speech. On behalf of the minority, Justice Stevens described the banner as “ambiguous,” “nonsense,” “ridiculous,” and “obscure” - an act merely aimed at getting the television audience’s attention, not advocating illegal drug use.

The Court held that the school did not violate the First Amendment. The majority reviewed the trilogy of student

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speech cases: *Tinker* (schools may suppress student expression when school officials reasonably conclude that the speech would cause a material and substantial disruption), *Fraser* (schools may suppress offensively lewd and indecent speech), and *Kuhlmeier* (schools may exercise editorial control over student speech in school-sponsored publications for legitimate pedagogical concerns). Chief Justice Roberts, writing for the majority, claimed that the Court was not modifying *Tinker*, or diverting from its prior precedents. The majority emphasized it would not extend *Fraser* to allow schools to punish any offensive speech. The majority did, how-

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ever, highlight two basic principles emanating from *Fraser* to support its decision. First, students' constitutional rights are not coextensive with the rights of adults in other settings. Second, *Tinker* is not the only mode of analysis for reviewing student speech cases. The majority then reviewed significant Fourth Amendment cases (*T.L.O.*, *Vernonia*, and *Earls*) to again emphasize that the nature of students' rights is different in public schools than elsewhere, and to recognize that deterring drug use by students is a compelling interest. Based on the "special characteristics of the school environment" and the compelling interest in stopping student drug abuse, the majority held that schools may "restrict student expression that they reasonably regard as promoting illegal drug use."

Justice Stevens, writing for the dissent, stated that the majority opinion "trivializes the two cardinal principles upon which *Tinker* rests." First, the majority would allow viewpoint discrimination (e.g., a school can prohibit pro-drug messages). Second, the majority would allow censorship of speech that is not inciting imminent lawless action (i.e., the school can prohibit the pro-drug message even where there is no substantial disruption to the educational environment). Justice Stevens noted that "carving out pro-drug speech for uniquely harsh treatment finds no support in our case law and is inimical to the values protected by the First Amendment."

The most extreme position was taken by Justice Thomas, who concurred in the result. Justice Thomas emphasized the *in loco parentis* doctrine and that historically there were few if any limits on the types of rules

due to threats of violence directed against African-American students. In May of 2005, the school announced that depictions of the Confederate Flag would be considered a violation of the dress code, even though it had not been banned in the past and even though there had been no disruptions resulting from depictions of the Confederate Flag. During the following school year, a couple of students wore shirts depicting the Confederate Flag to express "pride" in their southern heritage. The students sued when the school disciplined them for violating the dress code.

"School principals have a difficult job, and a vitally important one. When Frederick suddenly and unexpectedly unfurled his banner, Morse had to decide to act – or not act – on the spot. It was reasonable for her to conclude that the banner promoted illegal drug use – in violation of established school policy – and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers."
 ~ Chief Justice Roberts, majority opinion

that a school could set on students while in schools. Justice Thomas wrote: "In light of the history of American public education, it cannot seriously be suggested that the First Amendment 'freedom of speech' encompasses a student's right to speak in public schools." (Wow!) Justice Thomas indicated he would overturn *Tinker* altogether because that decision "is without basis in the Constitution."

D.B. v Lafon, (6th Cir. 2007)

A school dress code prohibited students from wearing various items, including clothing that "causes disruption to the educational process." There were racial tensions at the high school. In February of 2005, a physical altercation between a white student and an African-American student resulted in a civil rights complaint against the school. In April of 2005, the school was locked down

The Court analyzed the case under the *Tinker* standard. The Court noted the Confederate Flag's "inherent racial divisiveness," citing numerous cases. The Court found that the school did not have to wait until there was an actual disruption caused by a depiction of the Confederate Flag. Given the history of racial tensions at the school, school officials could reasonably determine that the depiction of the Confederate Flag posed a "substantial risk of provoking problems in the incendiary atmosphere" of the school. School officials could reasonably conclude that displays of the Confederate Flag would be likely to lead to disruptions and unrest in the future.

The Court rejected the challenge that the school's ban of the Confederate Flag was not viewpoint neutral. The Court acknowledged that even if past racial incidents justify a ban on the



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Confederate Flag, the school could not constitutionally impose a viewpoint specific ban on some racially divisive symbols, such as the Confederate Flag, and not others, such as Malcolm X symbols. The Court pointed out that during the 2005-2006 school year, there were 452 instances of dress code violations documented at the school, and only 23 involved the Confederate Flag. The Court found that the students provided no evidence of how frequently or conspicuously other political symbols were worn by students, or that school officials were aware of the presence of clothing depicting those other political symbols. The Court held that the lower court did not commit a clear error in finding that the school did not engage in viewpoint discrimination for banning depictions of the Confederate Flag as part of its dress code.

Lowery v Euverard, et al., (6th Cir. 2007)

A number of high school football players became disgruntled with their head coach and circulated a petition stating: "I hate coach Euvard [sic] and I don't want to play for him." When the coach learned of the petition, their wish came true. Three of the many players who signed the petition refused to apologize to the coach and were kicked off the team; they sued the coach, principal and school board.

The Court, referring to the movie *Hoosiers*, asked "what is the proper balance between a student athlete's First Amendment rights and a coach's need to maintain order and disci-

pline?" The Court stressed that a school's primary duty is to educate and train students, and that it cannot perform that duty without first establishing discipline and maintaining order. The Court noted that, unlike our system of government which derives its authority from the consent of the governed, the "authority of school officials does not depend on the consent of the students." The Court narrowed the issue down to whether the students had a right to remain on the

the coach's authority, lowering team morale, harming team unity, and dividing teammates into groups who support the coach and those who don't. The Court held that the petition was not protected by *Tinker*, and that the school did not violate the students' rights by removing them from the football team. According to the Court, the students "got what they desired: they are no longer playing for a coach they admittedly did not want to play for."

"Admittedly, some high school students (including those who use drugs) are dumb. Most students, however, do not shed their brains at the schoolhouse gate, and most students know dumb advocacy when they see it. ... That the Court believes such a silly message can be proscribed as advocacy underscores the novelty of its position, and suggests that the principle it articulates has no stopping point."
 ~ Justice Stevens, dissenting opinion

football team after they signed a petition that stated they hated their coach and didn't want to play for him.

The Court then analyzed the case under the *Tinker* standard, while giving special attention to the extracurricular athletic context of the speech involved. The Court cited a number of cases supporting the well-established rule that students do not have a general constitutional right to participate in extracurricular athletics. The Court stated that players do not have a "right to unilaterally undertake a referendum on the coach's authority. ... A high school athletic team could not function smoothly with an authority structure based on the will of the players." The Court found that it was reasonable to forecast that the petition would disrupt the team. The substantial negative effect of such a petition would include challenging

The Court stressed that the school could not, and did not, suspend the students academically for their opinions. The students' regular education was not affected, and the students remained free to campaign to have the coach fired. However, they did not have the right to play football while simultaneously working to undermine the coach's authority.

Action:

So where does *Morse v Frederick* leave students' free-speech rights? It appears that the student speech trilogy remains intact, with a new exception. If you are dealing with student speech that is *not* (1) in a school-sponsored publication, (2) indecent or lewd, and (3) reasonably regarded as promoting illegal drug use, you should analyze the situation according to the *Tinker* standard. If the speech is in a school-sponsored publication, analyze the matter according to the *Kuhlmeier* standard. If the speech is indecent, lewd, or promotes illegal drug use, then according to *Fraser* and *Morse*, discipline may be appropriate.



PARENTS CAN PURSUE FAPE CLAIMS WITHOUT AN ATTORNEY

In *Winkelman by Winkelman v Parma City Sch. Dist.*, ___ U.S. ___, 127 S. Ct. 1994 (U.S. 2007), the United States Supreme Court concluded that parents have substantive rights of their own under IDEA, and therefore parents of children with disabilities will be able to represent themselves (and their children's interest in a FAPE) in federal court proceedings to appeal an unfavorable administrative ruling relating to the educational program provided to their child. This decision rejects the notion that the right to a FAPE belongs to the child alone and is not a right shared jointly with parents. See, *Cavanaugh v Cardinal Local Sch. Dist.*, 44 IDELR 31 (6th Cir., 2005) [the right to a free appropriate public education belongs to the child alone and any right on which the parents could proceed on their own behalf would be derivative of the child's right such that parents bringing IDEA claims were not appearing on their own behalf].

The case began with an IEP that was proposed for (then) 6-year-old Jacob Winkelman, a student with Autism Spectrum Disorder. The parents participated in the development of Jacob's IEP, but when agreement could not be reached the parents requested a due process hearing. The parents, who were not attorneys, filed a complaint alleging that the district failed to provide Jacob with FAPE. After the local hearing officer rejected those claims, the parents appealed the decision to a state-level review officer. After losing that appeal, the parents filed, on their own behalf and on behalf of their son, a complaint in the U.S. District Court for the Northern District of Ohio. The complaint alleged that the IEP for Jacob was inadequate, that he had not been provided with FAPE and that the district failed to follow procedures man-

dated by IDEA. Although the Winkelmans had obtained counsel for assistance with some of the proceedings, they filed their federal complaint, and their later appeal, without the aid of an attorney. The parents sought reversal of the administrative decision, reimbursement for private school tuition and attorney fees. The District Court found in favor of the school district and the parents filed an appeal with the Sixth Circuit Court of Appeals. Relying on the decision in *Cavanaugh*, the Sixth Circuit entered

IDEA "convey[s] rights to parents as well as to children... . The IDEA does not differentiate ... between the rights accorded to children and the rights accorded to parents."

an order dismissing the Winkelman's appeal unless they obtained counsel to represent Jacob. While the parents did obtain counsel to continue the litigation, they appealed the Sixth Circuit ruling to the Supreme Court.

In resolving a split among the Circuit Courts of Appeals, the Supreme Court expressly rejected the idea that parents' rights under IDEA are limited to certain procedural and reimbursement-related issues. Rather, the Court concluded that IDEA "convey[s] rights to parents as well as to children." For example, Justice Kennedy, writing for the Court, pointed out that 20 USC 1414(d)(3)(A)(ii) requires a child's IEP team to consider any concerns the parents might have about the child's education, and that §1415(b)(6)(A) authorizes parents to seek a due process hearing on substantive issues such as child find, evaluation and educational placement. In addition, the Court noted, 20 USC 1415(m)(1)(B) provides for

the transfer of the parents' rights at the age of majority, thereby presuming that parents have rights of their own under the statute. "These provisions confirm that the IDEA, through its text and structure, creates in parents an independent stake not only in the procedures and costs implicated by this process, but also in the substantive decisions to be made," Justice Kennedy wrote. "We conclude that the IDEA does not differentiate, through isolated references to various procedures and remedies, between the rights accorded to children and the rights accorded to parents." Essentially the Court has ruled that parents have an independent, enforceable right to ensure that their child is receiving IDEA's statutorily guaranteed FAPE.

Action:

Concern has been expressed that this ruling will result in an increase in federal court lawsuits and frivolous complaints being filed, thus forcing districts to respond to an increase in litigation. Indeed, this was one of the arguments advanced by the school district in argument before the Supreme Court. While there may still be reason to be concerned, the complexity of litigation in the federal court system may serve as a deterrent to parents. Navigating federal court procedure is a daunting undertaking. Parents will likely have difficulty understanding the court rules and processes. Since the ruling by the Supreme Court acknowledges that parents have the right to pursue these claims to enforce the IDEA right to FAPE, more parents may attempt representation of their child, although most will still want the assistance of counsel.



MORE SUPREME COURT DECISIONS

The U.S. Supreme Court struck down two school district plans to achieve racial integration by using race in determining student assignment. In *Parents Involved in Community Schools v Seattle Sch Dst No. 1* and *Meredith v Jefferson Co Bd of Ed*, ___US___ (2007), the Court held that school integration could not be achieved through the use of racial designations. Since both school districts used race as a determining factor, both were subject to “strict scrutiny” and were required to prove that the use of racial classifications was “narrowly tailored” to achieve a “compelling” state interest. Although remedying the effects of past intentional racial discrimination was a compelling state interest, the school district in the *Seattle* case had never been subject of a desegregation order. Further, the desegregation order in the *Jefferson County* case had been terminated since the district had remedied the past discrimination. For these reasons, neither district could show that it has a “compelling inter-

est.” The Court also determined that achieving a racial mix by the percentages established in the plans was not the most “narrowly tailored” approach to achieving a diverse student body. Chief Justice Roberts declared that, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” Though a majority of Justices agreed that neither plan was based on a “compelling interest” or was “narrowly tailored,” the opinion authored by Chief Justice Roberts was only supported by a plurality of four justices.

The U.S. Supreme Court upheld a state athletic association rule that prohibits high school coaches from recruiting middle school students. In *Tennessee Secondary School Athletic Association v Brentwood Academy*, ___ US ___ (2007), the Court found that the school made a voluntary decision to join the athletic association and agreed to abide by its anti-recruiting rule. The Court held that the athletic association’s interest in enforcing its

rules justified curtailing the free speech rights of its voluntary participants in order to manage an efficient and effective athletic association. Using “hard-sell” tactics to recruit middle school students could lead to exploitation, distort competition between high school teams, and create an environment where athletics were valued more than academics. The anti-recruiting rule discouraged the type of conduct that would lead to those types of negative results. The Court also held that the athletic association did not violate the school’s due process rights when it imposed sanctions on the school. The sanctions were imposed after holding an investigation, attending several meetings, sending items of correspondence, providing an adverse written determination by the executive director, holding a hearing before the executive director and an advisory panel, and holding a separate review by the entire board of the athletic association.

Need PD?

Scholten Fant School Law attorneys can help with your professional development needs. Topics may include:

- ◆ General Educators Role in the IEP Process
- ◆ State Board Seclusion and Restraint Document
- ◆ Michigan Merit Curriculum and the Personal Curriculum
- ◆ Discipline of Students with Disabilities
- ◆ Teacher Evaluations under the Tenure Act
- ◆ Custom Presentations Designed to Meet Your Needs.



FOIA FOLLIES: FRANKLY, TIMING MATTERS

The Michigan Supreme Court recently held that the “frank communication” exemption under the FOIA applies to communications that are preliminary to a final agency determination at the time that they are created, even if they are no longer preliminary to a final determination at the time of a FOIA request. *Bukowski v City of Detroit*, 478 Mich 268 (2007).

In 2000, the Detroit Police Chief directed a Deputy Chief to head a three-person Board of Review to investigate a police officer's misconduct and the Department's mishandling of prior investigations of that misconduct. The Board of Review prepared a written document known as the “Shoulders Report.” In 2002, after the county prosecutor declined to file any charges against the officer involved in the misconduct, a local reporter filed a FOIA request to get a copy of the Shoulders Report. The city denied the request, invoking various exceptions under FOIA, including the frank communication exemption.

The frank communication exemption allows a public body to exempt from disclosure:

“communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest and encouraging frank communication between officials and employees of public bodies ‘clearly outweighs the public interest in disclosure.’ MCL 15.243(1)(m).”

The Michigan Court of Appeals held that the Shoulders Report would not be exempt as a frank communication because at the time of the FOIA request, it was no longer preliminary to a final agency determination of policy or action, since the prosecuting attorney decided not to press charges.

The Supreme Court previously set forth the framework for courts to apply the frank communication exemption in its *Herald Company v Eastern Michigan University* case. 475 Mich 463 (2006). [See Summer 2006 edition of *School Law Update*, FOIA Follies at page 8 for a discussion of the *Herald* case.] First, the public body has the burden of establishing the exemption. Second, the public record to be exempted must meet a three-part statutory definition of a frank communication:

- (1) It is a communication or note of an advisory nature made within a public body or between public bodies;
- (2) It covers other than purely factual material;
- (3) It is preliminary to a final agency determination of policy or action.

Third, if the public record qualifies as a frank communication, a court must engage in a balancing test to determine if the public interest in encouraging frank communication clearly outweighs the public interest in disclosing the document. Finally, if a court determines that the frank communication should not be disclosed, FOIA still requires the redaction of the exempt material and the disclosure of the purely factual material within the document.

The Supreme Court found that the

Court of Appeals erred in indicating that the requirement that communications or notes are preliminary to a final agency determination or policy of action has anything to do with the timing of the FOIA request. The Supreme Court determined that this phrase “speaks to the *purpose* of the communication or notes *at the time of their creation.*” The relevant timing therefore is the time of creation, not the time of the FOIA request. The Supreme Court noted that other exemptions have specific time limits as to when an exemption ceases to protect a public record from disclosure (e.g. exemptions related to bids or proposals to enter into a contract and appraisals of real property to be acquired by a public body). The Court relied on the fact that no such time limit was imposed on the frank communication exemption to show that the legislature intended that the exemption would apply to communications and notes even after the final agency determination of policy or action has been made.

Action:

If your school district intends to exempt from disclosure any frank communication contained within a public record, you should apply the *Herald Company* test. Unless another exemption under FOIA applies, you may only exempt from disclosure that portion of the public record that contains information that is other than factual information. In other words, you may redact the frank communication (e.g., the drafter's opinion on the issue), and you must disclose the purely factual material contained in the public record. If you need any assistance in responding to a FOIA request that involves frank communication please contact one of our school law attorneys.



NO ATTORNEY FEES FOR ATTORNEY WHO REPRESENTS HIMSELF IN OMA ACTION

The Michigan Supreme Court recently held that an attorney who represents himself in a successful action under the Open Meetings Act is not entitled to attorney fees. *Omdahl v West Iron County Board of Education*, 478 Mich 423 (2007). A local attorney represented himself against the West Iron County Board of Education in a lawsuit claiming the board violated the Open Meetings Act 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 costs.

The OMA provides in relevant part:

If a public body is not compliant 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 cover court costs and *actual attorney fees* for the action.

The Michigan Supreme Court stressed that the meaning of the three words, “actual attorney fees,” were central to the resolution of the case. Using common definitions, the word “actual” means “existing in act, fact, or reality.” The definition of an attorney is essentially a person whose profession is to “represent clients in a court of law or to advise or act for them in other legal matters”. The Supreme Court noted that the word attorney connotes an agency relationship between two people. Furthermore, the term fee is generally defined as “a sum charged or paid, as for professional services or for a privilege.” The Supreme Court held

that because an attorney is defined as an agent of another person, there must be separate identities between the attorney and the client before the litigant in an OMA case may recover actual attorney fees.

Action:

As we advised in our Summer 2006 edition of *School Law Update* (see page 2), it is important to prepare and keep minutes of a closed session. 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. discuss student disciplinary issue at the request of a student’s parent), and the time the Board reentered into open session. Minutes of a closed session do not need to be a transcript of, or contain significant detail regarding, the discussion held during the closed session.

MDE SUBMITS REPORT ON ESY SERVICES TO STATE BOARD OF EDUCATION

At the August 14, 2007 State Board of Education meeting, the Michigan Department of Education OSE/EIS submitted a report relative to the development of draft standards for Extended School Year (ESY) services. The report indicates that “SEAC [Special Education Advisory Committee] believes there is a need for specific language in the Michigan Rules to provide procedures for determining the need for ESY services.” The report goes on to indicate that a determination of the need for ESY services should consider a variety of factors.

The guidelines attached to the report address the typical “regression/recoupment” standard which has been utilized in Michigan. In addition, the report sets forth other circumstances which may justify ESY services, which

seem to significantly expand ESY services in Michigan, and appear to incorporate standards articulated in case law decisions from other areas of the country. Included among the circumstances which may justify ESY are the nature and severity of the student’s disability, “breakthrough opportunities” if a student is at a “critical point” for acquiring one or more skills, failure of the student to make adequate progress on his or her IEP goals, situations where a student’s progress in “critical life skills areas” could be potentially jeopardized, or where interruption and instruction will result in the loss of progress on “interfering behaviors.” The document reiterates that ESY services are designed to maintain skills, not to acquire new skills. Notwithstanding this statement, some of the factors (such as the degree

of progress towards IEP goals, the “emerging skills” or “breakthrough opportunities”) seem to imply something more than merely maintaining skills. A “check list” appended to the document also appears to require districts’ consideration of all the various ESY “tests,” in addition to the historical regression/recoupment analysis.

The document is available by visiting the Department of Education’s website, clicking on the State Board of Education and following the buttons to the State Board Agenda. A link to the document is included on the Agenda for August 14, 2007.

Although MDE has not requested public input, we would encourage school districts to review the document and provide your feedback to the Department.



COURT OF APPEALS RESTRICTS STATE TENURE COMMISSION'S STANDARD OF REVIEW

Prior to amendment of the Teacher Tenure Act (the "Act") by 1993 Public Act 60, the demotion or dismissal of a tenured teacher was subject to a full-blown hearing before the local or controlling board. The local board's decision was then subject to direct appeal to the State Tenure Commission (the "STC") which conducted a "*de novo*" review of the matter (i.e. essentially a new or second review of the case, including the possibility of receiving new evidence and producing different outcomes).

1993 PA 60, however, modified the Act to eliminate the local board hearings and to provide instead for appeals to the STC where a full-blown hearing would be conducted before an administrative law judge or hearing referee. The hearing referee makes a "preliminary decision and order" which can be challenged by either party upon the timely filing of "exceptions." If no "exceptions" are filed, the hearing referee's preliminary decision becomes the STC's final decision and order. However, if "exceptions" are filed, by either party or both parties, then the STC conducts a review of the record and of the exceptions as they pertain to the hearing referee's preliminary decision.

Notwithstanding the 1993 amendments to the Act, the STC's historical *de novo* review of appeals was not formally questioned or challenged until the case of *Lewis v Bridgman Public Schools*, decided by the Michigan Court of Appeals on May 8, 2007. The Bridgman board decided to terminate Lewis for poor professional judgment in giving his 18 year old teaching assistant a gift in the form of an air gun, which resembled a Ruger

semi-automatic handgun, together with ammunition. The air gun was given in the presence of other students and was stored at school for a period of time. It was given without permission of the student's parents or of school administrators and without instruction on its safe use and/or its removal from school. The student was uncomfortable with the gift and was fearful that it might result in his expulsion under the district's weapons policy.

On appeal from the local board's decision to discharge Lewis, and following a four day hearing, the hearing referee upheld the local board's deci-

The Court of Appeals makes clear that the State Tenure Commission must give deference to the hearing referee's findings and conclusions if they are supported by substantial evidence on the record.

sion. Both parties filed "exceptions" to the hearing referee's preliminary decision and order, thereby requiring the STC's review of the same. In keeping with its historical *de novo* standard of review (i.e. its new and independent review and consideration of all questions of fact and law), the STC concluded that the hearing referee's preliminary decision upholding Lewis' discharge was too harsh. The STC, therefore, reduced Lewis' discipline to a long-term unpaid suspension.

Upon further appeal, therefore, the *Lewis* court dealt with the STC's standard of review in cases where "exceptions" are filed in response to a hearing referee's preliminary decision. In its majority and controlling opinion, the Court of Appeals held that the 1993 amendments to the Act. . . se-

verely circumscribe the scope of authority of the Tenure Commission in the appeal process and imply that a *de novo* standard of review is no longer applicable. As such, deference is now clearly to be given by the STC to the hearing referee's findings and conclusions if they are supported by substantial evidence on the record made before the hearing referee. In *Lewis*, therefore, because the STC concurred with the hearing referee's substantive findings and conclusions, the court held that the STC erred by reducing the referee's discharge decision to a long-term unpaid suspension.

Although not central to the case's outcome, the *Lewis* court upheld the notion that prior incidents may be considered when determining the severity of the discipline to be imposed. It also affirmed the longstanding holding that "adverse effect" on the school community need not be proven in cases involving teacher misconduct in school or involving students.

Action:

As this case exemplifies, the record made before the hearing referee is critical. The Tenure Commission's authority upon review of a hearing referee's decision has been significantly restricted by the Court of Appeals, and will be limited to reviewing the record created before the hearing referee. Districts will need to assure proper documentation of the evidence and reasons supporting the discipline imposed.



NO RIGHT TO REAPPOINTMENT AS COACH

When the Parchment School District elected not to renew Douglas Mullen's "Schedule B" (extra-duty) coaching assignments following the 2004-05 school year, Mr. Mullen and the Kalamazoo County Education Association sued the Parchment District and its Board, alleging their breach of the parties' collective bargaining agreement ("CBA"). Following the trial court's dismissal of the claim, the plaintiffs appealed to the Michigan Court of Appeals, which upheld the trial court in an unpublished opinion on July 3, 2007.

Mr. Mullen's primary employment with the district was as a tenured elementary teacher. His multiple coaching assignments pursuant to the CBA's "Schedule B," however, were reflected by annual contracts.

The language of the parties' CBA, and of the district's annual "Schedule B" contracts, was obviously highly significant. In this regard, the CBA provided that a teacher's dismissal or transfer from a "Schedule B" position would not be made without "just

cause," and that such dismissals or transfers were subject to the CBA's grievance procedure, but only up to Step 2 (i.e. a conference with the superintendent, not to binding arbitration). The brief annual "Schedule B" contracts, however, prescribed the extra-duty assignment, the dates between which the assignment would be served, and the pay attributable to the assignment. These contracts further provided that failure to continue an extra-duty assignment would not be deemed a "demotion" for Tenure Act purposes.

In the absence of relief after processing a grievance through Step 2, the plaintiffs sued claiming that Mr. Mullen was entitled to reappointment to his previous coaching assignments in the absence of "just cause" for his dismissal, based on the language of the CBA. In interpreting and reconciling the pertinent provisions of the CBA and the annual "Schedule B" contracts, the Court relied upon recognized principles of contract construction - e.g. seeking to determine the intent of the parties, giving meaning to all provisions if possible, etc.

Without belaboring its analysis, the Court ultimately concluded that Mr. Mullen was not "dismissed" as a coach, and was not therefore protected by the CBA's "just cause" language, because he was allowed to serve out the full term of his annual "Schedule B" coaching contract - i.e. his coaching assignment was not terminated mid-season. In essence, therefore, the Court concluded that Mr. Mullen's non-renewal or non-reappointment as a coach for the subsequent year did not constitute a "dismissal" and did not, therefore, violate the CBA.

Action:

Although the district prevailed, the *Mullen* lesson is nevertheless clear. In an effort to avoid litigation of this sort, and to ensure a proper outcome in the event of it, the pertinent contract language, of the collective bargaining agreement and of the annual extra-duty agreements, must be clear, unequivocal, and not susceptible to differing interpretations.

CRIMINAL HISTORY CHECKS

The Michigan Court of Appeals recently ruled that the Superintendent of Public Instruction (Michael Flanagan) and other high ranking officials of the Michigan Department of Education (MDE) have governmental immunity with respect to false positive reports on criminal history checks that affect teachers and other similarly situated persons. *Frohriep v Flanagan, et al.*, 2007 WL 1375888 (Mich App, May 10, 2007).

Eric Frohriep, a certified teacher and a member of the Michigan

Education Association, sued three high ranking members of the MDE alleging that they falsely identified him and others similarly situated as having criminal convictions. He sought monetary damages for libel *per se*, interference with business expectations, intentional infliction of emotional distress, and an invasion of privacy. The court dismissed all claims. Because the plaintiff did not allege any facts from which it might be inferred that the individuals were acting outside the scope of their authority, or that they acted in a grossly negligent manner, the three defendants had governmental immunity.

Action:

Hopefully, none of you reading this have had to experience a false positive report on your criminal history check. In the event that you ever do, you should work with your school district to clear up the situation, and your good name, as soon as you can. School districts should verify the criminal history reports received from other agencies before taking action against an employee.



PART C REGULATIONS

As we told you in the Spring 2007 issue of *School Law Update*, the U.S. Department of Education has issued proposed regulations to implement the changes made to Part C of IDEA 2004, which relates to the early intervention programs for infants and toddlers with disabilities. Comments to the proposed regulations were due July 23, 2007. The changes included: (1) permitting mediation to be available to parents even when they have not requested a due process hearing and requiring that settlement agreements be enforceable in court; (2) allowing states to offer parents of children aged three to five (Part B/C eligible students) the option of continuing to receive early intervention services under an IFSP instead of FAPE under a Part B IEP; (3) providing clarity regarding confidentiality and the use of public and private insurance to pay for early intervention services and state responsibilities for children with surgically implanted devices. The proposed regulations also incorporate the new child find and early intervention provisions of IDEA requiring states have in place referral, public awareness, or other child find policies for children under the age of three who are: (1) involved in a substantiated case of abuse and neglect; (2) identified as affected by illegal substance abuse, or withdrawal symptoms resulting from prenatal drug exposure; (3) homeless; (4) in foster care; (5) wards of the state; and (6) for states that choose to allow parents to continue early intervention services for children age three and older, children who experience a substantiated case of trauma due to exposure to family violence. Because these additional child find requirements will substantially increase the number of referrals, the proposed regulations abandon as impractical the current

requirement that referral occur within two working days of a child's identification. Referral would instead be required "as soon as possible." According to the US DOE, the proposed regulations would:

RESTRUCTURE THE CURRENT REGULATIONS to follow the order and arrangement of the statute. This organization creates a freestanding document that will be helpful to parents, lead agencies, early intervention service providers, and the public—both in reading the regulations, and in finding the direct link between a statutory requirement and the regulation related to that requirement.

INCREASE STATE FLEXIBILITY AND OPTIONS by incorporating new provisions from IDEA that permit mediation to be available to parents at any time—even when a due process hearing is not requested—and requiring that settlement agreements reached as a result of mediation be valid and enforceable in a court of law. States would also be given flexibility to offer parents of children ages three through five the option of continuing to receive Part C services (in lieu of providing those children a free appropriate public education under Section 619 of IDEA) and allowing states to serve those children for one, two or three years.

PROVIDE MUCH REQUESTED AND NEEDED CLARIFICATION ON COMPLEX PROVISIONS in such areas as the confidentiality, the use of public and private insurance to pay for Part C services and states responsibilities for children with surgically implanted devices such as cochlear implants.

REDUCE BURDENS ON STATES by permitting states in most cases to provide assurances rather than supporting documentation in their applications. States would be permitted to use screening in addition to evaluations to determine whether a child is suspected of having a disability.

ENSURE STATE ACCOUNTABILITY FOR CHILD FIND AND PROVISION OF EARLY INTERVENTION SERVICES by incorporating new provisions from IDEA requiring that states have in place referral, public awareness or other child find policies for children under the age of three who are: involved in a substantiated case of abuse and neglect; identified as affected by illegal substance abuse, or withdrawal symptoms resulting from prenatal drug exposure; homeless; in foster care; wards of the state; and for states that choose to allow parents to continue early intervention services for children age three and older, children who experience a substantiated case of trauma due to exposure to family violence.

ALIGN THE PART C REGULATIONS, WHERE PRACTICABLE, TO THE IDEA PART B REGULATIONS by minimizing the burden for those lead agencies that are also state education agencies and encouraging a streamlined system of services for children with disabilities.

72 Fed. Reg. 26,456 (May 9, 2007).

Now that the comment period has concluded, the US DOE will review the comments and make any revisions/modifications which would be appropriate given the public comments. Final regulations can likely be expected in winter or spring of 2008.



PRIVATE SETTLEMENT AGREEMENT ENFORCEABLE THROUGH DUE PROCESS HEARING, NOT FEDERAL COURT

The United States District Court for the Western District of Michigan has recently ruled in a case which, among other things, challenged Michigan's new due process procedures and the enforceability of private settlement agreements in court. In *Traverse Bay Area Intermediate School District, Traverse City Area Public Schools v Michigan Department of Education, et al.*, Case No. 5:06-CV-139 (WD Mich July 27, 2007), the Court held that it lacked jurisdiction over a claim seeking to enforce a private settlement agreement, and that enforcement of such agreements must first be exhausted through the due process hearing procedures.

The case arose as a dispute between the parent of a student with a disability (S.G.) and the Traverse City Area Public Schools and Traverse Bay Intermediate School District (the "Districts"). S.G.'s primary diagnosis is autism. In addition, S.G. has several other medical conditions which impact her ability to attend school to such a degree that S.G.'s parent sought special education services to be delivered in her home. The Districts requested access to S.G.'s medical records or medical providers to assess the need for home-based services. The parent refused. The parent requested a due process hearing alleging that the Districts failed to provide services in S.G.'s IEP, and also claimed that S.G. could not attend a public school setting.

The hearing began under the "old" due process procedures (a two-tier administrative hearing) prior to the changes which became effective July 1, 2006 (a single-tiered system). The parties agreed to a local hearing officer (LHO) who held several pre-hearing conference calls. During these conference calls, the LHO encouraged S.G. to provide copies of the student's

medical records to the Districts, but the parent again refused. Finally, in January 2006, S.G. provided the medical records to the LHO to view *in camera* (privately) and the parties agreed to return to the IEP process. During the IEP meetings which followed, the Districts' independent medical expert expressed her opinion that S.G. could attend school safely. Disagreeing with this opinion, S.G.'s parent terminated the IEP meeting. Following a second IEP meeting, the Districts proposed a comprehensive reevaluation of S.G. by a team of educational and medical professionals. Having been unable to resolve the matter, the parties scheduled the due process hearing for May 2006. Prior to the hearing date, the Districts made a "ten-day" offer which, among other things, provided that the student's IEP would be implemented as written except as amended by the settlement offer, that S.G. would attend a summer enrichment program where the Districts' staff would observe and collect data regarding her attendance, that S.G. would begin her first day of school in the 2006-2007 school year in the Districts' mildly cognitively impaired program, that the due process hearing would be dismissed with prejudice, and that an order would be entered of the LHO fully terminating the due process procedures. S.G.'s counsel made a counter-proposal that included payment of attorney fees, which the Districts refused. S.G.'s counsel then accepted the original offer. S.G.'s counsel filed a motion requesting that the LHO incorporate the settlement agreement into her order of dismissal to support a claim as a prevailing party for an award of attorney fees. The Districts opposed the request. The LHO, after receiving and reviewing briefs on the matter, refused to incorporate the terms of the settlement agreement, and issued an order dismissing the matter with preju-

dice.

S.G.'s parent appealed the dismissal to the Michigan Department of Education (MDE) who referred the matter to the State Office of Administrative Hearings and Rules (SOAHR) for appointment of a state-level review officer. SOAHR appointed Administrative Law Judge Lauren Harkness to hear the appeal. The Districts filed a motion to dismiss asserting that SOAHR lacked jurisdiction over the appeal. ALJ Harkness denied the Districts' motion finding that she had jurisdiction over the appeal, and also denied the Districts' request for a stay of the administrative proceedings. Simultaneously, the Districts filed an action in Federal District Court seeking injunctive relief and an interlocutory review of the jurisdictional ruling. The Court denied injunctive relief, and ultimately ALJ Harkness issued a decision finding the LHO erred in refusing to incorporate the settlement agreement into the order of dismissal. ALJ Harkness incorporated the settlement agreement into her order.

The procedural history before the Court is complicated and convoluted. In a nutshell, the Districts claimed the MDE violated the IDEA, the State Emergency Rules, and the Interagency Agreement between MDE and SOAHR by failing to appoint an impartial hearing officer, by failing to rotate due process and state-level hearing officers and by appointing a state review officer (ALJ Harkness) who was essentially an employee of the MDE. In addition, the Districts alleged that S.G. breached the settlement agreement and sought en-

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cont....PRIVATE SETTLEMENT AGREEMENT ENFORCEABLE THROUGH DUE PROCESS HEARING, NOT FEDERAL COURT

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forcement of the agreement, as well as review of ALJ Harkness' decision regarding incorporation of the settlement agreement into the order of dismissal.

In a lengthy decision, the Court ruled against the Districts on all counts. In essence, the Court found that ALJ Harkness properly exercised jurisdiction over the appeal, even though there had been no hearing or decision on the merits, since refusal to incorporate the settlement agreement into the order of dismissal rendered S.G. an "aggrieved" party. As an aggrieved party, S.G. had the right to a state-level review, and the Court declined to limit the scope of review to exclude an issue which arose under the IDEA. The Court also dismissed all other claims against the MDE (and other State Defendants) finding that the Districts lacked standing to bring some of the claims and that the Eleventh Amendment barred others. The Court found that "the IDEA provides an express right of action to LEAs only for review of the findings and decision of a hearing officer issued pursuant to the administrative process....The Court concludes that he [sic] Districts may not assert a claim against the State Defendants under the IDEA, apart from an appeal under §1415(i) alleging a systemic violation." Since the IDEA does not require states to rotate hearing officers or enter into inter-agency agreements, failure to do so was not a violation of the IDEA.

The Court found that it lacked jurisdiction over the enforcement of the private settlement agreement. Examining the recent amendments to the IDEA, the Court noted that certain provisions require that settlement agreements be enforceable in court. Specifically, agreements reached

through the resolution meeting required under Section 1415(f) are required by statute to be enforceable in any state court of competent jurisdiction or in the federal district court. Similarly, Section 1415(e)(2)(F) requires mediation agreements to be similarly enforceable in state or federal courts. These requirements did not exist prior to the amendments to the IDEA in 2004. Acknowledging that other types of settlement agreements may exist, the Court stated "had congress intended that *all* settlement agreements reached during the course of the administrative process be enforceable in federal court, it could have easily adopted a provision to that effect." (emphasis in original) Further, the Court stated that "because the Districts' breach of contract claims concern educational and medical evaluations of the minor as well as her educational placement, these are issues that must be addressed through the administrative process. Moreover, because the Districts failed to exhaust these claims, the Court lacks a sufficient basis to conduct its review."

The underlying substantive issues of whether ALJ Harkness was correct in incorporating the settlement agreement into an order of dismissal, and whether the parent was entitled to an award of attorney fees, were not resolved by the Court. These issues will be the subject of a further decision following submission of additional briefs and arguments.

Action:

Much of the decision in this case involved legal wrangling between the Districts and the State Defendants. In essence, the decision limits a local school district's ability to bring an action against the State Department except in limited circumstances. The aspect of the decision which will affect school districts most directly relates to the enforcement

of private settlement agreements. Many times school districts will make a "ten-day" offer in order to avoid the time and expense associated with an administrative due process hearing. With the Court's ruling that such private settlement agreements are not enforceable in court absent exhaustion of administrative remedies (due process hearing), districts may well lose this benefit since enforcement of the private settlement agreement will require the district to return to the due process procedures and complete that process prior to review in court. As an alternative, when a district decides to make a ten-day offer, the parties may wish to convene a "mediation" session during which the settlement agreement is devised. By convening a mediation session, and devising the settlement agreement pursuant to mediation, the resulting settlement agreement would be enforceable in court without exhaustion of the due process procedures.

When drafting settlement agreements, consider directly addressing the issue of attorney fees. In this case, the settlement agreement provided for all claims and issues to be resolved between the parties, and the matter finally terminated. However, the original settlement offer (which was ultimately accepted and incorporated into ALJ Harkness' order) did not specifically exclude any payment of attorney fees. Compare this to the case of *Tomkins v Troy School District*, 46 IDELR 183 (6th Cir., 2006) discussed in *School Law Update* Fall 2006. In that case, the hearing officer incorporated a settlement offer

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cont....PRIVATE SETTLEMENT AGREEMENT ENFORCEABLE THROUGH DUE PROCESS HEARING, NOT FEDERAL COURT

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into his order of dismissal. However, the settlement offer included a paragraph specifically declining to pay any attorney fees. When the parents filed suit in federal court to recover attorney fees as a prevailing party, the Court determined that they had prevailed. However, since the settlement offer which had been incorporated in the

hearing officer's order declined payment of attorney fees, the parents had waived any claim to fees. The Sixth Circuit affirmed the District Court's denial of attorney fees since "the parents could have accepted the settlement as offered; continued negotiations; or proceeded to the scheduled due process hearing. . . The parents did not have the option of accepting a portion of the

offer..." It will be interesting to see if the federal court rules that incorporating the settlement offer made by the district into the hearing officer's order includes the counterproposal by the parents regarding payment of attorney fees and the district's rejection of such proposal. If it does (and likely should) the result may be similar to that in the

ELIGIBILITY DETERMINATIONS STILL REQUIRE NEED FOR SPECIAL EDUCATION

In order to be determined eligible for special education programs and services, a student must meet the criteria set forth under one of the disability categories. However, merely having a diagnosis of ADHD or Asperger's Syndrome does not necessarily mean the student will be eligible for special education services. All disability categories require that the disability adversely affects the student's educational performance. Remember that educational performance is more than merely academics. *See, Mr. and Mrs. I. v Maine Administrative School District*, 47 IDELR 121 (1st Cir., 2007) [discussed in *School Law Update*, Spring 2007] and *Letter to Clark*, 48 IDELR 77 (OSEP 2007) [IDEA regulations establish that educational performance is more than academic performance; students passing all academic courses may still be eligible for special education services]. Although educational performance is more than academic achievement, a student must still require special education (specialized instruction) in order to be determined a child with a disability.

Two recent cases exemplify these requirements. In *Brendan K. v Easton Area School District*, 47 IDELR 249 (ED PA, 2007) the Federal Court

found that the school district properly determined that the student was not eligible for special education programs and services. Although the student had been diagnosed with ADHD and ODD, and experienced some depression, these impairments did not rise to the level of a disability under IDEA. When the district evaluated the student for an emotional impairment, the district determined that the student's depression did not rise to the level of an emotional impairment, and could be appropriately accommodated through §504. Similarly, the student's organizational and attention issues could be addressed under his 504 plan. As for ODD, the Court noted that the IDEA excludes social maladjustment from the definition of an emotional impairment. Merely having a diagnosis of ADHD does not, in and of itself, entitle a student to special education services. In that case, the district appropriately accommodated the student's organizational and emotional needs through a 504 plan and the student made educational progress under that plan. As such, the Court affirmed the district's determination that the student did not require specialized instruction, and thus not eligible under the IDEA as a "child with a dis-

ability."

Similarly, in *Hood v Encinitas Union School District*, 47 IDELR 213 (9th Cir., 2007), the Court affirmed a decision that a student was not eligible for special education services under the IDEA because the student's educational needs could be met with interventions in the general classroom. Analogizing the *Rowley* FAPE standard to eligibility determinations, the Ninth Circuit stated: "Just as courts look to the ability of a disabled child to benefit from the services provided to determine if that child is receiving an adequate special education, it is appropriate for courts to determine if a child classified as non-disabled is receiving adequate instruction in the general classroom - and thus not entitled to special education services - using the benefit standard." The parents alleged that the student had a learning disability. Without deciding whether the student had a learning disability, the Court found that the student's ability to consistently receive average or above average grade showed that any discrepancy could be corrected in the general education classroom, and thus the student did not need special education services in order to obtain meaningful benefit, and thus was not eligible.



PREDETERMINATION OF IEP REQUIRES SCHOOL DISTRICT TO REIMBURSE PRIVATE SCHOOL COSTS

A Michigan administrative law judge recently ruled that a local public school district must reimburse the parents of a student with a disability more than \$22,000 in private school costs. In *Allen Park Public Schools*, 5 ECLPR 53, SEH 06-77 (SEA MI, 2007) the ALJ found that a school district had predetermined the IEP of a six year old student with autism. One important factor relied upon by the ALJ was the school district's failure to invite a regular education teacher to the student's IEP meeting.

The dispute between the parents and the district had been brewing for a number of years. The student began receiving services (at 2-1/2 years of age) as a student with a speech and language impairment during the 2002-2003 school year. For the next two years he received services in an early childhood program for 12-1/2 hours per week. In April 2004, a reevaluation occurred, at which time the student was identified as a student with autism. The resulting IEP provided for a "follow the child" paraprofessional to be assigned to the student in the early childhood program, as well as extended school year services. The parents declined the extended school year services, and instead enrolled the student in a Montessori program for summer programming.

During the 2004-2005 school year, another IEP was devised which placed the student in an AI categorical "center-based" program for 31 hours per week. The IEP also provided for occupational therapy and speech and language therapy. The student remained in the center-based program during the summer of 2005,

at which time the parents began investigating less restrictive placement options. During the 2005-2006 school year, the parents began training the student in American Sign Language (ASL). In the fall of that year, the parents hired a tutor to provide instruction in ASL. The parents also began discussing various program options with the district's special education director, but for various reasons rejected all of the program suggestions. In the fall of 2005, the parents sent a letter requesting that the school district incorporate ASL in the student's daily routine, as well as provide the student with an opportunity to interact with

behavior intervention plan. School staff indicated some concern over the reduction in programming hours, but placement was made to accommodate the parents' desire to remove the student from the center-based program. The IEP meeting was to be reconvened prior to the end of the school year.

Prior to the IEP being reconvened, the parents initiated various contacts with the school district inquiring of integration opportunities for the student in general education. In response, the teacher informed the parents that general education integration was devised on an individual basis, and determined by the IEP team. The parents continued to request general education integration, both verbally and in writing. Notwithstanding these requests, the school district never identified any general education classroom in which the student might be integrated even on a part-time basis, nor did it offer the parents the opportunity to view such general education classrooms. In late May, the parents sent a letter indicating their intent to enroll the student in a private placement for the extended school year services and to request reimbursement at public expense. The district responded by indicating that it had considered various options to provide FAPE, including ESY services, and intended to discuss these issues at the end of the year IEP meeting. The district also indicated that it would be forwarding an invitation

The IDEA and its regulations require that the first placement option considered by an IEP team be the regular education classroom. . . . the "default" [placement] is the general education classroom the student would attend if not disabled..."

age appropriate, non-disabled children. Throughout the school year, various other discussions continued, and an IEP meeting was scheduled in February 2006. The parents were intent on removing the student from the AI center-based program, and ultimately the meeting was adjourned, noting in the IEP that the parents had requested LRE placement and wished to discontinue the center-based programming. During the adjournment the parents viewed the early childhood program operated in the resident district and when the IEP was reconvened, the student was placed in the early childhood program for 12-1/2 hours per week (down from 31 hours per week) for the balance of the school year. The IEP also included a paraprofessional and a

district never identified any general education classroom in which the student might be integrated even on a part-time basis, nor did it offer the parents the opportunity to view such general education classrooms. In late May, the parents sent a letter indicating their intent to enroll the student in a private placement for the extended school year services and to request reimbursement at public expense. The district responded by indicating that it had considered various options to provide FAPE, including ESY services, and intended to discuss these issues at the end of the year IEP meeting. The district also indicated that it would be forwarding an invitation

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regarding this IEP meeting for June 7, 2006.

An IEP meeting was held on June 7, 2006. Despite the parents' continued request for the student to participate in general education, the district did not invite a general education teacher, and no general education teacher attended the IEP meeting. At the beginning of the meeting, the parents provided a letter outlining five items they sought in regard to their son's education. These items included placement in an environment in which he could "interact with age-appropriate children who would provide him with positive role modeling/the least restrictive environment." Additionally, the parents sought incorporation of ASL into the student's daily routine, a curriculum commensurate with kindergarten/first grade, speech and language therapy and occupational therapy. The written letter was incorporated as an addendum to the IEP and noted as the parents' input and concerns. Notwithstanding incorporation of the parents' letter, the ALJ found that the district's IEP team members failed to consider the requests at all. In fact, three of the district's witnesses testified that they did not recall ever seeing, let alone reading, the written requests. Indeed, district personnel testified that placement in a general education kindergarten was never even considered or discussed at the IEP team meeting.

The IEP devised at the June 2006 meeting placed the student for 30 hours per week in an AI special education classroom. No hours were identified for general education. The

IEP noted "opportunities for reverse and regular mainstreaming," although no other indication in the IEP allotted time for such mainstreaming. The IEP proposed ESY services, speech and language services and occupational therapy services. The present level of functioning statement had been written by the teacher prior to the IEP meeting, and was not developed collaboratively at the meeting by the IEP team. Though positive behavior supports was identified as a supplemental aid or service, no specific frequency was identified, but rather was left to be deter-

"[T]he lack of a general education teacher at the IEP team meeting, the absence of any academic goals and objectives for the student, and the ignoring of the parents' legitimate input on the matter . . . leads to a conclusion that the [IEP] was predetermined . . ."

mined by the teacher. Further, no behavior intervention plan was referenced, even though prior IEPs had referenced a behavior plan. Paraprofessional support was no longer provided in the IEP, nor was any instruction or education in ASL. Only three goals were identified in the IEP - two social/adaptive goals, and one early communication goal. No academic goals were included. Upon conclusion of the meeting, the IEP document was provided to the parents, who indicated that they would review the document and respond to the district. Following the IEP meeting, the parents enrolled the student in the Montessori school program for the summer program and the following school year. The parents signed the IEP in disagreement and returned it to the district two days later.

The ALJ found that there were a

number of procedural and substantive failures in the IEP which resulted in a denial of FAPE, and ordered the district to reimburse the parents more than \$22,000 for one year of private school costs. In analyzing whether the district had offered FAPE, the ALJ identified a number of failures which supported a determination that the IEP was predetermined and substantively inadequate. Primary in the ALJ's discussion was the fact that less restrictive environment had not been considered, and a general education teacher had not even been invited to the IEP meeting. The ALJ stated that the IDEA and its regulations require that the first placement option considered by an IEP team be the regular education classroom. While the district argued that the special education classroom was merely the "default" placement while they considered and evaluated possible mainstreaming options, the ALJ stated that "the actual 'default' [placement] is the general education classroom the student would attend if not disabled..." The hearing officer found that there was no real consideration by the school district of placing the student in general education and that the district had ignored the parents' input and requests. "Combined with the lack of a general education teacher at the IEP team meeting, the absence of any academic goals and objectives for the student, and the ignoring of the parents' legitimate input on the matter, the across-the-board refusal of the district's IEP team members to

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cont.....PREDETERMINATION OF IEP REQUIRES SCHOOL DISTRICT TO REIMBURSE PRIVATE SCHOOL COSTS

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consider a general education placement for the student under the circumstances of this case leads to a conclusion that the refusal to place the student in a general education setting with appropriate supplementary aids and services was predetermined by the district's IEP team members before the meeting was convened." Thus, the ALJ determined that the predetermination of the IEP deprived the parents of their right to meaningfully participate in the IEP team meeting, and denied meaningful educational benefit to the student.

Action:

This case exemplifies a number of issues that districts must guard against. Primary in the ALJ's determination that the IEP was predetermined was the fact that the district did not discuss any general education placement options, and clearly had no intention of doing so based upon the failure to include a regular education teacher in the IEP team meeting. When a parent requests placement in a general education classroom, a district must assure that a general education teacher is invited to (and attends) the IEP team meeting. The IDEA requires that general education with appropriate supplemental aids and services be the first placement option for all students with disabilities. By not even inviting a regular education teacher, the district clearly told the parents that this was not going to be an option. Further, when parents provide written input at the IEP meet-

ing, the team members should all be provided a copy of the parental requests and discussions should occur by the IEP team. It is only by reading and discussing the parental concerns that a district will be able to show that it "considered" the parents' input. Additionally, while districts may come to IEP teams with proposals, any prewritten present-level statement or goals should be reviewed, revised and modified at the IEP team meeting. In this case, the special education teacher brought a present level statement to the meeting which was read at the meeting with no further discussion or modification. Collaboration on present level statements and goals and objectives is imperative if

In this case, while the present level statement identified significant behavioral issues, the only IEP support was a vague reference in supplemental aids and services to "positive behavior supports" to be provided at the discretion of the teacher. Similarly, while the district acknowledged that the student utilized ASL and had previously been provided paraprofessional support, neither of these supplemental aids or services were included.

The key lesson to be learned from this case is that the general education setting is always the first placement option to be considered.

With very few exceptions, the first placement discussion which needs to occur at all IEP meetings is placement in general education with supplemental aids and services.

Only after this discussion has been held, and the IEP team has determined that the student cannot be satisfactorily educated in that setting due to the nature and severity of the student's disability, should special education placement be discussed. This is especially true where parents have requested general education placement, and the IEP must document the reasons why the IEP team determined that a general education placement was not appropriate. Vague statements about "reverse mainstreaming" or that the student "will be provided mainstreaming opportunities" will rarely be sufficient.

When a parent requests placement in a general education classroom, a district must assure that a general education teacher is invited to (and attends) the IEP team meeting.

a district is to show that the IEP was devised as a collaborative effort of all team members. While a district need not adopt all parental requests, it must show that such requests were considered with an open mind.

Care must be given to address all student needs through the goals and objectives. In this case, while occupational therapy was provided as a related service, the district did not include any fine motor goals. Additionally, no academic goals were included. Where a student is identified as having educational needs, the IEP must address all student needs through goals, supplemental aids and services or programs and services.

"I am not a teacher but an awakener" ~ Robert Frost



FEDERAL COURT RULES THAT ASSESSMENT OF PROGRESS BY CURRICULUM-BASED INSTRUMENTS IS APPROPRIATE

The Federal Court for the Southern District of Ohio determined that use of curriculum-based assessments, as opposed to standardized instruments, was appropriate for determining progress on a student's goals and objectives. *Pierce v Mason City School District*, 48 IDELR 7 (SD OH, 2007). The Court also noted that meaningful educational benefit does not require an IEP to be designed to improve a student's academic performance vis-à-vis her age group peers.

The parents of a student with a disability requested a due process hearing challenging the school district's IEP and the manner in which progress was measured. The student, Amelia, was eligible for special education programs and services under the IDEA as learning disabled, and had central auditory processing deficits, fine visual-motor and visual-perception delays, ADHD and dyslexia. The student originally attended school in Illinois, and received all of her education in a special education classroom except for social studies and science. In Illinois, the student had been provided multi-sensory approaches and instruction. When the student's IEP for the fourth grade was devised, the parents insisted that the district utilize "brand name" multi-sensory approaches such as Wilson, Ortin Gillingham, or Linda Mood-Bell. The district acquiesced to the parents' demands, and prepared an IEP for her fourth grade. After developing the fourth grade IEP, the family moved to Ohio and enrolled in Mason City School District. During the first few weeks of school, the school district held an IEP meeting, and reviewed the IEP from Illinois. The parents had requested that Amelia receive all of her instruction in special

education, and not participate in general education at all. The district personnel, however, had two concerns relative to the IEP devised for Amelia in Illinois. First, the district believed that Amelia was not receiving her education in the least restrictive environment (general education) and secondly, that the IEP did not sufficiently state measurable goals. The district favored changing the instructional method used to teach Amelia in general education, and providing an instructional assistant. Additionally, the district sought to change the goals and objectives and provide for curriculum-based measurement.

The IEP meeting was adjourned, and later reconvened. In October, the district presented the parents with an IEP, which included instruction in the general education classroom, a full-time instructional assistant, individual and small group instruction, materials and directions read aloud, oral responses, modified materials, extended time, graphic organizers, manipulatives, etc. The IEP also set forth seven goals and objectives in different content areas, including multiple specific benchmarks or objectives for each goal. The program utilized a five teacher team to teach Amelia, with only one of those teachers being a special education teacher. The IEP also utilized curriculum-based measures to determine progress on goals, as opposed to the use of individual achievement tests. The parents preferred the use of standardized achievement tests, and presented the district with a list of proposed goals for Amelia based on one level increases on the Wechsler Individual Achievement Test - II (WIAT-II). The parents also discussed an increase in speech and language services, and objected to Amelia's placement in general education. Instead, the parents sought a categorical

self-contained classroom where the students utilized a "brand name" multi-sensory teaching method throughout the day.

The parents rejected the district's proposal and withdrew Amelia from school, and enrolled her in a private school. The parents then requested a due process hearing seeking reimbursement of the private school cost. Following the due process hearing, the hearing officer found in favor of the district, and denied the parents' request. The parents appealed to a state review, who affirmed. The parents again appealed to the Federal District Court.

After hearing additional evidence, the Court affirmed the hearing officer's decision. Key to the Court's decision was the fact that the school district had proposed very specific and measurable goals and objectives. Comparing the goals of the contested IEP to the goals found inadequate in *Cleveland Heights - University Heights City School District v Boss*, the Court found that the goals were appropriate. In *Boss*, the Sixth Circuit had criticized the goals as being "vague and general." In that case, the goals stated that the student would "identify" a "list of sight words with 80 percent accuracy" and would "improve her reading fluency when read a passage aloud 8/10 times." In comparison, the goals and objectives proposed by Mason City School District were specific. For example, instead of simply referring to sight words, the IEP specified that Amelia would "be able to identify Dolch sight word lists 1-6 that correspond up to a second grade reading level with 90 percent accu-

(Continued on page 18)



**cont.....FEDERAL COURT RULES THAT ASSESSMENT OF PROGRESS
BY CURRICULUM-BASED INSTRUMENTS IS APPROPRIATE**

(Continued from page 17)

racy.” Another example was that Amelia would be able to answer factual questions relating to a two to four sentence paragraph orally presented with 80 percent accuracy. While the IEP goals may not correlate to standardized testing instruments, the Court found that they were appropriately measurable, citing to cases from other jurisdictions where goals such as ‘Noah will produce verbs and prepositions at the sentence level in response to pictures with no clinician prompts with 90 percent accuracy over two consecutive sessions’ to be sufficiently specific and objective. The Court rejected the parents’ argument that curriculum-based assessments were not appropriate since they would not determine whether Amelia had improved or regressed vis-à-vis her peer group performance. Instead, the Court stated that the IDEA does not require an IEP to be designed to improve a student’s academic performance vis-à-vis her age-group peers. Rather, the IEP must be

designed to confer a meaningful educational benefit upon a disabled child “gauged in relation to the potential of the child at issue.” (citation omitted).

Turning to the appropriateness of general education placement, the Court first noted that placement and methodology are matters of educational expertise which require deference to the state agency. The parents claimed that the student had failed to make progress in that setting, asserting that the standardized testing completed by their expert showed no statistically significant progress. The Court found this of little help. First, the standardized tests would have been subject to a test-retest bias. Further, the standardized testing was administered at a reading level which was well above the student’s capabilities. Even if the standardized testing did not show “demonstrable progress” such would not have been fatal, as “the IDEA does not guarantee success.”

Action:

Specific and measurable goals and objectives are key to defending any IEP.

Vague goals such as a student will “improve” in reading, or even that a student will identify sight words at a specific percentage may not be sufficient. In the present case, the Court found the goals sufficiently measurable because they specifically identify the sight words (Dolch sight words on lists 1-6 that correspond up to a second grade reading level) and identified a specific level of accuracy (90 percent accuracy). This goal was sufficiently specific and measurable to show progress. Additionally, curriculum-based assessments are many times more sensitive for measuring progress on specific goals than are standardized instruments. Many times parents seek use of standardized instruments to determine whether the student is “catching up” to their same aged peers. As the Court pointed out, however, the IDEA does not require that a student made progress vis-à-vis the student’s peers, but rather to benefit as gauged against the student themselves.

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AVOIDING IEP TEAM BLUNDERS

As the summer vacation comes to an end, school districts begin gearing up for another school year. Students who have moved in over the summer will need IEPs devised, and many other students will have annual reviews coming due. Recent cases remind us of important aspects of these IEPs which must be addressed.

First, districts must work with parents regarding the scheduling of the IEPs. The regulations require that districts keep track of efforts to schedule IEP meetings at a mutually agreeable time and place. These efforts include telephone calls, letters to the parents and visits to the parents' home or place of employment. 34 CFR 300.22. While a district need not ignore the schedules of its own staff, parent schedules must also be considered. In *Mr. and Mrs. M. v Ridgfield Board of Education*, 47 IDELR 258 (DC CN, 2007), a school district held an IEP meeting without the parents. The parents had informed the school district that they were unavailable on the day the meeting was scheduled and requested that it be rescheduled. Without informing the parents, however, the district held the meeting as scheduled. The Court found this to be in error, and permitted the parents to request reimbursement of private school expenses.

Remember to get all of the right members to the IEP table. As discussed at length in *Allen Park School District*, it is imperative that regular education teachers participate in IEP meetings where the student is, or may be, participating in general education. Where a parent has specifically re-

quested participation in general education, failure to have a regular education teacher at the IEP meeting can be evidence of predetermination. Similarly, related service staff should attend IEP meetings where their service will be discussed. In *Allen Park*, the occupational therapist did not attend the IEP meeting even though occupational therapy services were being proposed. The failure to have the occupational therapist at the meeting (and to propose OT goals) was a procedural error. Similarly, in *Baltimore County Public Schools*, 47 IDELR 234 (SEA MD, 2006) excusing a speech and language therapist from attendance at an IEP meeting without a written agreement with the parents was determined to be a violation of the IDEA.

When considering educational programs and services, the district must consider input and suggestions by the parents. Again, as discussed in *Allen Park*, documentation of the discussion will be important. Do not merely attach a letter provided by the parent without discussing its content. While a district is required to consider a parent's request for services, it is not required to adopt all of those recommendations. See, *Odell v Special School District of St. Louis*, 47 IDELR 216 (ED MO, 2007). Remember, although the district is not required to adopt all parental recommendations, it must come to the meeting with an open mind and consider the parents' input. *N.L. v Knox County Schools*, 38 IDELR 62 (6th Cir., 2003).

IEP teams must also remember to address all of the student's disability-related needs in the IEP. A student's

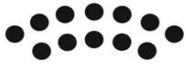
eligibility label does not limit the programs and services which may be required for FAPE. See, *Letter to Anonymous*, 48 IDELR 16 (OSEP 2006). Goals and objectives must be included which address all of the student's needs. Failing to do so may subject the district to claims for private school reimbursement. *North Redding School Committee v Massachusetts Department of Education*, 47 IDELR 215 (DC MA, 2007). See also, *Maine School Administrative District No. 56 v Ms. W.*, 47 IDELR 219 (DC ME, 2007) [where goals and objectives primarily focused on behavioral issues for a student with ADHD and LD, the failure to address writing deficiencies results in partial reimbursement of tuition].

Lastly, collect data on student progress and achievement. If a program is not working, reconvene the IEP team and revise the program. Failure to do so will likely result in reimbursement of educational services or compensatory education awards. See, *Draper v Atlanta Independent School System*, 47 IDELR 260 (ND GA, 2007) [continued use of a reading program where student failed to progress for three years results in district reimbursing \$38,000 per year for compensatory education]. Good data collection in both general and special education settings regarding student progress and supports is imperative to defending any IEP.

“We can not always build the future for our children But we can build our children for the future.”

Franklin D. Roosevelt





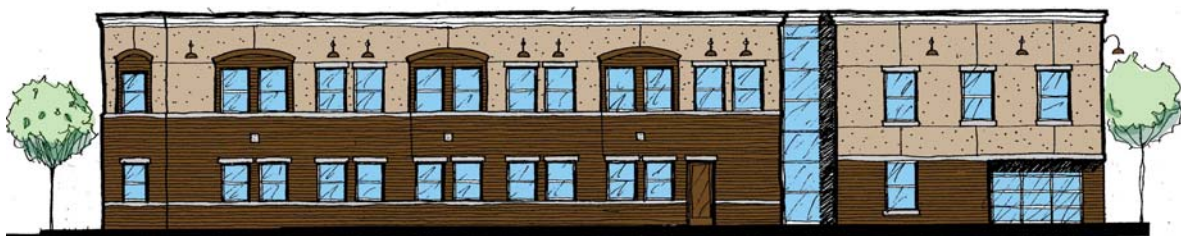
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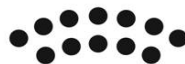
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