



SUPREME COURT DECIDES BURDEN OF PROOF IN IDEA CASES

The United States Supreme Court ruled that the burden of proof in an IDEA case properly lies with the parties seeking relief. Schaffer v Weast, ___ US ___, 126 S Ct 528, 44 IDELR 150 (2005).

This case was brought to the Supreme Court to resolve the question of who bears the burden of proof in an administrative hearing. Many states and Courts have assigned that burden to the school districts, others to the parents, and others have applied the typical analysis which assigns the burden of proof to the parties seeking relief. In this case, the procedural history extends back over several years. The student had attended private schools through the seventh grade, experiencing academic difficulties throughout. The parents notified the local school district, who completed an evaluation and offered special education programs and services at either of two middle schools in the district. The parents disagreed and placed the student in a private school, and requested a hearing seeking reimbursement. The hearing officer assigned the burden of proof to the parents, and after three days of hearing determined that the evidence was exactly equal on each side. Since the parents had the burden of proof, he found that they failed to meet that burden and ruled in favor of the school district. The parents appealed and the case spent the next several years navigating through various appeals, remands and multiple hearings. Ultimately, the hearing officer awarded reimbursement to the parents (although only partial) for the private school placement, and the Federal District Court granted summary judgment to the parents awarding all tuition and finding that the district bore the burden of proof. On appeal, the Fourth Circuit Court of Appeals ruled that there was no reason to depart from the typical rule assigning the burden of proof to the party seeking relief, and reversed the District Court decision. The parents appealed to the United States Supreme Court, which granted *certiorari*.

The Supreme Court began its analysis by differentiating between the burden of persuasion and the burden of production. This case dealt solely

with the issue relating to the burden of persuasion; namely, which party wins if the evidence is closely balanced. Noting that the text of the IDEA was silent as to who bore the burden of persuasion, the Supreme Court began its analysis with the general rule that the plaintiff (person seeking relief) bears the burden of persuasion.

For every rule, however, there are exceptions, and the Supreme Court acknowledged that there are times where the burden of persuasion is shifted to the other party. Decisions which place the entire burden of persuasion on the opposing party from the outset, however, are extremely rare. The parents presented two different arguments, though, asking the Court to do just that.

First, the parents argued that placing the burden of proof always upon the school district furthered the IDEA's purpose in that it would insure that children receive a free appropriate public education. Stating that very few cases would be in "evidentiary equipoise," the Supreme Court found that assigning the burden of proof to the school district would encourage districts to put more resources into preparing IEPs and presenting evidence. Stating that the IDEA was silent about whether the "marginal dollars" available should be allocated to litigation and administrative expenditures, the Court rejected this argument. The Court stated that, in essence, petitioners were asking the Court to assume that every IEP created is invalid until the school district is able to demonstrate that it is not. The Court refused to adopt this approach, noting that such conclusion is not supported by the IDEA and that the IDEA relies heavily upon the expertise of school districts. Had Congress intended that a school district's IEP be considered inappropriate until proven otherwise, it would not have included a "stay put" provision requiring maintenance of the then current educational placement during IDEA hearings. Instead, if an IEP was presumed invalid, Congress would have required a child to be given the educational placement requested by the parent.

The most plausible argument advanced by the parent was that school districts have a "natural

advantage” in information and expertise. The Court rejected this argument, finding that the school district bears no unique informational advantage. The Court cited to the procedural protections set forth in the IDEA including the right of parents to review records, obtain an IEE, requirements that districts answer the subject matter of complaints in writing, including the reasoning behind the disputed action, disclosure of evaluations and recommendations prior to hearings, and a parent’s right to recover attorney fees if they prevail as some of the factors which place parents in the same “informational” position as school districts.

Lastly, the parents requested that the Supreme Court decide that states could, if they chose, establish a rule that always placed the burden on the school district. The Court refused to decide this issue, since no state law or regulation purported to do that in Maryland (the state from which the case arose). Justice Breyer (dissenting) would have left the allocation of the burden of proof entirely up to the individual states.

In closing, the Supreme Court stated: “We hold no more than we must to resolve the case at hand; the burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. * * * But the rule applies with equal effect to school districts: If they seek to challenge an IEP, they will in turn bear the burden of persuasion before an ALJ.”

Action: The Supreme Court decision resolved a split of authority between the Circuits. The Sixth Circuit, which Michigan is a part, has held that the party challenging the IEP had the burden of persuasion for several years. See, Cordrey v Euckert, 917 F 2d 1460 (6th Cir., 1990); Doe v Tullahoma City Schools, 9 F 3d 455 (6th Cir., 1993), and Doe v Defendant I, 898 F 2d 1186 (6th Cir., 1990). Thus, in Michigan, the party appealing the IEP has typically borne the burden of proof. Given the dissent, it will be interesting to see if states attempt to pass statutes or administrative rules reallocating the burden of proof.

Some hearing officers have held that procedural violations may “shift” the burden of proof from the parent to the district. This issue was not addressed by the Supreme Court, except that in some situations a defendant may have the burden of proof in an “affirmative defense.” In reality, most due process hearings include significant evidence and testimony and as the Supreme Court stated, perfect “evidentiary equipoise” is rare. Thus, the burden of proof is rarely the deciding factor.

“What we want to see is the child in pursuit of knowledge and not knowledge in pursuit of the child”.
~G.B. Shaw

SUPREME COURT AGREES TO HEAR EXPERT FEE CASE

To resolve another split between the Circuits, the U.S. Supreme Court has agreed to hear an appeal of the Second Circuit decision in Murphy v Arlington Central School District Board of Education, 43 IDELR 31 (2nd Cir., 2005). The Second Circuit held that expert fees were available and could be awarded under the IDEA. Previously, the Seventh Circuit and the Eighth Circuit have both rejected claims that expert fees are available under the IDEA. The U.S. Solicitor General has

urged the Court to reverse the Second Circuit decision which granted nearly \$30,000 for expert “educational consultant” fees. The Solicitor General, agreeing with the Seventh and Eighth Circuits, argued that awarding expert fees contradicts both the express terms of the IDEA and Supreme Court precedent. It is unknown when the Supreme Court will hear argument or issue a decision.

**DISCLOSURE OF EDUCATION RECORDS TO MEDICAID BILLERS AND OTHER
THIRD PARTIES MAY VIOLATE FERPA**

Responding to an inquiry from a program consultant with the Iowa Department of Education, the Family Policy Compliance Office (FPCO) recently explained that there is no exception in FERPA's definition of an education record that would exclude records used to submit Medicaid reimbursement claims to a state Medicaid fiscal agent. Further, the FPCO did not find any exception to the requirement that would permit a district or education agency to disclose personally identifiable information without first obtaining prior written consent from the parent (or eligible student). Letter to Stevens, 105 LRP 58479 (FPCO, 2005).

In this case, local school districts and intermediate agencies (AEAs) seek reimbursement for eligible services provided under Part B of the IDEA. The AEAs provide support services to local districts such as physical therapy, occupational therapy, speech and language therapy and behavioral support from school psychologists and social workers. In Iowa, the Medicaid program provides that an IEP must define Medicaid eligible services.

The AEAs use a statewide system that stores the IEP service information and generates a "Medicaid Service Form" that includes the student's name, date of birth, Medicaid ID, attending school, IEP services, and staff assigned to work with the student. Once the form is completed by AEA staff, the data is entered into the computer system. Local districts are also permitted to seek Medicaid reimbursement using electronic filing or paper claims that contain the same student information. All Medicaid claim documentation is maintained in an area separate from the student's IEP file.

Under FERPA, the term "education records" is defined as those records directly related to a student and are maintained by an educational agency or institution. Although FERPA contains a number of exceptions to the definition of "education records" (e.g., records kept in the "sole possession" of the maker under specified conditions, records of the institution's "law enforcement unit," employee or personnel records, or records of medical and psychological "treatment" of post secondary

students), there is no exception to the definition of "education records" for records used to submit reimbursement claims to a state fiscal agent. Moreover, there is no exception to the written consent requirement that permits disclosure of personally identifiable information to the Medicaid fiscal agent without the written consent of the parent (or eligible student). However, under § 99.30(a), an education agency or institution may disclose education records if a parent has provided prior written consent to a third party authorized to receive the records, such as the designated Medicaid fiscal agent.

This opinion is consistent with other FPCO opinions which have noted that "while FERPA does not prescribe specific methods that should be used to protect education records from unauthorized access or disclosure," its prohibition against disclosing or permitting access to education records without consent "clearly does not allow an educational agency or institution to leave records unprotected or subject to access by unauthorized individuals, whether in paper, film, electronic, or any other format." See, Letter to McGraw, 105 LRP 58481 (FPCO, 2005) (where a proposal to allow offices and agencies to share a computer network and personnel with the school system would violate FERPA, because electronic student educational records could be accessed by persons of entities not employed by the school system).

Action: Limited disclosure of educational records without parental consent is permitted under FERPA in some instances. Disclosure may be made to school officials within the agency or institution who have a "legitimate educational interest" or to the officials of another agency or institution where the student seeks or intends to enroll. "School officials" generally include administrators, teachers, members of committees and school boards, counselors and attorneys employed or contracted by the district. A school official has a "legitimate interest" if the official is performing an official task for the agency or institution that requires access to information in education records. See, Letter re: Haralson County Sch. Dist., 105 LRP 6997 (FPCO, 2004). Thus, the

Medicaid fiscal agent would likely not be a “school official” with a “legitimate educational interest.” However, the FPCO has pointed out that an educational agency may disclose protected education records if a parent has provided prior written consent to a third party authorized to receive those records, such as the Medicaid fiscal agency. Districts that use a fiscal agent to process Medicaid reimbursement claims should check to make sure that the parents of Medicaid eligible students have consented to the release of educational records for

purposes of processing these claims. Districts that make educational records available to third parties in electronic form or through a network must take steps to ensure that access is limited to only those student records for which the third party has consent. General access to all student records electronically by third parties or school employees would likely be found to violate FERPA.

TENURE CASE TAKES BACK SEAT TO CRIMINAL PROSECUTION, BUT RECORDS MUST BE PRODUCED UNDER FOIA

In Southgate Community School District v County of Wayne and Wayne County Prosecuting Attorney (unpublished, 12/20/05), the Michigan Court of Appeals found that the Circuit Court did not err in granting the school district’s motion to have the county prosecuting attorney produce certain documents but ordering that the documents not be released until after the completion of a criminal trial.

The school district submitted a FOIA request to the prosecuting attorney’s office seeking documents and records pertaining to the upcoming criminal trial of a teacher who was charged with criminal sexual conduct involving a student. The school district had tenure proceedings pending against the teacher. The prosecuting attorney’s office denied the school district’s FOIA request indicating that because criminal proceedings were still in progress, the documents would be exempt pursuant to MCL 15.243(1)(1)b. This provision of FOIA exempts from disclosure investigating records that were compiled for law enforcement purposes to the extent that disclosure would either interfere with law enforcement proceedings or deprive a person of the right to a fair trial. The prosecuting attorney’s letter, however, did not specify the specific basis upon which the prosecuting attorney’s office relied in denying the request.

The school district appealed the matter to the Wayne County Executive, who granted the school district’s appeal with regard to its assertions that the

prosecuting attorney’s office failed to specify sufficient grounds upon which to base the denial, but denied the appeal with respect to the request that the documents be released immediately. The Wayne County Executive sent the matter back to the prosecuting attorney’s office for a more detailed statement of the justification for the claim of exemption. Before the prosecuting attorney responded, the plaintiff brought an action in Circuit Court.

At the hearing, the prosecuting attorney indicated that the criminal trial would be held within two weeks. The prosecuting attorney argued that disclosure of the requested documents prior to trial would jeopardize the defendant’s chances of a fair trial. The Circuit Court granted the plaintiff’s motion for production of the documents, but noted that the tenure hearing could be adjourned and ordered that the documents not be released until after the completion of the criminal trial. The Court of Appeals found that the Circuit Court correctly weighed the risk of disclosure, the denial of a fair trial in the criminal case, against the harm and delay in the tenure hearing.

Action: When responding to a FOIA request a district must be sure to specify the reason for the denial. Failure to do so may subject the district to costs and attorney fees if the person requesting the documents takes the matter to Circuit Court.

For questions regarding School Law issues, including FERPA, FOIA, OMA, Special Education, Discipline, etc. call one of Scholten Fant’s School Law attorneys: John S. Lepard, Michael L. Bevins, Daniel R. Martin or Bradford W. Springer.

COURTS BEGIN INTERPRETING REQUIREMENTS OF IDEA 2004

School districts have been implementing IDEA 2004 since July 1, 2005. One of the areas which had significant statutory changes was the due process hearing procedures. Even without final regulations, Courts and hearing officers have been called upon to interpret these new procedures and have given guidance as to these requirements.

Sufficiency of Due Process Complaint Notice.

No longer is merely “checking a box” sufficient to initiate due process procedures. Instead, IDEA 2004 expanded upon the requirement that a party seeking a due process complaint must file a notice which meets certain statutory requirements. The notice is required to set forth, among other things, a description of the nature of the problem of the child relating to the district’s proposed initiation or change, including facts relating to such problem, and a proposed resolution of the problem. A party is prohibited from having a due process hearing unless a sufficient due process complaint notice has been filed. What constitutes a sufficient due process complaint notice has been the focus of a number of cases.

In regard to the first requirement that a party set forth the nature and facts relating to the problem, hearing officers have held that the complaint notice must provide sufficient specificity to enable a district to file a response which includes an explanation of why the district proposed or refused to take the action raised in the complaint, a description of the other options considered, a description of the evaluation procedures assessment or records relied upon by the school district, and a description of other relevant factors. *See, Howard County Public Schools*, 105 LRP 57809 (SEA Md., 2005). To do so, the due process complaint notice may not merely set forth general allegations and a summary of events covering several years. For example, in *Howard County*, *supra*, the parent filed a due process complaint notice which included a comprehensive summary of medical issues and allegations spanning a five-year period, including falsification of documents and failure to disclose the student’s IEP. While the hearing officer indicated that some of these allegations may rise to the level of a “complaint,” the hearing officer held

that the parent did not specifically identify the nature of the problem or provide supporting facts relating to the problems sufficient to permit the district to respond and prepare for hearing. As a result, the hearing officer granted the district’s request for a “more definite statement” and directed the parent to file an amended due process complaint notice.

In *Portland Public School District*, 44 IDELR 232 (SEA Or., 2005), the hearing officer specifically addressed the three components of the required complaint notice. While more general descriptions of the nature of the problem may be sufficient, there must be sufficient facts supporting the allegation. For instance, the parents alleged an issue for the hearing as being “whether the district should reimburse the parents for educational services and experiences privately obtained from July, 2000 through June, 2004.” The hearing officer stated that this notice failed to set forth the nature of the problem or any facts relating to the problem. By example, the hearing officer stated that the notice did not identify what educational services or experiences had been provided, or what reimbursement was being sought. Further, the allegations covered nearly a four-year period of time, some of which may be barred by the statute of limitations. Similarly, an allegation that the district failed to assess the student in all areas related to the suspected disability and failed to provide FAPE by failing to provide an adequate IEP lacked sufficient specificity. While this issue may set forth the nature of the problem, no facts were alleged describing the nature of the failures or the resulting denial of FAPE. Lastly, the hearing officer looked to the parents’ proposed resolutions, and found that no resolutions were set forth in the complaint notice, and there had been no attempt to provide information as to why the proposed resolutions would be appropriate. For these reasons, the hearing officer found the due process complaint notice failed to meet the requirements of the statute and dismissed the due process complaint.

In *Baltimore City Public Schools*, 105 LRP 57759 (SEA Md., 2005), the parent alleged that the district had neglected to provide appropriate IEPs or

hold required IEP meetings. As a resolution, the parent merely requested that the matter be resolved by a “higher authority” such as a hearing officer or Court. When addressing the sufficiency of the notice, the hearing officer first held that “nothing in the law gives the parent the right to respond” to the school district’s objection as to the sufficiency of the due process complaint notice. See also Howard County, supra, holding the same. Instead, the hearing officer must determine whether “on its face” the notice meets the requirements of the statute. The hearing officer held that merely asking that a hearing officer make a determination was not a proposed resolution, but rather a request for the forum in which the complaint would be resolved. Such request was insufficient and the due process complaint notice was dismissed.

In ISD No. 719, Prior Lake Public Schools, 106 LRP 1882 (SEA Mn., 2005), the hearing officer found the complaint notice sufficient because the notice described the nature of the student’s problems, the neurological deficit that affected his abilities, which had not adequately been addressed through the alleged inappropriate IEP because of a lack of adequate services. While not describing the extent of the facts, the hearing officer found that the complaint notice alleged “some facts relating to such problems,” and that was all that was required. Turning to the resolutions, the hearing request set forth eleven specific changes to the IEP which were requested, and found that this constituted a proposed resolution. Thus, the due process complaint notice was found to be sufficient.

District’s Response to Due Process Complaint Notice.

Once a sufficient due process complaint notice has been filed, a school district is required to respond within ten days. In Massey v District of Columbia Public Schools, 400 F Supp 2d 66, 44 IDELR 163 (Dist. Ct. D.C., 2005), a Federal Court found that the district had failed to provide a response which met the requirements of the statute. Specifically, the District Court found that the district’s response must meet the requirements of the statute, which requires that the district provide an explanation of why the agency proposed or refused to take an action, a description of the other options considered by the IEP team, and the reasons those options were rejected, a description of each evaluation procedure, assessment or record used for the basis of that proposal or refusal and a description of other relevant factors. While the

school district claimed that its placement notice fulfilled these requirements, the District Court disagreed. The statute sets forth specific content for the school district’s response, and there is no evidence that Congress “intended an exemption for ‘close enough’.”

Resolution Sessions.

In Massey, supra, the Court also addressed the scheduling of a resolution session. In that case, the school district had attempted on several occasions to contact the parent and reach a mutually agreeable time for the resolution session. The parent, however, failed to return the calls, and the district did not schedule the resolution session. The Court stated:

“For purposes of compliance with the IDEA’s requirement to hold a resolution session within 15 days of receipt of a due process hearing request, this Court finds that it is immaterial how many times DCPS called the Masseys. It was appropriate for DCPS to attempt to consult with the Masseys in order to schedule the conference, but it should not have used their lack of response as an excuse for allowing the statutory deadline to pass unheeded. The statute obligates DCPS to hold a session within 15 days. It does not make allowances for difficulties in communicating. Particularly since DCPS knew the Masseys were represented by counsel, there is no excuse for their failure to call counsel or to simply schedule the conference within the statutory time frame and advise counsel or the parents thereof.”

In Spencer v District of Columbia Public Schools, 45 IDELR 11 (Dist. Ct. D.C., 2006), the Court held that a parent may not “side-step” the requirement of a resolution session. In that case, the parents had initiated the due process procedures, and a resolution session had been scheduled. The parents, however, withdrew the request for a hearing prior to the resolution session. On the day the resolution session was to have been held, the parents again filed a due process complaint notice, and the district rescheduled the resolution session. The parents filed an action in Federal Court seeking to have the judge order the district to hold a due process hearing, and find that the district had violated her rights by failing to hold the resolution session within 15 days. The Court denied the



request, finding that the resolution session had been appropriately scheduled, and that by failing to participate in the due process procedures, the parents had failed to exhaust administrative remedies. Since the time line for a due process hearing had not expired, the Court refused to issue the requested injunction against the district.

Action: It is imperative for a district to pay close attention to the procedures set forth in IDEA regarding due process complaints. The time lines are specific, and failure to comply with time lines may have significant effects. Additionally, Michigan Department of Education still requires that a school district notify it within one business day of receiving a due process request (regardless of whether the complaint notice has been filed or is sufficient) to allow it to begin the process to appoint a hearing officer. Whether a hearing officer has been appointed or not, several actions must be taken within the appropriate time lines.

If the due process complaint notice is not sufficient, an objection must be filed. It is recommended that this objection be filed within 10 days, though it is not required until 15 days following the receipt of the due process complaint notice. However, if the objection is not filed, the district must file its response, meeting the statutory requirements, within 10 days. As the Court held in Massey, supra, relying on the prior placement notice (in Michigan we use the IEP document for this purpose) may not be sufficient.

Whether to object to the sufficiency of the complaint notice and seek dismissal or a “more definite statement” (amendment) is a matter of strategy which the district should discuss with its

counsel. Holding that a parent has no right to file a response to the district’s objection, the hearing officers have decided these issues on the face of the complaint notice. When a district has sought a “more definite statement,” the hearing officers have directed amendment of the complaint notice. Where districts have sought dismissal, however, complaint notices have been dismissed. While the notice may be dismissed, nothing would prohibit the parent from filing an additional due process complaint notice which would meet the statutory requirements alleging the same or similar issues, and the process would begin anew.

A district is required to schedule a resolution session within 15 days. There is no requirement in the statute that this session be set at a “mutually agreeable” time and place. As the Court also held in Massey, supra, the statute requires the scheduling of the meeting and does not provide for difficulties in communication with the parents. At the very least, the district should schedule the meeting and notify the parents (and/or their counsel) of the date and time. If the parents fail to attend, they are prohibited from having a due process hearing until such a time as they do, or until the parties agree to waive the resolution session or utilize mediation. As with MDRs, do not let a parent’s lack of response push the district into noncompliance with its statutory obligations.

The due process procedures have become increasingly complicated and time sensitive. Upon receipt of a due process complaint, the best advice is to immediately notify your special education director and your school district’s counsel.

NON-TEACHER COACH NOT MEMBER OF BARGAINING UNIT

The Michigan Court of Appeals has held that a coach who is not a teacher was not a member of the collective bargaining association and therefore could not grieve or arbitrate his termination. Marquette Area Public Schools v Marquette Area Education Association, (unpublished, January 19, 2006).

The individual was employed as the girls’ head track coach for the 2003-2004 school year. He was employed only in the extra-curricular coaching position and was not a certificated teacher. In

March of 2004, the school district terminated his employment as a coach. The Education Association filed a grievance under the collective bargaining agreement and demanded arbitration of the matter. The school district rejected the grievance and the demand for arbitration on the grounds that they were not covered by the collective bargaining agreement because he was not a member of the collective bargaining association, and further that the collective bargaining agreement specifically precluded arbitration of grievances concerning

termination from employment and extra-curricular coaching positions.

The collective bargaining agreement provided in relevant part:

The bargaining unit shall consist of:

All regularly scheduled full-time and part-time certificated teaching personnel under probationary contract or continuing tenure, including counselors, alternative school personnel, department heads, nurses, social workers, psychologists, therapists, Planetarium Director, and Coordinators; but excluding . . . [specifically named administrative and other positions], and all other employees including supervisors.

Both the trial Court and the Court of Appeals agreed with the school district that under the plain language of the collective bargaining agreement, a non-certificated coach was not a member of the bargaining unit. Therefore, absent some other provision in the collective bargaining agreement to the contrary, the coach's employment would not be governed by the collective bargaining agreement. The Court found no other provision in the collective bargaining agreement that would protect the coach. The fact that other provisions included in the

collective bargaining agreement address extra-curricular positions did not warrant a conclusion that a non-member extra-curricular employee would be governed by the collective bargaining agreement merely because they were hired to fill a position that could have been filled by a bargaining unit member.

The collective bargaining agreement also provided in relevant part that an arbitrator shall have no power to rule on any of the following: "The termination of services or failure to re-employ any teacher to a position on the extracurricular schedule." The Court of Appeals found that under this provision, termination from employment in an extra-curricular position would not be subject to arbitration under the collective bargaining agreement even if the individual would be considered a teacher.

Action: This case was fact dependent upon the actual language contained in the collective bargaining agreement. The language is fairly standard and typical, but it is important to review your own collective bargaining agreement.

**DON'T BE FOOLISH. GOVERNMENT IMMUNITY IS NOT IRONCLAD.
YOU CAN BE SUED**

Recently, various Michigan Courts examined the protections offered by governmental immunity as it applies to school districts and their employees and volunteers. Although immunity is an available shield in most cases, the Michigan Court of Appeals declared and all should note: "Foolish and ill-advised actions can equate to recklessness" and recklessness can lead to personal liability.

"We've Always Done It That Way" May Equal Liability.

In a case involving a counseling session without parental consent following the hanging death of student, Choquette v Onsted Community Schools, (unpublished, 9/1/05), the parents of a six year old student who was allegedly traumatized by the counseling session because she did not comprehend the situation until after attending the session brought suit against the school district. The Court found there was no civil rights violation by the

school district because the plaintiff could not show the complained of counseling session was based on a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." The Court cautioned, however, that a policy need not be in writing to be the basis of a civil rights complaint. A policy could be a "widespread practice" or a "custom" so ingrained as to equal a "legal institution not memorialized by written law." Consequently, be cautious of "standard operating procedures" and situations that arise "because that's the way we've always done it." Such standard practices need to be carefully considered because the failure to evaluate long standing practices could result in liability for a bad "policy."

Dealing with disruptive, aggressive or hostile students of any age requires care and caution.

The Sixth Circuit recently considered the horrible case of a first grade boy who brought a gun



to school and killed a classmate, when the teacher was out of the room. McQueen v Beecher Community Schools, ___F3d ___ (6th Cir., 2006) In this case, the teacher left the boy and a number of other students alone in a classroom while she walked another group of students down the hall to another room. The parents of the deceased classmate claimed that the act of leaving the students unsupervised in the classroom created the danger which resulted in their daughter's death. The Court rejected this argument, finding that the danger would have been there had the teacher been in the room or not; namely, the student possessing a gun, loading it and firing.

The parents also argued that the school district should have known that the boy posed a substantial danger. The Court focused on the knowledge of the teacher and the school to determine whether either was liable for the civil rights violations. While the boy had a history of being disruptive, aggressive and had once threatened another student with a pencil, the Court did not find any evidence to conclude that the teacher knew or should have known that the boy brought a weapon to school or would use a gun to kill a classmate if left unsupervised. The case file also was devoid of evidence that the boy previously brought a gun to school or previously threatened to kill a classmate. Due to the lack of specific knowledge and the lack of historical threat the parents were unable to establish the school district's liability.

Governmental Immunity for Well Organized and Run Parent – Teacher Organizations and Their Volunteers:

A young boy, who was under the care of the defendant parent – teacher organization (PTO) while his mother was attending a meeting of the organization, was injured. The parents sued the PTO and its volunteers.

In Smith v Parents & Teachers Together (unpublished, 11/15/05), the Michigan Court of Appeals held that since the PTO was an organization established pursuant to Michigan statute by the school district and was set up in fulfillment of the district's statutory duties, the PTO was covered by governmental immunity and the parents' suit was blocked by immunity. In support of its conclusion, the Court noted that this PTO operated according to the applicable rules, its funds were handled by the school district, and its services were provided to the school district. By noting all

of the elements and organizational behaviors that this PTO did correctly, the Court left open the possibility that a PTO that is not fully organized or does not reflect the behaviors done by the PTO in this case, may not be covered by governmental immunity.

Foolish Coaches May Be Personally Liable for Player Injuries. The Amount of Injury and the Intent to Injure are Irrelevant to Finding Liability.

In Barry v Ishpeming-Nice Community Schools (Michigan Court of Appeals, unpublished, 11/15/05), an injury was sustained by a player which was allegedly caused by his football coach at practice. The Court concluded that there were enough factual questions concerning whether the coach's behavior constituted gross negligence to present the matter to the jury for its decision on the issue of whether the coach's conduct constituted gross negligence and therefore governmental immunity did not apply. In reaching this decision, the Court reviewed the principles of governmental immunity and gross negligence. Importantly, in its discussion, the Court stated that the governmental immunity statute does not make any distinctions for the degree of injury suffered. The Court stated that there was not a "necessary and determinative correlation between the seriousness and directness of an injury and establishing a substantial lack of concern for whether an injury results." Further, the plaintiff need not show that a defendant showed a lack of concern as to whether a "particular" injury would occur so long as the injury was conceivable or may likely flow from the behavior. Consequently, the plaintiff does not need to show intent to injure.

The Court confirmed and all should note:

"Foolish and ill-advised actions can equate to recklessness" and recklessness of this nature can lead to liability."

Governmental immunity protects the district from the results of the administrator's allegedly grossly negligent conduct when the plaintiff does not sue the individual administrator.

In Darrow v Potterville School District, (unpublished, 1/10/06), the Michigan Court of Appeals held that a school district has governmental immunity for claims for intentional infliction of emotional distress and negligent infliction of emotional distress. The plaintiff sued the school district claiming that she suffered emotional distress

in connection with the termination of her employment. She argued that because the school district employees' actions amounted to gross negligence, the school district itself should not be entitled to governmental immunity.

The Court recognized the difference between the administrator and the district. The Court found the gross negligence exception to governmental immunity allowed by statute applies only to the immunity conferred on the individuals acting on behalf of a governmental agency. The exception to immunity did not apply to the governmental agency. A governmental agency itself cannot be grossly negligent and lose its immunity. Furthermore, governmental agencies cannot be vicariously liable for the intentional torts of their

employees. As such, the Court found that the defendant school district had governmental immunity for the plaintiff's claims of intentional and negligent infliction of emotional distress.

Action: Governmental immunity is established by statute but the Courts look at real behavior to determine how far the immunity extends. Immunity is not concrete. Thoughtful behavior is protected by immunity. Foolish behavior is not.

U.S. COURT OF APPEALS ADOPTS QUALITATIVE STANDARD FOR DETERMINING COMPENSATORY EDUCATION

In two recent cases decided by the U.S. Court of Appeals, the District of Columbia Circuit adopted a qualitative standard to be used in calculating compensatory education awards where there has been a denial of FAPE, holding that the purpose of compensatory education is to put the disabled student in the same position the student would have been in had the district not denied FAPE in the first place.

In Reid v District of Columbia, 43 IDELR 32 (D.C. Cir., 2005), the D.C. Circuit Court of Appeals held that compensatory education awards should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA. In that case, a hearing officer had awarded one hour of compensatory education for each day of special education services that were not provided. The plaintiff urged the Court to adopt a presumption that each hour without FAPE entitles the student to one hour of compensatory instruction. The D.C. Circuit rejected these "cookie cutter" approaches to calculating compensatory education. The Court reasoned that compensatory education is not a contractual remedy but an equitable remedy, part of a Court's resources in crafting appropriate relief for a denial of FAPE in any given case. The Court explained that compensatory education involves discretionary, prospective, injunctive relief crafted by a Court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide FAPE to a student. Just as IEP's must focus on disabled students' individual needs, so

must awards compensating past violations rely on individualized assessments. The Court went on to explain that some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies, while others may need extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE. The Court concluded that in every case the ultimate compensatory education award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.

The D.C. Circuit followed Reid in another compensatory education case decided months later. In Branham v District of Columbia, 105 LRP 52133 (D.C. Cir., 2005), the Court reversed a compensatory education award that was issued by the lower Court without a sufficient factual record to support the award. The Court held that because the ultimate compensatory education award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place, the determination of the compensatory education award in a given case must be a qualitative, fact-intensive determination that is above all tailored to the unique needs of the disabled student. Such a determination must be based on an assessment of what services the student needs to elevate him to the position he would have occupied absent the school district's failures.



Action: The best defense against a compensatory education award is to make sure a student's IEP is calculated to provide FAPE, and that it is implemented. Most cases involving compensatory education could be easily avoided by merely assuring the services provided for in the IEP are delivered. But where a lapse in service occurs, an hour-for-hour calculation is not enough. Instead, expert testimony will need to be produced to show where the child would have been if the student had

received the services. Such predictions will be fact-intensive and individualized based on the student's disability and his or her needs.

"Save the Date"

Scholten Fant Client Workshop: April 17, 2006

UNITED STATES DISTRICT COURT FINDS ASPERGER'S SYNDROME ADVERSELY AFFECTED STUDENT'S EDUCATIONAL PERFORMANCE

Adverse affect and the need for special education services are two criteria which are necessary in nearly every eligibility determination made under the IDEA. A Federal District Court recently examined these two aspects of eligibility in a case dealing with a student diagnosed with Asperger's Syndrome. In Mr. and Mrs. I v Maine School Administrative District 55, 45 IDELR 4 (D.C., Me., 2006), the Court found that a student with Asperger's Syndrome who was not disruptive in class and academically received all As and Bs, still met the requirements for eligibility under IDEA because the disability affected the student's social interactions and other aspects of "educational performance."

The parents of a 12-year-old girl with Asperger's Syndrome sought a due process hearing and reimbursement for private school tuition. The student attended school through her elementary years and performed well academically, but began exhibiting signs of anxiety, depression, and difficulty with her peers in fourth and fifth grades. The student received school counseling, outside counseling and medication which did not seem to help. In sixth grade, the student began changing her appearance, her clothing and decided to do worse academically in an effort to fit in with her peers. She began missing school, began cutting her arms and ultimately attempted suicide after which she was hospitalized. During the hospitalization, the student refused to return to the public school.

The parents notified the school district and requested services. A special education evaluation was undertaken and the district suggested (though never provided) ten hours per week of tutoring services until the evaluation was completed. Ultimately, the IEP team determined that the student was not eligible for special education

services since her diagnosis of Asperger's Syndrome and depression had not "adversely affected" her educational performance. Apparently the IEP team focused solely on the student's academic achievement. The team did, however, find the student eligible under Section 504 of the Rehabilitation Act and provided accommodations including "close supervision, two hours per week of speech/language therapy services, two half hour sessions of social services per week and access to the district's 'gifted and talented' offerings."

During the time the evaluation was pending, the family attempted home schooling. Being unsuccessful, the family placed the student in a private school on a part-time basis, and sent a letter to the school district pointing out that it failed to provide a tutor, and stating that the student would begin private school. Later, when the student began attending the private school four days per week, the parents sent another letter indicating that they were "planning to enroll" the student in a private school and referred to district payment. While at the private school, the student made excellent progress in all of her classes and, over time, developed more positive peer relationships, and became less withdrawn or isolated from her peers.

Ultimately, the matter went to a due process hearing over the IDEA eligibility. The hearing officer, while acknowledging that academic achievement was only one part of educational performance, found that because the student's disability did not affect her academic performance, and no special education was necessary for academic needs, the student was not eligible. On appeal to the Federal Court, a magistrate judge found that the hearing officer had defined "educational performance" too narrowly, and stated

that such performance also included performance in non-academic, extra-curricular areas.

Notwithstanding this, the magistrate judge found the error to be “harmless” and affirmed the hearing officer’s decision that the student was not eligible. (See magistrate decision reported at 43 IDELR 197, 2005.) The judge, however, did not adopt this finding, instead determining that the error was not harmless, and that the student was eligible under IDEA.

In discussing the “adverse affect” requirement, the Court pointed out that educational performance involves more than just academic achievement, and includes such things as communication skills, non-academic areas such as daily life activities, extra-curricular activities and progress in meeting goals established by the state general curriculum. In Maine (as in Michigan) state curricular standards included items much broader than merely academic performance. The Court stated that while a diagnosis of Asperger’s Syndrome in and of itself does not guarantee eligibility, in this case, the student’s Asperger’s Syndrome negatively affected several areas related to educational performance, albeit not academic achievement. The Court interpreted the phrase “adversely affects” as meaning any adverse affect on educational performance, however slight. The Court refused to adopt any qualifier such as “substantial,” “significant,” or “marked.” Nor was the Court willing to impose a time requirement for the length of time the student’s performance had been affected.

Turning to the question of a “need” for special education, the Court found that this issue was not properly before it as the parties had not identified need as being an issue in the hearing. Instead, the Court determined that the parties had agreed that the student “needed” the services recommended by the various experts. Thus, since the student’s disability had an adverse impact on her educational performance, and there was no issue relative to the

“need” for special education, the Court directed the district to convene an IEP team meeting and to develop an IEP.

Notwithstanding the above, the magistrate judge’s denial of reimbursement was affirmed. The Court found that the parents were not entitled to reimbursement since they had failed to show that the private school in which they enrolled the student met the second prong of the Burlington/Carter test as being “appropriate.”

The school district’s attorney stated that the district intends to appeal the ruling to the First Circuit Court of Appeals since the ruling is “breathtakingly broad.”

Action: This case illustrates the need to look beyond mere academic performance when determining whether or not a student’s disability adversely affects a student’s educational performance. If there is an adverse affect, the district must then look next to whether or not the student “needs” special education programs and services. While the statutes do not include the qualifiers “substantial,” “significant,” or “to a marked degree,” the level of adverse affect is, in reality, “qualified” by the criteria requiring that the adverse affect “necessitates” special education programs and services in order for the student to benefit. In Mr. and Mrs. I, the issue of the student’s need was not contested.

When making eligibility determinations, districts must consider the adverse affect the student’s disability has on educational performance. Be careful not to define this too narrowly and take into consideration all aspects of the student’s functioning, including non-academic and extra-curricular areas. Further, it must be remembered that under Michigan law, unlike the federal statute, the need for a related service is the need for special education services. Thus, a student who only needs a related service (e.g., social work, speech and language, etc.) will meet this criteria for eligibility under IDEA.

For assistance with policies, guidelines or professional development workshops call one of the Scholten Fant School Law Attorneys: JSL, MLB, DRM, BWS

**USE TIMELY AND SPECIFIC DETAILS IN REGARDING TO FOIA REQUESTS:
SOFTWARE EXCLUDED**

The Michigan Court of Appeals recently provided some insight as to the requirements for extending the time frame in responding to a Freedom of Information Act request and in charging fees, in Simpson v Washtenaw County Clerk and Washtenaw County Election Administrator, (unpublished, 12/22/05).

The plaintiff requested the opportunity to examine and copy qualified voter and master card files, as well as all annotations made during a recall petition evaluation, and the software associated with the electronic qualified voter file. The FOIA Coordinator initially responded to the request by unilaterally extending the time frame an additional ten business days, but not providing any reason for invoking the extension. Within the ten additional business days, the FOIA Coordinator responded by denying the request for the software, citing MCL 15.232 which expressly exempts software from the definition of a public record. The FOIA Coordinator also denied plaintiff's request for all annotations made during the recall petition evaluation, indicating that no such records existed. The plaintiff's request was granted in all other respects, and if the plaintiff chose to pursue the request further, the fees to obtain the information were provided, including charges of \$5.00 per CD-R copy and \$.20 per page. The FOIA Coordinator concluded the response letter by informing the plaintiff of his statutory right to either appeal the decision to the county administrator or seek judicial review in Circuit Court. The plaintiff went to Circuit Court.

The Court held that when extending the time frame within which to respond to a FOIA request, the FOIA requires that the notice "specif[y] the reasons for the extension and the date by which the public body" will either grant or deny the request in whole or in part. Failing to specify the reasons for invoking the extension means the county did not comply with the FOIA. The Court acknowledged that a public body is not limited to the "unusual

circumstances" necessary to unilaterally extend the statutorily prescribed ten-day period for responding to an appeal of a FOIA denial, when extending the time for a response to an initial FOIA request. While there need not be any unusual circumstances, a public body must specify the reasons for the extension. The Court held that any denial of a FOIA request must be contained in a writing setting forth the reason for the denial, including an explanation of the basis for any claimed exemption from disclosure. Furthermore, where the basis for a denial is that the public record requested does not exist, the public body must also provide the requesting part with a "certificate that the public record does not exist under the name given by the requester or by another name reasonably known to the public body." The Court found that the FOIA Coordinator's denial for the software was appropriate where the FOIA Coordinator cited the statute as the basis for denying disclosure of the software. Finally, the Court turned to the issue of fees and found that the Trial Court erred in deciding that the fees to be charged were not excessive. Even though fees quoted may seem reasonable on their face, reasonableness is not the test for compliance with the express statutory requirements concerning the fees that may be charged by a public body in compiling and producing public records requested under the FOIA.

Action: When extending the time frame for responding to a FOIA request, a public body must specify the reasons for the extension and provide the date by which the public body will either grant or deny the request. Any fees charged must be limited to the actual mailing costs, the actual incremental costs of duplication or publication (including labor), the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information, and must be specified in the estimated costs.

OMA REQUIRES THE PRESENCE OF AN ATTORNEY FOR CLOSED SESSION

The Michigan Court of Appeals, in an unpublished decision, recently ruled that a township board violated the Open Meetings Act (OMA) when it adjourned to a closed session to discuss pending litigation, without its attorney present. Jefferson Township v Zoltan Tiser Jr., et al., (December 6, 2005).

The OMA provides that all meetings of a public body shall be open to the public and held in a place available to the general public. MCL 15.263(1). Under Section 8(e) of the OMA, a public body is expressly permitted to meet in closed session “[t]o consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation...” Likewise, Section 8(h) of the OMA permits a public body to meet in closed session to consider material exempt from discussion or disclosure by state or federal statute, such as board consideration of attorney-client communications contained in a written document.

In this case, the township board met in a closed session to discuss a recently filed lawsuit regarding a zoning ordinance dispute between the township and property owners. The township board unanimously approved a motion to “adjourn to a closed Executive meeting to discuss Pending Litigation.” Although permitted by Section 8(e) of

the OMA to adjourn to closed session to “consult” with its attorney, the township’s attorney was not present at the meeting. Moreover, the board did not assert that purpose of the closed session was to consider any written attorney-client communications, as permitted under Section 8(h). Thus, the Court concluded that the closed session was not permissible under any exemption to the OMA.

Action: When considering “sunshine laws” such as the OMA and the Freedom of Information Act (FOIA), Court decisions generally favor meetings being open to the public. When contemplating moving to a closed session, a public body must take care to meet statutory criterion applicable to a permissible closed session. A public body will be in violation of Section 8(e) of the OMA unless the attorney for the public body is present and consulted during closed session. Under Section 8(h), if the purpose of the meeting is to consider written attorney-client communications, a public body can meet in closed session without an attorney present (but make sure you have written correspondence to consider!).



Scholten Fant
Attorneys

SAVE THE DATE:

**SCHOLTEN FANT CLIENT WORKSHOP
APRIL 17, 2006**

**More details to follow with e-mail registration*

BATTLE OVER THE STUDENT SAFETY INITIATIVE – ROUND ONE

You probably spent a good deal of your time and energy over the last couple of weeks dealing with "the list" sent by the Michigan Department of Education (MDE). Subsections 1230d(7), 1535a(15), and 1239b(15) of the Revised School Code, as amended by the Student Safety Initiative Legislation, each require the MDE to work with the State Police and the State Department of Information Technology to develop and implement an automated program that does a comparison of the MDE's list of registered educational personnel with the conviction information received by the State Police. This comparison must be done during January and June of each year until July 1, 2008. If the comparison discloses that a person on the MDE's list has been convicted of a crime, the MDE must notify the superintendent and the school board of the district where that individual is employed of that conviction. Unfortunately, the automated program developed and implemented to do this comparison was less than perfect. This resulted in numerous "false positives" - employees wrongly identified as being convicts.

Making matters worse, the recent legislation did not establish any type of appeal procedure to allow someone wrongly identified on the list to clear their good name. The MDE and the State Superintendent of Public Instruction reacted by telling school districts to verify the accuracy of the lists that the MDE had already sent out, and then let them know of any errors. As if one unfunded mandate is not enough.

In the meantime, the Detroit News submitted FOIA requests to the MDE, as well as to local districts, seeking copies of the lists. Michigan's two primary teacher unions, the Michigan Education Association and the American Federation of Teachers, each filed separate suits (one in State Court the other in Federal Court) to prohibit the disclosure of the lists in light of the false positives. On February 10, 2006, the Ingham County Circuit Court issued an order granting a preliminary injunction on the MDE, the State Superintendent of Public Instruction, "or any other governmental entity in possession of any portion of the data compilation at issue from disseminating to

the public the comparative data recently compiled by" the MDE, State Police and Department of IT. On February 14, the Federal District Court of the Eastern District of Michigan issued a temporary restraining order that included a mandate that the MDE recall all copies of the lists previously released to local boards of education or other agencies or political subdivisions. On February 16, 2006, the State recalled the lists.

In our opinion, the recall of the list is vital because Section 1230c of the Revised School Code provides that if a school official has notice from an authoritative source that an individual has been convicted of a listed offense, the board shall not employ that individual. As noted above, the statute does not provide any appeal procedure with respect to false positives on the MDE's list (e.g., it does not authorize local districts to do an I-CHAT to remove names from the list), so unless the list is recalled, it should be treated as authoritative notice.

By the time school districts receive this newsletter, they will have likely denied the FOIA requests for the lists based upon the recent state and federal judicial decisions, as being both an unwarranted invasion of privacy and the fact that the list has been recalled and does not exist.

So much for round one. There will be future FOIA requests for the next list. The next big battle will not be over false positives (let's hope they develop and implement a more accurate automated program), but rather will likely be whether local school districts must disclose convictions of misdemeanors for other than sexual or physical abuse. When a school district has the State Police do a criminal background check on an individual, it is illegal for the school district to disclose the results of the report received on the individual, except for felonies and misdemeanor convictions for sexual or physical abuse. There is no similar limitation on the school-wide comprehensive list received from the MDE. Legislation has recently been introduced to address this issue. When the next round of FOIA requests come, consult with your local counsel to determine the best approach in responding.