



HIGH SCHOOL GRADUATION REQUIREMENTS AND STUDENTS WITH DISABILITIES

As you know, in April 2006, the Michigan Legislature enacted Public Acts 123 and 124 which set forth comprehensive high school graduation requirements applicable to all Michigan students. Although as originally enacted the Michigan Merit Curriculum provided for a “personal curriculum,” the statute essentially required students with disabilities to meet the same curricular requirements as non-disabled students. On January 3, 2007, Governor Granholm signed into law Public Act 623, an amendment which expanded the personal curriculum options for a student with a disability. This amendment permits modification of aspects of the Michigan Merit Curriculum (MMC) not otherwise permitted, so long as the modifications are consistent with the student’s educational development plan (EDP) and individualized education plan (IEP).

As an overview, the MMC was a move toward a standards-based education. The statute sets forth curricular requirements, in addition to any local school board requirements, which must be met by students in order to receive a high school diploma.

By the end of 8th grade and prior to entering high school, each student must develop an educational development plan (EDP). The EDP is developed by the student, under the supervision of the school counselor, and based on a career pathways program or similar career exploration

program.

Beginning with pupils entering 8th grade in the 2006-2007 school year, in order to receive a high school diploma the student must complete:

- 4 credits in English language arts;
- 3 credits in science, including at least biology, and either chemistry or physics;
- 4 credits of mathematics aligned with the content expectations of the department, including at least algebra I, geometry, and algebra II, or, an integrated sequence of the course content which includes 3 credits, and an additional math credit such as trigonometry, precalculus, applied math, business math, etc;
- 3 credits in social science, including at least one credit in U.S. history and geography, one credit in world history or geography, 1/2 credit in economics and 1/2 credit in civics;
- 1 credit in health and physical education;
- 1 credit in the visual, performing or applied arts; and
- an online course or learning experience.

In addition, students entering 3rd grade in 2006 will need 2 credits in a language other than English in order to receive a high school diploma.

The parent of any student may request a personal curriculum which

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modifies certain aspects of the MMC, and a student may receive a high school diploma if he or she completes the personal curriculum. The personal curriculum is devised by at least one of the student’s parents, the student, and the high school counselor or designee.

The extent of modification of the MMC under the personal curriculum available to all students is limited. Mathematics may be modified only after the student completes 2 1/2 credits of math, and must still complete 3 1/2 credits of math during high school, including 1 credit during the student’s final year. The social science credit may be modified if the

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student completes 2 credits of social science (including civics), and an additional credit in English, math, science or foreign language. The P.E. and visual or performing arts credits may be modified if the student takes an additional credit in English, math, science or foreign language. The credit requirements for English and science cannot be modified.

The personal curriculum must establish measurable goals, a method of evaluating the goals and be agreed to by the student's parents and the superintendent. Further, the parents must be in communication with each of the student's teachers each quarter to monitor progress.

When originally passed, one of the unanswered questions was how the MMC graduation requirements would impact students with disabilities. IDEA 2004 recognizes that students with disabilities are general education students first, and must be given access to, and support for success in, the general curriculum. With the passage of PA 623 in January, the legislation now permits a student with a disability to seek a personal curriculum to modify curricular requirements beyond the "typical" personal curriculum which were not otherwise permitted.

First, as noted above, all students (including those with disabilities) are required to have an EDP prior to entering high school. Next, as with non-disabled students, the parent or legal guardian of a student with a disability may request a personal curriculum. PA 623 now authorizes a parent of a student with a disability to seek a further modification of a curricular requirement that would not otherwise be allowed if the par-

ent can demonstrate that the "modification is necessary because the pupil is a child with a disability." For all students, the personal curriculum is developed by a group of persons that includes at least the student, the student's parent or legal guardian, and the student's counselor or other designee qualified to act in a counseling role. For a student receiving special education services, a school psychologist should also be included in the group developing the personal curriculum. While the personal curriculum must incorporate as much subject area content expectations of the MMC as is practicable for the student, if the parent has shown that modifications are necessary because the student is a "child with a disability," the school district may permit further modification of the MMC requirements "to the extent necessary because of the pupil's disability." Any modifications to the MMC standards must be consistent with the student's IEP and the EDP. The IEP must identify the appropriate "course or courses of study and identify the any supports, accommodations, and modifications necessary to allow the student to progress" in meeting the MMC standards or the student's personal curriculum.

Once completed, the parent or legal guardian and the superintendent (designee) must agree to the personal curriculum before it can take effect and any revisions must be made and agreed to in the same manner as the original personal curriculum.

Action:

It is critical to keep in mind that the MMC and the personal curriculum are creatures of general education. While an IEP is used to identify the course or courses of study a student will pursue, and to identify supports and accom-

modations necessary to enable the student with a disability to meet the requirements of the MMC, the IEP does not create the personal curriculum. Nor does the IEP modify or "defeat" the MMC requirements, as evidenced by the inclusion of a provision requiring the Superintendent of Public Instruction to monitor a district for compliance, if there is reason to believe that a district is allowing modifications too broadly.

While it is paramount to approach the MMC and personal curriculum from the perspective of general education, one must be mindful of the special education issues that may be implicated. Transition is an area that may need to be given additional consideration, as the IDEA requires that transition services be in place when the student turns 16. Since all students, including students with disabilities, must have an EDP in place before entering high school, transition services will need to be coordinated to work with the EDP and any personal curriculum.

PA 623 defines a "child with a disability" as set forth in IDEA, meaning only IDEA eligible students, and not students with disabilities pursuant to a §504 plan, may seek additional modifications to the personal curriculum. This fact may result in increased requests for evaluation for special education services.

For more information regarding the MMC, visit the MDE's website. The MDE has developed a general overview of the graduation requirements, but have not yet developed any guidance related to PA 623. The MDE has a group of persons examining the statutory provisions, and it is hoped that guidance will be provided sometime this spring.



STANDARDS FOR EMERGENCY USE OF SECLUSION AND RESTRAINT

The State Board of Education adopted standards for the emergency use of seclusion and restraint on December 12, 2006, set forth in "Supporting Student Behavior: Standards for the Emergency Use of Seclusion and Restraint" ("Standards"). This article will provide a general overview of the Standards, quoting much of the language contained in the public document. If you would like a copy of the standards, they are available on-line.

The Standards further the State Board's policy on Positive Behavior Supports (adopted September 12, 2006) and are to be utilized in conjunction with "Positive Behavior Supports for All Michigan Students: Creating Environments that Assure Learning" (February 2000) and "Positive Behavior Support for Young Children" (June 2001). The Standards, which apply to all students (regardless of whether the student has a disability), reiterate the State's policy that every district implement a system of school-wide positive behavior support strategies.

As noted in the Standards, positive behavior support (PBS) "applies a behaviorally-based approach that enhances the capability of educators and parents to design effective environments that support student learning and behavior." PBS emphasizes behavior that encourages learning by:

- building relationships;
- creating routines;
- teaching skills, rules and expectations;
- identifying replacement behaviors for behaviors that interfere with learning;
- making problem behavior less effective, efficient and relevant; and
- making the desired behavior more functional and adaptive.

The Standards acknowledge that as part of a PBS system, school personnel need guidelines regarding what is appropriate in emergency situations. The Standards provide that any use of seclusion or restraint must be undertaken only by trained personnel, and only as a last resort. Seclusion and restraint may not be utilized

- for the convenience of staff;
- as a substitute for an educational program;
- as a form of discipline or punishment;
- as a substitute for less restrictive alternatives;
- as a substitute for adequate staffing; or
- as a substitute for staff training in PBS and crisis prevention crisis prevention and intervention.

TRAINING

A primary focus of the Standards is a district's obligation to provide comprehensive training to "the broader educational community, including pre-service training for all teachers," substitute teachers, and "key identified personnel." This "awareness" training must include:

- proactive practices and strategies that ensure the dignity of students;
- conflict resolution;
- mediation;
- social skills training;
- de-escalation techniques;
- positive behavior support strategies;
- techniques to identify student behaviors that may trigger emergency safety situations;
- related safety considerations, including information regarding the increased risk of injury to students and staff when seclusion or restraint is used;

- instruction in the use of seclusion and restraint;
- identification of events and environmental factors that may trigger emergency safety situations; and
- instruction on the State Board of Education policy on *Supporting Student Behavior: The Emergency Use of Seclusion and Restraint*.

In addition to providing the awareness training above, a district must identify "sufficient key personnel" to ensure that such personnel are available for an emergency situation. These key identified personnel must have additional training in:

- description and identification of dangerous behaviors;
- methods for evaluating the risk of harm to determine whether the use of seclusion or restraint is warranted;
- types of seclusion and restraint;
- the risk of using seclusion and restraint in consideration of a student's known or unknown medical or psychological limitations;
- the effects of seclusion and restraint on all students;
- how to monitor the physical signs of distress; and
- how to obtain medical assistance.

SECLUSION

The Standards define seclusion as "a last resort emergency safety intervention that provides an opportunity for the student to regain self-control" and as "the confinement of a student in a room or other space from which the student is physically prevented from leaving and which provides for continuous adult observation of the student." The area utilized for seclusion must:

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- not be locked;
- not prevent the student from exiting the area should staff become incapacitated or leave that area; and
- provide for adequate space, lighting, ventilation, viewing, and the safety of the student.

The Standards distinguish seclusion from a “time out.” The Standards define a time out as “a behavior intervention in which a student, for a limited and specified time, is placed in an environment where access to positive reinforcement is unavailable.” The significant difference between a time out and seclusion is that a student’s movement is not physically restricted in a time out.

The use of seclusion is only appropriate where behavior requires immediate intervention because the behavior poses an “imminent risk to the safety of the individual student” or others. In those situations, seclusion must be performed in a manner that is safe, appropriate, and proportionate and sensitive to the student’s:

- severity of behavior;
- chronological and developmental age;
- physical size;
- gender;
- physical condition;
- medical condition;
- psychiatric condition; and
- personal history, including any history of physical or sexual abuse.

Seclusion is not appropriate for students who are severely self-injurious or suicidal.

RESTRAINT

The Standards define three types of restraint: physical, chemical and mechanical. Physical restraint is defined as “direct physical contact that prevents

or significantly restricts a student’s movement.” Chemical restraint is defined as “the administration of medication for the purpose of restraint.” Chemical restraint does not include medication prescribed by and administered in accordance with the directions of a physician. Mechanical restraint is defined as “the use of any device or material attached to or adjacent to a student’s body that restricts normal freedom of movement and which cannot be easily removed by a student.” Mechanical restraint does not include an adaptive or protective device recommended by a physician or therapist, when it is used as recommended, or safety equipment used as intended by the general school population (e.g., seat belts).

The Standards permit the use of only physical restraint; the use of chemical or mechanical restraints is prohibited under any circumstances, including emergency situations. The Standards also prohibit prone restraints (the restraint of a person face down) and restraints that negatively impact breathing (floor restraints, face-down position, or any position in which a person is bent over in such a way that it is difficult to breathe). In addition, the Standards prohibit corporal punishment; the deprivation of basic needs; anything constituting child abuse; and the intentional use of any noxious substance(s) or stimuli which results in physical pain or extreme discomfort.

As with seclusion, restraint is to be used as a “last resort” intervention for a student to regain self-control. Behaviors which require immediate intervention constitute an emergency that may require the use of restraint if the behavior:

- poses an imminent risk to the safety of the individual student or to others; or

- is otherwise governed by the corporal punishment sections of the Revised School Code (MCL 380.1312).

The Standards specifically state that the policy on physical restraint is not intended to forbid actions taken

- to break up a fight;
- to take away a weapon;
- to briefly hold the student in order to calm or comfort;
- the minimum contact necessary to physically escort a student from one place to another;
- to assist a student in completing a task (provided the student does not resist or the resistance is minimal in intensity or duration); or
- to hold a student to prevent an impulsive behavior that threatens the student’s safety.

When a seclusion or restraint is utilized, staff must immediately call for help from within the building at the onset of the emergency. Neither seclusion nor restraint may be utilized any longer than necessary to allow the student to regain control of his or her behavior. The Standards establish the following general maximum time limits:

- ◆ Seclusion of elementary student - 15 minutes;
- ◆ Seclusion of middle and high school student - 20 minutes;
- ◆ Restraint of any student - 10 minutes.

If a seclusion or restraint lasts longer than those times, staff must seek additional support (such as changing staff, introducing a nurse or specialist, obtaining additional expertise, etc.) and must document an explanation for the extension beyond the general time limit.

Whenever seclusion or restraint is

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been utilized, staff must involve appropriately trained key identified personnel, continually observe the student for indications of physical distress, document observations and seek medical assistance if there is a concern.

DOCUMENTATION, REPORTING AND DATA COLLECTION

The Standards require each use of seclusion or restraint (including the reason for each use) to be documented in writing and reported to building administration immediately. Further, the parent or guardian must be notified immediately or as soon as possible. A written report for each use of seclusion or restraint (including multiple uses within a given day) must be given to the parent within 24 hours.

Staff must also “de-brief and consult” with parents and students (as appropriate) following any use of seclusion and restraint. Questions that must be addressed include:

- What precipitated the behavior that required the emergency intervention?
- Is there any anticipation that such behavior will reoccur?
- Is there a need for follow-up action?

If a pattern of behavior emerges, the school must:

- conduct a functional behavior assessment;
- develop or revise a positive behavior support plan (PBSP) to reduce or eliminate the use of seclusion or restraint; and
- develop an assessment and planning process conducted by a team including the parent, student (if appropriate), staff knowledgeable in PBS and persons responsible for implementing the PBSP.

If a pattern of behavior requires the use of seclusion or restraint, an emer-

gency intervention plan (EIP) must be developed in addition to the PBSP. The EIP must describe in detail the emergency intervention procedures. The team, which must include a person knowledgeable about restraint, must inquire of the student's medical personnel (with parental consent) to learn of any known medical or health contraindications for the use of seclusion or restraint. The team must conduct a “peer review” by knowledgeable staff. The team must also obtain informed consent from the parent after providing:

- an explanation of the emergency procedures and the purpose of the emergency seclusion or restraint;
- a description of possible discomforts or risks;
- a discussion of possible alternative strategies with advantages and disadvantages;
- answers to any questions; and
- information on freedom to withdraw consent at any time.

The emergency intervention plan must provide for periodic review, must ensure that staff are trained in specific techniques, and must maintain appropriate staffing at all times. If a concern arises regarding the humaneness of the plan, a “human rights committee” should be convened to review the plan.

The Standards require school districts to develop a system of data collection regarding the use of restraint. The data should:

- be analyzed to determine the efficacy of the school's school-wide system of behavioral support;
- be analyzed in the context of suspension, expulsion, and dropout data;
- be analyzed for the purposes of

continuous improvement of training and technical assistance toward the reduction or elimination of restraint;

- be analyzed on a schedule determined by the MDE;
- be reported to the MDE;
- include a list of appropriately-trained key identified personnel and their levels of education, training, and knowledge.

Action:

Each school district is expected to adopt and follow the MDE Standards, even though they are not “rules” per se. In doing so, districts will need to establish extensive training of personnel and document participation. For assistance in devising local policies or in providing some aspects of training, please contact one of Scholten Fant's School Law attorneys.

The MDE Standards specifically state that they are not intended to conflict with the “reasonable force” provisions of the Revised School Code section regarding corporal punishment. The use of reasonable force in conformity with a district's board policy, is therefore still “permitted.” Since the definition of restraint is much narrower than that of “reasonable force,” it will be interesting to see how the two will be differentiated. Under the Standards, it would appear that any “reasonable force” would also be a “restraint” and thus require the added documentation and procedures under the Standards. Also, while the Standards only permit restraint as a last resort where a student poses an imminent risk of harm to the student or others, the Revised School Code permits reasonable force to protect property. How these issues will be reconciled is yet to be seen.



CLASSROOM CITY: A LESSON IN FIRST AMENDMENT RIGHTS

The Federal District Court for the Eastern District of Michigan recently held in favor of a school district (even though the school district violated a student's First Amendment rights) because (1) the plaintiffs did not demonstrate that the school district failed to train its personnel in dealing with such issues, (2) the school principal was entitled to qualified immunity, and (3) the request for declaratory and injunctive relief was moot. *Curry v School District of Saginaw, et al.*, 452 F Supp 2d 723 (ED MI 2006).

As part of the fifth grade curriculum, students participated in an exercise called "Classroom City," where they created, marketed, and sold a product. Before a product would be approved for sale, students had to conduct a market survey, submit a prototype, and get the teacher's approval.

Joel Curry, at the suggestion of his mother, made candy cane ornaments out of pipe cleaners and beads. Joel's father created cards explaining the religious symbolism of a candy cane to be given with the ornament. The card was not included as part of the prototype submitted for approval.

Joel's partner for the exercise, who was of Asian-Indian descent, informed Joel that "nobody wants to hear about Jesus." Joel's partner created an alternate product to sell.

When the supervising teacher discovered that Joel was "selling religious items," she sought counsel from the Social Sciences teacher. The Social Sciences teacher looked at Joel's business license and determined the ornament with the card fit the product's description. The Social Studies teacher told Joel that while he had done nothing wrong, she was concerned about the card's religious content and whether other students might be offended, and therefore he could

not sell the card until she talked with the principal. For the rest of the day, Joel sold the ornaments without the card. The Social Sciences teacher left a note along with a copy of the card for the principal, and asked if it could be sold. The principal turned the information over to an Assistant Superintendent.

The next day, Joel's mother placed a copy of "Students Rights on Public School Campuses" - an article written by Christian attorney Matthew Staver - in the Social Science teacher's school mailbox, along with a note indicating that there are many groups offering "free counsel to anyone who may have question about students' rights to free speech." Nonetheless, the Assistant Superintendent and principal determined that the card was inappropriate for the project. The principal informed Joel's mother that Classroom City was considered instructional time, that the school would not permit Joel to sell the ornaments with the card because of the card's religious content, and that if the Joel wished to sell the candy canes with the card, he could do so after school in the parking lot. Joel received an A for the project.

At the end of the school year, the parents sued the district and principal. The parents argued that the school district was responsible for failing to provide adequate training or supervision to the teachers and principal, and that the principal violated Joel's First Amendment rights. The parents sought injunctive relief to prevent future violations of Joel's rights.

Failure to Train/Supervise

The Court noted that to succeed on a failure to train / supervise claim, the parents must prove:

(1) the training or supervision was inadequate;

(2) the inadequacy was the result of the school district's deliberate indifference; and

(3) the inadequacy was closely related to or actually caused the injury.

Even though the district provided no training at all with respect to how to accommodate religious speech in the school, the Court found that did not mean the district was deliberately indifferent to the issue. There was no evidence that there had been previous violations of religious rights at the school, or that the school board knew or should have known that they should train teachers on the issue. The Court found that in the absence of any prior incident of religious confrontation, the failure to train teachers in this area was not a matter of deliberate indifference. The Court found no evidence to conclude that it was inherently foreseeable that a teacher might violate the speech or religious rights of students, or that specific training was necessary to avoid such a deprivation of constitutional rights. The Court stated: "Although a training program of the type the plaintiffs advocate may help school administrators in their tasks, there is no basis for school board liability based on the sole fact that no training existed."

Qualified Immunity

The Court then addressed the qualified immunity of the principal. "Qualified immunity is an affirmative defense that protects government actors performing discretionary functions from liability for civil damages when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

A three-step test is used:

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- (1) whether there is a violation of a constitutionally protected right;
- (2) whether that right was clearly established at the time such that a reasonable official would have understood the behavior violated that right; and
- (3) whether sufficient facts have been alleged and supported by sufficient evidence to indicate that what the official did was objectively unreasonable in light of the clearly established rights.

The Court found that the student's constitutional right to free speech was violated. The Court found that the restriction on the student's speech could not be justified even under the school-deferential *Hazelwood* standard for a closed forum. The school argued its actions were reasonably related to the following legitimate pedagogical concerns: (1) ensuring that students learned the lesson the activity; (2) eliminating the threat of disruption; and (3) ensuring that student views are not mistakenly attributed to the school, which might result in a violation of the Establishment Clause.

The Court found none of these concerns were sufficient to permit the suppression of speech in this case. First, the Court found that the students were not prohibited from using religious themes as part of the project, and that a religious theme might be viewed as filling a marketing niche. Therefore, the religious nature of the speech would not contradict any of the lessons sought to be learned. Second, the Court found no evidentiary basis for any concern regarding potential disruption. The closest thing to a disruption involved Joel and his partner, who resolved their dispute amicably.

The Court noted that even though Joel was insensitive and intolerant of the diverse cultural background of his partner (Asian Indian descent), it did not cause a disruption in the common sense of the word. Finally, the Court acknowledged the difficulty schools face in trying to walk the fine line between allowing freedom of speech for students and avoiding an Establishment Clause violation. Censoring private religious speech based on Establishment Clause concerns turns on whether the private speech is attributed to the school, or whether the school appears to have endorsed the religious message. The Court found that no reasonable observer would attribute the religious message on the card attached to the candy cane ornament to the school. The Court found that the reasonable observer would view the Classroom City as having created a limited public forum, since the exercise was designed to be a mock city where different products and viewpoints converged on the streets and in commerce: a product with a religious card would be allowed in a city's marketplace. The Court found that the district's Establishment Clause concern was not a valid reason to curtail Joel's right to free speech.

Significantly, however, the Court found that Joel's free speech right to make a religious statement in a quasi-classroom setting was not clearly established at the time of the violation. The Supreme Court has articulated at least three different tests to be applied to speech restrictions in the academic arena. The Court found that the nature of the Classroom City exercise defied an easy categorization as to the type of forum it was, and therefore school administrators could not reasonably be expected to identify the subtle distinctions differentiating one type of forum from another, and deter-

mining which test should be applied. Furthermore, the parents did not offer sufficient evidence to indicate that what the principal did was objectively unreasonable in light of the situation. The Court noted that the principal, who had received a law degree, had a difficult choice to make in a complicated situation. She was expected to apply several constitutional tests to determine the correct legal answer: "Balancing obligations under the Establishment Clause and the Free Speech provisions of the First Amendment in this case placed the (principal) squarely upon the 'hazy border' that divides acceptable from unreasonable conduct." The Court stated that this was precisely the type of case for which the qualified immunity defense was intended.

Injunctive Relief

The Court finally turned to the parents' request for injunctive relief. The Court held the request was moot because Joel had matriculated out of the middle school.

Action

School districts should consider whether it is appropriate to train administrators and staff in how to handle student religious expression and other First Amendment Issues. The mere fact that a school has not trained its personnel in such matters does not automatically give rise to liability; however, depending on the facts and circumstances in your district, training may be appropriate and necessary.

We will include a session on First Amendment issues, including student speech, in our Spring Workshop to be held on March 23, 2007 in Holland, Michigan. If you would like to provide training on this issue to personnel in your district, contact Daniel Martin (dmartin@scholtenfant.com).



DON'T DISCLOSE DISCIPLINARY ACTION WITHOUT NOTICE TO EMPLOYEE

The Michigan Court of Appeals recently issued an important reminder to employers, including public school districts, not to disclose disciplinary records of current or former employees without first notifying the employee. *McManamon v Charter Township of Redford*, decided December 5, 2006 (2006 Mich App LEXIS 3557).

The Redford Township Supervisor, in response to media inquiries, disclosed to a local newspaper that a Township employee had been "suspended." The Supervisor refrained, however, from commenting on the reasons behind the employee's suspension.

The case focused on the prohibitions of Section 6 of Michigan's Bulard-Plawecki Employee Right to Know Act (the "Act"). Section 6 (MCL 423.506) provides that:

"(1) An employer or former employer shall not divulge a disciplinary report, letter of

reprimand, or other disciplinary action to a third party, to a party who is not a part of the employer's organization, or to a party who is not a part of a labor organization representing the employee, without notice as provided in this section.

(2) The written notice to the employee shall be by first-class mail to the employee's last known address, and shall be mailed on or before the day the information is divulged from the personnel record."

The Court essentially found that the Township Supervisor's reference to the employee's "suspension" constituted the "divulging" of "disciplinary action" without having given the employee the written notice required by Section 6(2).

While the Court acknowledged the Supervisor's right to divulge the

"disciplinary action," his failure to give the employee written notice of the disclosure, by first class mail on or before the day of the disclosure, subjected the Township to the damage remedies prescribed in Section 11 of the Act.

Action Item:

The *Redford* case serves as a good reminder to refrain from divulging any disciplinary records or disciplinary action pertaining to current or former employees unless the written notice requirements of the Act are satisfied. And speaking of reminders, it is also prudent to remember that the Act, in Section 7, further prohibits the disclosure, with or without notice, of disciplinary records which are more than four years old. Be prudent when disclosing such records in response to any request, including but not limited to a FOIA request or a reference request from a potential employer of a current or former employee.

Save the Date!

The Scholten Fant Client Workshop will be held on

March 23, 2007

in Holland.

Topic Areas Include:

- ◆ First Amendment
- ◆ Seclusion and Restraint
- ◆ Labor and Employment
- ◆ Discipline and Due Process Procedures
- ◆ High School Graduation Requirements and Personal Curriculums
- ◆ Significant Case Law Decisions in Special Education and General School Law



SUPERINTENDENT CAN SUE SCHOOL BOARD FOR VIOLATING HIS FREE SPEECH

The Sixth Circuit Court of Appeals recently held that a former superintendent who was not appointed to a new position could sue the school board and individual board members for violation of his First Amendment rights. *Scarborough v Morgan County Board of Education*, 470 F3d 250 (2006). The Sixth Circuit remanded the case to the trial court, ruling that the lawsuit could go forward, and holding that the individual board members did not have qualified immunity.

Scarborough was elected as the school superintendent in 1996. A change in Tennessee law replaced the superintendent position with a director of schools, who would be appointed by the local board of education rather than be elected. Scarborough had to apply for the position as director of schools in 2000.

In the spring of 2000, Scarborough was asked to say a prayer at a convention hosted by a church with a predominantly gay congregation. Although Scarborough initially agreed, he later declined the invitation due to a scheduling conflict. A local newspaper reported incorrectly that Scarborough would speak at the convention, and pointed out that the church had a predominantly gay congregation. Scarborough provided written statements to two local newspapers explaining the inaccuracies in the prior story, indicated that he declined the speaking engagement, and noted that he did not endorse, uphold, or understand homosexuality, but stated that he would not refuse to associate with gay people or refuse the opportunity to share with them his beliefs.

Within days of the newspaper article, the school board interviewed five candidates for the position of director of schools, including Scarborough. When the school board chose another candidate, Scarborough sued the school

district, claiming the board retaliated against him for exercising his First Amendment rights.

While the Federal District Court found that Scarborough did not engage in any "speech" because he did not actually attend and speak at the convention, the Sixth Circuit disagreed. The mere fact that Scarborough agreed to pray or speak before the largely homosexual congregation was sufficient for First Amendment protection. The Sixth Circuit found that his intended speech was related to political, social, and other concerns of the community. Because the intended prayer was to be outside of the schools and did not relate to his work with the school system in any way, the Sixth Circuit found that it was a matter of public concern.

The Sixth Circuit then engaged in the Pickering Balancing Test to determine whether the superintendent's interest in engaging in such speech outweighed the board's interest in promoting the efficiency of the public services it performs through its employees. Even though his actions aroused tensions between the board and the superintendent, the Sixth Circuit Court found that his speech was nonetheless protected by the First Amendment. The Court stated: "It would contravene the intent of the First Amendment to permit the Board effectively to terminate Scarborough for his speech and religious beliefs in this way. Thus, the issue for the finder of fact is whether the protected conduct was the cause of the board's refusal to hire Scarborough." Scarborough's lawsuit could therefore proceed on First Amendment claims.

The Sixth Circuit found that Scarborough offered sufficient evidence to create a genuine issue of material fact as to whether three of the board members were motivated by animosity against homosexuals. As such, the

lawsuit against those board members could also proceed on equal protection grounds.

The Sixth Circuit also found that Scarborough's lawsuit against the board of education as a whole could also proceed. In order to succeed against the board, Scarborough would have to show that his protected conduct was a substantial factor in the board's decision, and not just in the votes of certain members. However, where improperly motivated members supplied the deciding margin, the board itself could be found liable. Scarborough submitted evidence showing that three of the board members voted with an improper motivation. Because those votes were part of the deciding margin, the school board was not entitled to summary judgment.

Finally, the Sixth Circuit found that the individual board members were not entitled to qualified immunity. The Sixth Circuit noted that the greater a speech's relationship is to a matter of public concern and the less of an adverse effect there is on office efficiency, the more likely a reasonable person would understand that restricting the employee's speech violated the Constitution. Because the superintendent's right to express himself was clearly established, and there was minimal impact on the office efficiency, the board members were not entitled to qualified immunity.

Action

Because these situations are fact sensitive, it is prudent to consult your counsel before disciplining a public employee for speech-related or expressive activities. We will include a session on First Amendment issues, including employee speech, in our Spring Workshop to be held on March 23, 2007.



DISTRICT'S WEB PAGE INITIATIVE IS A PROHIBITED SUBJECT OF BARGAINING

In a case of first impression, the Michigan Employment Relations Commissions adopted the recommended order of the administrative law judge and found that a school district did not commit an unfair labor practice when it refused to bargain with its teachers' union over the district's decision to have teachers create web pages to be posted to the district's website. *Grand Haven Education Association v. Grand Haven Area Public Schools*, Case No. C02-L-273 (decided December 18, 2006) The Employment Relations Commission agreed with the district's position that the webpage initiative was a prohibited subject of bargaining under the Public Employment Relations Act (PERA).

The case, involved the school district's webpage initiative, in which the district instituted a voluntary program to have its high school teachers post web pages containing important information about their classes to the district's website. The primary purpose of the webpage initiative was to provide to parents and students, in electroni-

cally accessible format, the course descriptions, class expectations, grading policies and procedures, syllabi and other information fundamental to the educational programs and services rendered by the district. The district's webpage initiative did not involve course instruction or test-taking through the web pages or website. The union filed an unfair labor practice charge against the district when the district agreed to discuss the webpage initiative with the union but not to bargain over it.

The primary issue was whether the webpage initiative was one of the prohibited subjects of bargaining specified in section 15 of the PERA. That section prohibits bargaining over nine enumerated subjects, including "decisions concerning use of technology to deliver educational programs and services and staffing to provide the technology, or the impact of these decisions on individual employees or the bargaining unit." MCL § 423.215 (3) (h). See also MCL § 423.215 (4) ("The matters described in subsection

(3) are prohibited subjects of bargaining between a public school employer and a bargaining representative of its employees, and, for the purposes of this act, are within the sole authority of the school employer to decide.")

After an extended evidentiary hearing, the union argued that section 15 of PERA only prohibits bargaining as to "educational programs and services" that constitute actual course instruction of the subject matter of a particular class. However, the administrative law judge agreed with the district's position and found, in a decision that the Employment Relations Commission affirmed on appeal, that "had the legislature intended to limit the scope of Section 15 (3) (h) to the use of technology to deliver instruction, they would have used those words." Prior to this case, there were no reported decisions involving the issue of whether webpage initiatives or other uses of technology were prohibited subjects of bargaining under PERA.

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

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CELEBRATING OUR 50th YEAR OF SERVICE



THE FLSA AND THE USE OF NON-EXEMPT EMPLOYEES AS COACHES

The obvious question is whether a district can use one of its full-time “non-exempt” employees (such as a custodian, secretary, etc.) as a coach (or in some other “Schedule B” - i.e. extra-curricular - position), without incurring overtime liability under the Fair Labor Standards Act (“FLSA”). The unfortunate answer, however, is: It all depends!

The cases dealing with these situations have widely differing outcomes. Therefore, because the outcomes are highly fact-dependent, it is only possible to identify the general principles against which the facts of a particular situation should be evaluated in an effort to determine the potential for overtime liability.

The U.S. Department of Labor Wage and Hour Division (“WHD”) has, in various opinion letters, addressed the overtime exposure of a school district, or other public agency, when using a single individual both as a regular (and generally full-time) non-exempt employee and in a coaching or other extra-curricular capacity. In a recent WHD opinion letter dealing with these issues, a number of useful principles, based on the FLSA and its implementing regulations, were discussed.

While the FLSA recognizes the value of bona fide “volunteers” to a school district or other public agency, it does not do so without significant limitation. The FLSA, its regulations, and the WHD essentially prescribe criteria to be satisfied in order for an individual to qualify as a bona fide “volunteer.” A “volunteer” must, therefore:

1. Provide services for charita-

ble or public purposes without compensation, except for expenses, certain benefits, or a “nominal fee”; and

2. Offer the services freely, without any coercion attributable to the employer; and
3. Not be employed by the same public agency to perform the same (or similar) services for which they volunteer.

In general terms, the WHD's recent opinion noted that a parent employed by a district as a non-exempt instructional aide could volunteer in his/her child's school if the parent's volunteer activities directly involved his/her child's education and program participation.

In deciding whether or not a school secretary could volunteer to perform similar services for a PTA or PTO, the WHD noted that it likely depended on whether or not the PTA/PTO and the school were separate entities or essentially the same entity. Obviously, if they are separate legal entities, then the additional PTA or PTO hours are not attributable to the district for overtime purposes.

Other non-exempt school employees might also qualify as volunteers (e.g. as occasional ticket-takers for infrequent events, etc.) if their service is truly voluntary, if they receive no more than a “nominal fee,” and if the volunteer work is not the same type of work they perform as non-exempt employees for the same district.

Although every case will turn on its own particular facts, there are a couple of exceptions which may allow a district to avoid the need to aggregate, for purposes of determining overtime eli-

gibility, a non-exempt employee's work hours in his or her “primary duty” with the additional hours worked in a “Schedule B” (extra-curricular) assignment. These include:

1. Occasional or Sporadic Work. If a public employee “occasionally or sporadically,” and voluntarily, chooses to perform services to the same employer in a capacity different from his/her normal work, it may be possible to avoid overtime exposure for the intermittent work. Unfortunately, however, whether or not the added volunteer work is “occasional or sporadic or intermittent” will depend on the facts of each case, and the ultimate determination of the WHD.

2. Volunteer Stipend. A non-exempt employee may qualify as a volunteer as a coach, or in another extra-duty capacity, if the work is both voluntary and different, even if it pays a “nominal fee.” Unfortunately, however, neither the FLSA nor its implementing regulations define “nominal fee.” Whether or not the fee is “nominal” depends upon the facts of each case. The fee should not, however, be a substitute for compensation and may not be tied to productivity or outcome.

Action

In the final analysis, because the potential for overtime exposure in these situations is highly fact-dependent, it is prudent to either avoid situations which are questionable, or to otherwise consult with counsel or seek an opinion letter from the WHD based on the particular facts and circumstances involved.



CHANGES IN THE DISCIPLINE PROVISIONS OF THE 2006 IDEA FINAL REGULATIONS

Many aspects of discipline for students with disabilities have remained the same. Others have changed or been “clarified.” A new section 300.530(a) describes a district’s authority to consider discipline on a “case by case” basis and make individualized determinations. The comments indicate that the intent is to provide school administrators flexibility, and suggest considering such factors as a child’s disciplinary history, the child’s ability to understand consequences, the child’s expression of remorse, and the various supports provided to a child with a disability prior to the violation of a school code (e.g., positive behavior supports, etc.).

With the exception of the expedited due process procedures, all days referenced in the discipline provisions are “school days.” When determining the number of days of removal a student has been subjected to, the comments to the regulations (71 FR 46715) still provide that In-School-Suspension (ISS) and regular education bus transportation are not considered days of removal, subject to conditions. In order for a day of ISS not to be counted as a day of removal, the student must be able to continue to participate and progress in the general curriculum, to receive special education services as set forth in his/her IEP, and to participate with non-disabled peers. As for a bus suspension, the comments make clear that suspension from regular transportation is not counted as a day of suspension. This is true even if the student is unable to attend school because he/she is suspended from the school bus since the student’s parents have the same obligation to provide some alternate transportation for their child as any other non-disabled student’s parents would. The same is not true,

however, of a suspension from special transportation. In that case, a school district would need to provide some alternate transportation for the student, or count the day of suspension.

FAPE services for suspended and expelled students with disabilities.

FAPE services must be provided which enable the student to continue to participate in the general curriculum, progress toward meeting the goals and objectives in the IEP, and the student must receive, as appropriate, an FBA and BIP designed to address the behavior violation so that it does not recur. § 300.530(d). The regulations describe this as a “modified” concept of FAPE (71 FR 46716). A school district need not replicate every aspect of the services the student would receive in the normal classroom (e.g., chemistry lab, auto mechanics, etc.), and the extent of services may be different (fewer hours of instruction, etc.). The services must be provided by highly qualified teachers” and that these students must still participate in state and district wide assessments. 71 FR 46579.

Short term removals (not a change in placement).

As before, when the student has been removed for more than 10 cumulative school days, the student must be provided educational services. However, who determines what the services will be has changed. Now, the services determined by the school personnel in consultation with at least one of the student’s teachers (as opposed to one of the student’s special educators). The comments to the regulations make clear that an MDR is not required merely because the student has been removed for more than 10 school days cumulatively during the

school year; an MDR is required only where there has been a change in placement.

Change in Placement.

When a district decides to impose a change in placement, the district must immediately notify the parents of the student, and provide a copy of the Notice of Procedural Safeguards. The student must receive “modified concept” FAPE (§300.530 (d)) services which are determined by the IEPT. § 300.531.

The regulations provide that a “change in placement” occurs if the removal is for more than 10 consecutive school days, § 300.536(a), or, there is a series of removals that constitutes a pattern. § 300.536(b). The School District determines in the first instance, on a case-by-case basis, whether a pattern of removals constitutes a change in placement. If the parents of a student disagree with the determination, it is subject to review through due process and judicial proceedings. The factors to be considered by the school district in making this determination are (1) that the series of removals total more than 10 school days in a school year; (2) the child’s behavior is substantially similar to the child’s behavior in previous incidents that resulted in the series of removals; and (3) because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. The second factor is new in IDEA 2004 and the regulations.

Manifestation Determination Review (MDR).

As before, within 10 school days

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of any decision to impose a “change in placement” for disciplinary reasons, the school district must convene the MDR. The MDR team has changed, however, and is now made up of the parent, the district representative and “relevant members” of the IEP team (as determined by the parent and the school district). The questions to be addressed by that team have also changed. The first question is whether the conduct in question was *caused by, or had a direct and substantial relationship to*, the student’s disability, and secondly, whether the conduct in question was *the direct result of the LEA’s failure to implement the IEP*.

The legislative history of the changes made relative to the MDR questions shows that “the conduct in question [must be] caused by, or had a direct and substantial relationship to, the child’s disability, and was not an attenuated association, such as low self-esteem, to the child’s disability.” The cost benefit analysis to the regulations indicate that the MDR amendments will make it easier to discipline students with disabilities, and will make it easier for review team members to conclude that the behavior in question is not a manifestation of a child’s disability, enabling school personnel to apply disciplinary sanctions in more cases involving children with disabilities.

When looking at the second question relating to the implementation of the IEP, the comments make clear that the Act no longer requires that the appropriateness of the child’s IEP and placement be considered when making a manifestation determination. However, if the MDR team determination is that the behavior was a manifestation because the behavior was the direct result of the district’s failure to imple-

ment the IEP, then the district must take immediate steps to remedy the deficiency. §300.530(e)(3).

If the MDR determines the behavior to be a **manifestation**, the regulations now *require* the District to complete a Functional Behavioral Assessment (if one has not been previously completed), and implement a Behavior Intervention Plan, or if a BIP has previously been developed, review the plan and modify it, as necessary, to address the behavior. Except for students placed in an IAES for special circumstances (weapons, drugs, serious bodily injury), the student is returned to the placement from which he was removed, unless the parent and the LEA agree to change the placement as part of the modification of the BIP. As before, if the team determines that the conduct was **not a manifestation** of the student’s disability, the student is subjected to the same discipline as non-disabled students. § 300.530(c).

“Special Circumstances” IAES.

IDEA 2004 added the authority of a school district to impose an Interim Alternative Educational Setting (IAES) for serious bodily injury, in addition to the prior authority regarding weapons and drugs. “Serious bodily injury” means a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. Under IDEA 2004, the special circumstances IAES may be imposed for up to 45 school days, rather than calendar days (to the same extent that a non-disabled student would be disciplined). The comments to the regulations also provide that an IAES may extend from one academic year to the next. 71 FR

46722. When determining the location of the IAES, school district may consider a student’s home as an appropriate setting. 71 FR 46722

Expedited hearings.

The parent of a student may appeal any decision regarding placement in and IAES, or an MDR determination, and a school district may seek a hearing officer imposed IAES for “dangerous” students, where returning the student to the prior setting is substantially likely to result in injury. Either hearing is requested by filing a due process complaint notice as provided in §§ 300.507 and 508. The hearing is expedited.

Given the recent Supreme Court decision in *Schaffer v Weast* (School Law Update, Winter 2006) the burden of proof is on the party seeking relief. Thus, a parent now bears the burden when appealing the MDR (unlike the prior regulations, which placed the burden on the school district to show its determination was appropriate) 71 FR 46723. The school district has the burden when seeking a hearing officer imposed IAES. 71 FR 46724.

Only the provisions in § 300.508 (a) and (b) relating to the content of the due process complaint apply to expedited hearings. There is no requirement to file sufficiency objection, or to file response to due process complaint. 71 FR 46725. The resolution session must be held within 7 (calendar) days of receipt of the due process complaint, and if the complaint is not resolved to the satisfaction of both parties in 15 days, the hearing may proceed. Refusal of a party to participate in the resolution session will result in delay of the hearing. A parent may seek an order of



**continued...CHANGES IN THE DISCIPLINE PROVISIONS OF THE
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hearing officer to initiate hearing timelines if a district fails to participate, and a district may seek dismissal at the end of the 15 day resolution period if the parent refuses to participate.

The expedited hearing must be held within 20 school days of the receipt of the due process complaint, and may not begin before the expiration of the 15 day resolution session. The decision of the hearing officer must be issued within 10 school days after the hearing. The regulations provide that a state may impose other procedural rules so long as it ensures the requirements of § 300.510 - 514 are met. Any appeal is to a court of competent jurisdiction.

“Stay Put” during any expedited hearing procedure is the interim alter-

native setting determined by the district until the hearing decision, until the suspension/expulsion under § 300.530(c) expires, or expiration of the 45 school day IAES, whichever occurs first.

Not yet eligible students.

The circumstances under which a school district is deemed to have knowledge of a disability has changed under IDEA 2004 and its regulations, and include (a) the parent expressed concern in writing to supervisory or administrative personnel or teacher, (b) the parent requested evaluation or, (c) a teacher or staff expressed specific concern about a pattern of behavior directly to special education director or supervisor. Mere referral through child find may not be enough. 71 FR 46727. The district will not be deemed to have knowledge if (a) the parent has not al-

lowed evaluation, (b) the parent has refused service, or (c) prior evaluation determined student not eligible. The regulations do not set a time limit as to when the evaluation occurred. 71 FR 46727.

Action:

It will be important for school personnel to continue to be aware of the number of days a student with a disability has been removed from school, and to become familiar with the “new” MDR considerations. While the regulations are intended to make this process easier, procedural violations continue to plague school districts. One of the most important considerations continues to be watched is to assure that timelines and other procedural matters are not overlooked.

FPCO REITERATES FERPA DISCLOSURE REQUIREMENTS

In a recent letter from the Family Policy and Compliance Office (FPCO), a district was reminded that it is improper to release personally identifiable information regarding a student during an open session of a school board meeting without prior written consent. In *Letter re: Fowler School Board*, 10 FAB 5 (FPCO, 2006), a newspaper published information regarding a student disciplinary hearing. The parent had verbally waived the right to an executive (closed) session of the Board for the disciplinary hearing and permitted the hearing to proceed in open session, with the public present, but did not sign a written FERPA consent.

FERPA prohibits a school district from disclosing information from education records without the written consent of the parent. The consent

must be signed and dated, and must specify the records that may be disclosed, the purpose for the disclosure, and the identity of the person or entity to whom the information will be disclosed. The oral consent for disclosure provided by the parent (by waiving executive session) was not sufficient to meet FERPA’s requirements. Although the District had not complied with FERPA, no investigation was initiated since the parent’s complaint was untimely.

In *Letter re: Festus R-IV School District* (FPCO 2006), a high school coach allegedly told a newspaper that a student had been “dismissed” for actions that occurred in a basketball game. While the school district could designate a student’s “participation in officially recognized sports and activities” as directory information, and thus

could release the student athlete’s actions and statistics that occurred during the game, directory information would not include nonconsensual release of any disciplinary action imposed by the District relative to the student’s participation. FPCO stated: “For example, a school would be permitted by FERPA to disclose, as appropriately designed directory information, that a student-athlete was ejected from a game by a referee for unsportsmanlike conduct; but the school would not be permitted to disclose that the student was also suspended from the team by the school for such action.”

For answers to questions about student records and FERPA, please contact one of Scholten Fant’s School Law attorneys.



UNITED STATES SUPREME COURT PREVIEW

The United States Supreme Court will hear three significant education cases this term, with two cases arising from the Sixth Circuit, and one from the Ninth Circuit.

The first case, *Winkelman v Parma City School District*, involves whether a parent may represent their child without an attorney in actions brought in the federal courts under the IDEA. Parents are permitted to represent their children before administrative hearing officers. The Sixth Circuit held that when a parent brings an action in federal court seeking review of an administrative decision, the parent may not represent the child without an attorney. Many school districts believe that if parents are permitted to bring lawsuits without an attorney, the number of frivolous lawsuits will increase. The majority of federal appeals courts

have held that parents may not represent their children in federal court without an attorney, but others permit it. The Supreme Court's decision will resolve this split among the circuits.

The second case, *Tennessee Secondary School Athletic Association v Brentwood Academy*, involves whether the TSSAA's recruiting rules violated Brentwood's First Amendment rights of free speech and the 14th Amendment protections of procedural and substantive due process, among other things. Finding in favor of the school, the Sixth Circuit held the Athletic Association's recruiting rule was not narrowly tailored to further the Athletic Association's substantial governmental interest.

The third case, *Morse v Frederick*, involves whether a principal violated a student's First Amendment rights by

suspending him for ten days for displaying a banner stating "Bong Hits 4 Jesus" along the street in front of the high school as the Olympic torch passed. The Ninth Circuit held the student's banner was protected speech, and that the principal was not entitled to qualified immunity.

The Supreme Court denied review in *Shelby S. v Conroe Independent School District*, a Fifth Circuit case which held a school district has the right to complete a medical examination of a student to determine student needs and eligibility, and that if a parent wishes the student to receive special education services, they must permit the evaluation.

MDE TO RELEASE RULES AND DOCUMENTS

During the February Michigan Association of Administrators of Special Education (MAASE) meeting, Jackie Thompson indicated that the MDE OSE-EIS tentatively intends to release various rule revisions and documents for public comment this spring. It is anticipated that proposed rule revisions to R 340.1793a relative to interpreters, R 340.1738 and 340.1748 regarding programs for the cognitive impairment and severe multiple impairment, will be released this spring. In addition, a new rule will be proposed which will deal with Extended School Year services.

It is also anticipated that a number of MDE documents will be released for public comment this spring, including revised Procedural Safe-

guards, Surrogate Parents, Discipline Guidance, Confidentiality, Model Forms for Part 8 Complaints and Due Process Complaints as well as Due Process Complaint Procedures.

In the fall, MDE intends to release rule revisions to R 340.1713 regarding the definition and eligibility criteria for Specific Learning Disability and R 340.1851-1853 regarding Part 8 Complaints will be released for public comment. In addition, a new rule regarding Speech and Language services will be proposed.

MDE OSE-EIS documents to be released in the fall include revisions to the monitoring standards, the Part 8 Complaint Procedures and the revised model IEP forms.

A summary of the rule revisions

and documents to be release will be posted on the Directors and Planner-Monitor listserves, as well as provided to MAASE to post it on its web site, <http://www.maase.org>. Information and documents will also be available in the spring on the Department's web site.

While the Department does not intend to release the new IEP forms until fall, it reminded districts that the language on the signature page of the form regarding due process hearings must be changed, and the Department will be doing so in the new forms. At this time, however, checking the box does not initiate a hearing, and Districts should replace the "I request a due process hearing" language with "I intend to file a due process complaint."





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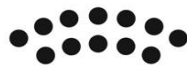
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