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SCHOOL LAW UPDATE

Winter 2008

SCHOOL DISTRICTS MAY PURSUE ACTION PROHIBITING EXPENDITURE OF LOCAL FUNDS ON UNFUNDED NCLB ACTIVITIES

In what some view as a major victory, the Sixth Circuit recently reversed the decision of the US District Court of the Eastern District of Michigan dismissing a lawsuit over funding against the United States Department of Education (US DOE). *School Dist. of the City of Pontiac v Spellings*, 108 LRP 792, Docket No. 05-2708 (6th Cir. Jan. 7, 2008). The Sixth Circuit found that a group of school districts stated a valid claim that they are not obligated to spend local funds to comply with mandates under the No Child Left Behind Act (NCLB). Relying on the Act's "Unfunded Mandates Provision," the Sixth Circuit held that states did not have the clear notice of their financial liabilities under NCLB that is required by the Spending Clause of the US Constitution. The Spending Clause gives Congress the power to impose terms under which it will disburse federal money to states, and requires that when Congress imposes a condition on a state's acceptance of federal funds, it must set out the conditions unambiguously.

The school districts sued the Secretary of the US DOE, arguing that states and local districts are not obligated to spend non-NCLB funds to comply with NCLB requirements (e.g., curriculum, testing, reporting and technical assistance). Further, the districts asserted that any failure to comply with the NCLB due to a lack of federal funding did not authorize the government to withhold NCLB funding to which the districts were otherwise enti-

led. The NCLB Unfunded Mandates Provision states: "[n]othing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under the Act." The US DOE argued that the provision simply prohibited imposition of requirements not authorized by the NCLB. The lower court accepted the US DOE's interpretation as merely prohibiting a federal officer and employee, not Congress, from imposing unfunded mandates. The Sixth Circuit rejected this argument, and found that even if such an interpretation were accurate, the provision still did not clearly notify states of their obligation.

In rejecting the US DOE's arguments, the Court determined that even if Congress intended the Unfunded Mandates Provision to only prohibit imposition of obligations not authorized by NCLB, such an interpretation would not comply with the Spending Clause requirements because it falls "short of being so evident that a State would clearly understand it to be the interpretation Congress intended." Further, the Unfunded Mandates Provision is reasonably read merely to prohibit federal officers from "controlling school curriculum and allocation of local funds," but may say

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"nothing about these officers mandating States to spend funds or incur costs for unauthorized obligations." The Court found that if Congress truly were "concerned about this sort of ultra vires conduct by federal officers and employees, it could have said so expressly."

The US DOE also argued that the NCLB emphasizes that state participation under NCLB is voluntary. The Court rejected this argument, finding such an interpretation unsupported by the plain language of the statute. Further, the Court indicated that NCLB utilized the same language as appears in the Perkins Vocational Education Act, which unlike NCLB specifies some exceptions for which states must

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Cont.....SCHOOL DISTRICTS MAY PURSUE ACTION PROHIBITING EXPENDITURE OF LOCAL FUNDS ON UNFUNDED NCLB ACTIVITIES

pay out of their own funds. Had Congress intended local funds to be spent in some situations under the NCLB, it could have expressly said so. The Court also rejected the DOE's argument that in NCLB activities were not a "mandate" as used in the Unfunded Mandate Act, which excludes costs entailed in complying with voluntary programs. The Court stated that "(1) NCLB makes no reference to the UMA's definition of 'mandate,' which excludes voluntary participation in federal programs, and (2) the label 'mandate' is often applied to obligations that states assume voluntarily in order to qualify for federal funds." Finally, the Court noted that former

Secretary of Education Rod Paige's interpretation of NCLB ("if it's not funded, it's not required,") conflicts with current secretary Spelling's interpretation, which the Court found demonstrates that "NCLB does not provide clear notice that their interpretation (and, apparently, the former Secretary's) is somehow misplaced."

Action:

Caution must be exercised when considering the implications of this decision. The case will almost certainly be appealed to the US Supreme Court. Secretary Spelling has indicated that "the Sixth Circuit's ruling, if it stands, would only provide a limited

defense in future enforcement proceedings. No state or school district should regard this ruling as license to disregard NCLB's requirements." The Secretary expects that it will be "business as usual" for districts, and expects that local districts will comply with NCLB mandates regardless of federal funding. The Sixth Circuit noted that "the ball is properly left in [Congress'] court" if it intended to require states to expend local funds. As NCLB is currently undergoing reauthorization, Congress will have the opportunity to "correct" its lack of clarity, or to reiterate that activities which are unfunded are not required.

FINAL MEDICAID RULE ELIMINATES TRANSPORTATION AND SCHOOL ADMINISTRATIVE COST REIMBURSEMENT

On December 28, 2007, the Department of Health and Human Services, Centers for Medicare and Medicaid Services, published final regulations which eliminated reimbursement for school administration expenditures and costs related to transportation of children between home and school. While the regulations take effect February 26, 2008, the rule will not affect school districts during the 2007-2008 school year because of a six-month moratorium included in the State Children's Health Insurance Program (SCHIP).

Under the new rules, Medicaid reimbursement will no longer be available for the costs of school-based administrative activities (e.g., those under the administrative control of a public or private educational institution and conducted by school employees or contractors, or anyone else under the control of a public or private educa-

tional agency). The Centers for Medicare and Medicaid Services (CMS) determined that these activities supported the educational program and did not specifically benefit the Medicaid program. CMS indicated that only costs of administrative activities "found necessary by the secretary for the proper and efficient administration of" the Medicaid program were appropriately reimbursed under Medicaid. Because these activities further a school district's educational mission and are performed to meet requirements under the IDEA, CMS expects such activities will continue to occur even in the absence of any Medicaid reimbursement. CMS stated that school-based administrative activities that overlap with educational activities do not directly benefit Medicaid programs, and therefore are not "necessary" for the proper and efficient administration of the Medicaid

program.

While the rules eliminate the bulk of school administrative costs, federal funding would continue to be available for administrative overhead costs that are "integral to, or an extension of, a direct medical service and, as such, are claimed as medical assistance." These types of activities would include patient follow-up, assessment, counseling, education, parent consultations, and billing activities would be properly reimbursed at the applicable medical assistance percentage rate for the related direct medical service. In addition, Medicaid outreach and eligibility intake activities that are conducted by employees of the state or local Medicaid agency would continue to remain eligible for reimbursement. However, outreach or eligibility intake activities conducted by school district employees would no longer be reimbursable.

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**Cont.....FINAL MEDICAID RULE ELIMINATES TRANSPORTATION AND
SCHOOL ADMINISTRATIVE COST REIMBURSEMENT**

In addition to eliminating school-based administrative costs, the Medicaid rule eliminates reimbursement for transportation from home to school and back for school-aged children. Again, CMS found that such transportation is not necessary or proper for the efficient administration of the Medicaid program. The limitation on transportation reimbursement still permits reimbursement for transportation of school-aged children from school or home to a non-school-based direct medical service provider, or from the non-school-based provider to school or home. Further, reimbursement would continue to be available for transportation costs related to children who are not yet school aged and are being transported from home to another location, including a school, and back to receive direct medical services. In this instance, reimbursement is available so long as the visit to the medical service provider does not include an educational component or any activity unrelated to the medical service.

The comments to the regulations make clear that Medicaid reimbursement will remain the same for covered services provided to children pursuant to an IEP or an IFSP, whether they are provided in school or in the community. Reimbursement will still be available for school-based Medicaid service costs, including transportation

services of a school-aged child from school or home to a non-school-based direct medical service provider. Services for children not yet school aged will continue to be reimbursed for direct medical services, as well as transportation so long as the transportation is not primarily for purposes other than gaining access to the Medicaid provider for covered services (such as where the transportation is to a day care program or a school-based program).

Action:

The elimination of school-based administrative costs and transportation services will have a significant impact on school districts. The comments to the regulations seem to expect that school districts will continue to do outreach programs and eligibility intake services, as well as other case management activities, even though a district will not be permitted to recover the costs associated with these activities. Only individuals employed by the state or local Medicaid agency will be eligible for reimbursement of these administrative costs. While not directly stated in the comments to the regulations, school-based administrative services will likely not be reimbursed if the person providing such services is an employee of the school district, even if the services are provided under contract or on behalf of

the state or local Medicaid agency. Instead, it is expected that these outside agencies will send workers into the school environment to perform these activities. Transportation reimbursement will be significantly curtailed. While some transportation costs may still be reimbursed, it will be significantly less than many districts currently receive.

CMS made the move to restrict such reimbursement based upon perceived fraud, waste and abuse by many states and local school districts. Under various audits, the Office of the Inspector General found that in one school district none of the 120 transportation claims met all state and federal requirements, which resulted in more than \$96,000,000.00 in improper Medicaid reimbursement. Additionally, improper reimbursement for salaries, capital outlay, debt service, and administrative services provided unrelated to Medicaid service are cited as reason for the exclusion. Many commentators indicated that to reduce Medicaid funding would further strap local school districts whose budgets are already dwindling, resulting in reduced services to students. CMS indicated that such comments reinforce its view that Medicaid funds were being utilized for educational service provision, as opposed to medical services reimbursable under Medicaid.

SCHOLTEN FANT 2008 CLIENT WORKSHOP

Mark your calendars for Friday, March 28, 2008, to join us for our annual workshop held at the Haworth Inn & Conference Center (located in Downtown Holland) from 8:00 a.m. to 4:00 p.m., with a reception following at the Curragh Irish Pub from 4:10 p.m. to 6:00 p.m.

Directions and more detailed information will be sent soon with the registration forms.

We hope to see you there!!



CHECK YOUR MOTIVES BEFORE CALLING CHILD FAMILY SERVICES

The Sixth Circuit Court of Appeals recently allowed a lawsuit against a superintendent to go forward where the superintendent contacted the County Department of Child Services on a family in retaliation for complaints brought by a mother against the district. *Jenkins, et al. v Rock Hill Local School District*, ___ F3d ___ (6th Circuit 2008). Two parents separately sued the school district and its superintendent alleging violations of the First Amendment and their privacy rights. One suit was dismissed; the other was permitted to proceed.

The first parent, Ms. Jenkins, was the mother of a first grader diagnosed with diabetes. Ms. Jenkins made arrangements with the school nurse to assist her daughter with her diabetes treatment. No problems were noted until her daughter started second grade. At that time, a dispute arose over whether the nurse would administer an insulin shot if she received proper written authorization. Ms. Jenkins believed the school was being uncooperative, and contacted the superintendent. The superintendent informed Ms. Jenkins that the school was not responsible for her daughter's medical care and suggested that she enroll her daughter in a different school. The mother contacted the Department of Education's Office of Civil Rights, the State Department of Education, and members of the school board, and claimed the superintendent told her that her daughter could not return to the school. After missing a week of classes, the superintendent allowed her daughter to return to school. Ms. Jenkins claimed the superintendent threatened to contact the Department of Child Services, stating that since she contacted the Office of Civil Rights, he would start an investigation on her. Ms. Jenkins subsequently wrote a letter to the editor of a local newspaper critical of the school

district, and also filed a formal complaint with the U.S. Department of Education. Two days later, a call was made from the school principal's office to Child Services. Child Services filed a complaint in January of 2002, but the charges were dropped as unsubstantiated in May. Also in January of 2002, the girl's doctor recommended that she be home schooled.

The second parent, Ms. Mulkey, enrolled her diabetic son in the same school in January of 2003. The school nurse checked his blood sugar regularly. Ms. Mulkey received frequent calls from the nurse asking her to pick her son up from school because his blood sugar was high or because he was not feeling well. In May of 2003, the school nurse tried to contact Ms. Mulkey, but her phone was disconnected. The nurse was running low on medical supplies for the child. After consulting with the school principal, the school nurse contacted Child Services to report possible child neglect. Two weeks later, the mother and her son moved to a different school district.

Both parents sued claiming the superintendent and the district violated their First Amendment rights by retaliating against protected activity when the school contacted Child Services. There are three elements to a First Amendment retaliation claim:

- (1) the plaintiff must have engaged in a constitutionally protected activity;
- (2) the defendant's adverse action must have caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and
- (3) the adverse action must have been motivated at least in part as a response to the exercise of the plaintiff's constitutional rights.

If a plaintiff can show that these three

elements have been met, the burden of proof shifts to the defendant, who must then show that they would have taken the same action in the absence of the protected activity.

The Sixth Circuit found the lower court incorrectly held the parents' speech was not constitutionally protected because it did not touch upon a matter of public concern. As you may recall, the public concern test originated in *Pickering v Board of Education*, 391 US 563 (1968) and deals primarily with the speech of public employees. The Sixth Circuit noted that other than a few limited exceptions, applying the public concern test outside of the realm of the public employment setting would not follow the rationale and purpose for the test, which relates to governmental agencies need to maintain order in their workplaces. The Sixth Circuit found this rationale inapplicable to situations of private individuals petitioning the government for a redress of their grievances, and specifically noted that it would not apply in the context of parents criticizing school officials. The Sixth Circuit rejected the argument that the public concern test would be necessary to prevent frequent disputes between parents and school officials from becoming First Amendment retaliation lawsuits. The Court noted this concern would be addressed by the other two elements of the First Amendment retaliation claim.

The Court found that with respect to Ms. Jenkins, all three elements of the retaliation test could be met. Ms. Jenkins was engaged in constitutionally protected speech, including complaining to district officials, school board members, the Office of Civil Rights, and writing a letter to the editor of the local newspaper. Furthermore, the Court found that a jury

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Cont...CHECK YOUR MOTIVES BEFORE CALLING CHILD FAMILY SERVICES

could conclude that the superintendent's actions (dismissing the student from school, being involved in making false reports to Child Services, and refusing to provide home school education through a tutor) would chill a person of ordinary firmness from engaging in such constitutionally protected speech. Finally, the Court found that Ms. Jenkins satisfied the third element because the superintendent allegedly admitted that it was her complaint that prompted him to be involved in making the report to Child Services.

As such, the Court allowed Ms. Jenkins' lawsuit to go forward.

With respect to Ms. Mulkey, however, the Court found that there was no evidence of any retaliation. The school nurse contacted Child Services because she could not contact the mother, and the mother had not provided the necessary medical supplies for her son. As such, the reasons for the school nurse's actions were not due to any First Amendment activity, but other legitimate non-retaliatory reasons. The Mulkey lawsuit was appropriately dismissed.

Action:

Michigan's Child Protection Act requires school administrators, counselors and teachers who have reasonable cause to suspect abuse or neglect to make an immediate report to the Family Independence Agency. Before a school employee seeks to file a report, however, the employee should make sure the reason for doing so is based on the factors giving reasonable cause to suspect abuse or neglect and not in retaliation of the protected activity of the parents.

MARCH 28, 2008 CLIENT WORKSHOP TOPICS

We'll cover topics related to both general and special education, including but not limited to:

- MDE Extended School Year Document and its Implications
- Highly Qualified Teachers—Secondary Special Education
 - Student Speech—Religious & On-Line
 - Significant Case Law & Legislative Update

If there is a hot topic that you would like to see us cover in our Workshop, please contact one of our School Law attorneys and share your ideas prior to March 10, 2008.

More information regarding the Workshop will be sent to you in the coming weeks.

MAY 6, 2008 ELECTION

As a result of the election consolidation legislation enacted a few years ago, many districts selected the May election date, in both even and odd years, as their new regular school election date. For 2008, this election date (i.e., the first Tuesday after the first Monday in May) is Tuesday, May 6, 2008.

Board candidates seeking election at the May 6th election must file their nominating petitions and affidavits of identity with the district's Election Coordinator (in most cases the county clerk) by 4:00 p.m. on Febru-

ary 13, 2008. (This deadline was extended by one day due to the February 12th observance of Lincoln's birthday.) In lieu of a nominating petition, a candidate may file a non-refundable \$100 fee.

A second deadline of particular interest is February 26, 2008. That is the date by which the ballot wording of any millage proposal, and/or bond proposal, must be certified to the county clerk and local clerks in order to be submitted at the May 6th election.

Since enactment of the election

consolidation legislation, districts should work with their Election Coordinator, which in most cases is the county clerk (unless the district is situated solely within a single governmental unit), to ensure that all election arrangements and requirements are satisfied in accordance with the terms of their Election Coordinating Committee's agreement and the Michigan Election Law.

Board members elected at the May 6th election will begin their terms on July 1, 2008.



CLASSROOM CITY REVISITED: A CONTINUING LESSON IN FIRST AMENDMENT RIGHTS

The Sixth Circuit Court of Appeals recently affirmed the Eastern District of Michigan's decision in a case we reported on in *School Law Update* (See Winter 2007 edition, pp. 6-7). The case is *Curry ex rel. Curry v Hensiner*, __ F3d __ (6th Circuit 2008). While the Sixth Circuit affirmed the decision that the school officials were not liable for violating the First Amendment rights of the student, it did so on different grounds than the lower court.

As part of the fifth grade curriculum, students participated in an exercise called "Classroom City," where they created, marketed, and sold a product. The entire elementary school acted as customers. Before a product could 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. His father created cards explaining the religious symbolism of the candy cane, which would be given out with the ornament. The religious 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 then created an alternate product to sell, as well as prepared the storefront.

When the supervising teacher discovered that Joel was "selling religious items," she asked Joel if the card had been attached to the product at the time of the market survey. He indicated that it had not. The teacher advised Joel that he could not sell the ornament with the card attached until she had a chance to talk with the principal. The principal discussed the matter with the assistant superinten-

dent. Collectively, they decided that the school would not permit Joel to sell the ornaments with the card because the Classroom City was considered instructional time and the cards contained religious content. If Joel wished to sell the ornaments with the card, the school would allow him to do so after school in the parking lot. Ultimately, Joel received an "A" for his grade in the Classroom City project, and was not disciplined for circumventing the approval process.

The lower court held that while the school violated Joel's First Amendment right by prohibiting him from including the card as part of the product, the principal had qualified immunity and therefore was not liable.

The Sixth Circuit held the school did not violate the First Amendment at all. The Sixth Circuit began by determining the appropriate constitutional standard to apply. The Sixth Circuit determined that the Classroom City was part of the fifth grade curriculum and therefore applied the *Hazelwood* standard. The Sixth Circuit noted that the products were required to be approved by the school, and that this fact would have been known by students and parents. Even though Joel and his parents circumvented the product approval process, students and parents would be unaware of that fact, and reasonably would have believed that the product as sold had the school's approval.

Under the *Hazelwood* standard, as long as actions of educators are "reasonably related to legitimate pedagogical concerns," the school may permissibly exercise "editorial control over the style and content of student speech in school-sponsored expressive activities." In determining that the school violated the First

Amendment, the lower court incorrectly limited its analysis of pedagogical concerns to the academic variety.

The Sixth Circuit, however, determined that "the universe of legitimate pedagogical concerns is by no means confined to the academic." The Sixth Circuit noted that in an elementary school setting, the appropriateness of student expression depends upon several factors, including the type of speech, the age of the speaker and the audience, the school's control over the activity in which the expression occurs, and whether the school solicits individual views from students during the activity. The Sixth Circuit found the ornament with the religious card was not merely personal religious expression, similar to wearing across or a tee shirt with a religious slogan; it was part of a curricular assignment and one that did not invite personal views of the students involved. Joel acknowledged his purpose in distributing the ornament with the religious card was to promote Jesus to other students. This potential audience included much younger students (e.g. the entire elementary school study body), who, along with their parents, would have believed that the school approved the product with the religious card. The school had complete control over Classroom City, including a formal approval process for the products to be sold, which Joel and his parents circumvented. The Sixth Circuit held that the principal had legitimate pedagogical concerns and therefore did not violate Joel's First Amendment rights.

Action:

Even though the Sixth Circuit held that the First Amendment rights of

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Cont....CLASSROOM CITY REVISITED:**A CONTINUING LESSON IN FIRST AMENDMENT RIGHTS**

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the student were not violated in this instance, school districts should still consider whether it is appropriate to train administrators and staff in how

to handle student religious expression and other First Amendment issues. First Amendment issues, including student religious speech, will be discussed in our Spring Workshop to be held on March 28, 2008, in Holland,

Michigan. If you would like to provide any additional training on this issue to personnel within your district, contact one of our School Law attorneys.

Our mission is to provide excellent legal services at a fair cost in a timely manner. We believe that adherence to this mission is the reason our firm has enjoyed long term relationships with many of our clients - some for nearly fifty years.

SUPREME COURT NEWS**Stay Put Does Not Apply to Part C**

The Supreme Court has refused to review the decision of the Eleventh Circuit Court of Appeals finding that the IDEA's Stay Put Provision is not applicable to students transitioning from early intervention services provided under Part C to Part B services for students aged 3 through 21. As discussed in *School Law Update's Spring Issue 2007, D.P. ex rel. E.P. v School Board of Broward County*, 47 IDELR 181 (11th Cir. 2007) held that the Part B Stay Put Provision does not apply to disputes between parents and school districts over what services should be provided to a student transitioning from Part C IFSP services to Part B IEP services. The Eleventh Circuit determined that when a student transitions from Part C to Part B services, the only available stay put is the public school program, and the parents cannot force the district to continue providing services under the IFSP by refusing consent for the student to receive services under Part B. This decision conflicts with the decision from the Third Circuit Court of

Appeals, holding that Part B Stay Put Provision would require the student to continue receiving services under Part C, since Part B and Part C have "significant" overlap. While the Supreme Court could have resolved this conflict, it has chosen not to, and the Eleventh Circuit Decision stands. The Sixth Circuit, of which Michigan is a part, has not addressed this issue, and neither the Third nor Eleventh Circuit decision is binding in Michigan.

The Federal Office of Special Education Programs (OSEP) recently issued two interpretation letters which support the Eleventh Circuit's determination. In *Letter to Foreman*, 48 IDELR 285 (OSEP 2007) and *Letter to Zahorchak*, 48 IDELR 135 (OSEP 2007), OSEP stated that districts have no obligation to provide Part C services to children beyond age 3. Any decision to offer such services under Part C is strictly voluntary. In addition, OSEP noted that the regulations state that the agency responsible for Part B services do not have to provide Part C services when the parents dis-

pute the child's initial IEP.

School Site in IEP

The Supreme Court also refused to review the case of *A.K. v Alexandria City School Board*, 47 IDELR 245 (4th Cir. 2007) which held that a school district's failure to identify a particular school site for the provision of special education programs and services resulted in an IEP which failed to provide the parents with sufficient information to effectively evaluate whether the placement was appropriate. In Michigan, the geographic location of the school and the name of the school are set forth on the IEP commitment page. The "location" with respect to the programs, services and supplemental aids and services continues to be the environment (e.g., regular classroom, special education classroom, etc.) in which the service is provided, not the name of the school building. See, comments to 1999 regulations at 64 FR 12594 (1999).



AVOIDANCE OF UNEMPLOYMENT COMPENSATION UPON "REASONABLE ASSURANCE" OF CONTINUED EMPLOYMENT

The Michigan Court of Appeals' recent decision in *Adams v West Ottawa Public Schools* serves as a reminder that districts need to issue timely "reasonable assurance" notices to school year employees in order to avoid unemployment compensation exposure during the summer "school denial period" (e.g., the period between two successive academic years).

The *Adams* facts differed from the norm insofar as the West Ottawa bus drivers had, for several years, worked during the summer months to transport intermediate school district students. When student transportation for the intermediate school district was "privatized," the West Ottawa drivers were no longer needed by West Ottawa during its summer "school denial period." The West Ottawa drivers sought to avoid the "school denial period" exemption from benefit eligibility because they

had traditionally worked on a year-round basis. Ultimately, however, notwithstanding their summer driving for intermediate school district students, these drivers remained West Ottawa employees and were found by the Court to be subject to its school calendar alone.

The *Adams* case was decided under MCL 421.27(i)(2) of the Michigan Employment Security Act which denies unemployment benefits to certain non-instructional school employees during the period between two academic years if they were employed during the first academic year and if there is "reasonable assurance" that they will be employed during the second academic year.

West Ottawa was ultimately successful in avoiding payment of unemployment compensation benefits during the summer "school denial pe-

riod" because it had given its bus drivers "reasonable assurance" that they would continue to be employed during the next school year notwithstanding their lack of summer work.

While MCL 421.27(i)(2) applies to non-instructional personnel, a similar exception (to eligibility for unemployment benefits) applies to teachers and others under MCL 421.27(i)(3) of the Michigan Employment Security Act.

While the facts of the *Adams* case are somewhat unique, *Adams* nevertheless serves as a reminder to districts of the importance of issuing timely "reasonable assurance" notices to its school year employees if the payment of unemployment compensation benefits is to be avoided during the summer recess or so-called "school denial period."

SCHOLTEN FANT 2008 CLIENT WORKSHOP

Friday, March 28, 2008, from 8:00 a.m. to 4:00 p.m.

Haworth Inn & Conference Center (Located in Downtown Holland)

Reception following at the Curragh Irish Pub (Go Irish!)

ISD CONSOLIDATION OF SERVICES REPORT DUE SOON

As you recall, Public Act 63 of 2007, effective September 19, 2007, requires each intermediate school district to conduct a study concerning various opportunities for constituent districts to share services with other districts or intermediate school districts in order to achieve a cost savings. The statute requires the intermediate school district to study and report to the Michigan

Department of Education the possibilities for sharing services, and the study must include consideration of at least pupil transportation, human resources, procurement of supplies, technology support, professional development, accounting services, legal services, food services, event management, production printing, shipping and receiving's, and any other services described in Section 627 and other non-

instructional services identified by the superintendent. The report must include a detailed description of the average cost per constituent district for each of the above services.

The report must be submitted within six months of the effective date of the statute, making the reports due no later than March 19, 2008.



GUIDANCE ISSUED ON HIGHLY QUALIFIED TEACHER REQUIREMENTS

As many of you know, Michigan Department of Education was notified by the U.S. Department of Education that Michigan HOUSSE Option which permitted teachers to show that they were highly qualified to teach secondary special education students by passing the MTTC elementary test was not permissible. Therefore, many teachers who had utilized this option for becoming "highly qualified" were notified that they no longer were considered to be highly qualified. Michigan was given until June 30, 2009, to show that all teachers teaching core academic subjects to secondary special education students met the highly qualified requirements.

Since that time, Michigan has clarified various HOUSSE options which are available to teachers to show their highly qualified status. The MDE issued a document, revised December 14, 2007, clarifying the requirements for highly qualified special education teachers. HOUSSE Option No. 1 provides that a teacher is highly qualified if the teacher, since the issuance of his or her provisional certificate, has completed 18 semester hours in a planned "standards based" approved program or a master's or higher degree. HOUSSE Option No. 2 re-

quires a teacher to have completed six semester hours in a specific core area within the last five years or, to have completed 90 clock hours of professional development activities in core subject areas within the last five years. HOUSSE Option No. 3 allows for the development and submission of a content area portfolio as a means of demonstrating competency. The portfolio must include certain components, including teaching experience, college level course work, content specific professional development activities, and service to the profession in the content area. There are specific guidelines with which the portfolio must comply.

In addition to the December MDE "clarification," the Department issued a questions and answers document in January 2008. This document attempts to provide further guidance as to which teachers are required to be "highly qualified," what school programs are covered and which master's degrees will (or will not), in and of themselves, demonstrate that the teacher is highly qualified in a core academic subject. Generally, a teacher who has passed the elementary MTTC continues to be highly qualified if they provide instruction in the elementary grades (K through 5 classrooms), in

grades 6 through 8 if the setting is a self-contained classroom, or in grades 9 through 12 if the teacher instructs only those students assessed against the alternate achievement standards (Mi Access). Secondary special education teachers who teach core academic content subjects to students must meet the highly qualified standards. A teacher need not be highly qualified if they are a resource room teacher providing support to a student who received instruction in general education in a core content area, who co-teaches with a highly qualified regular education teacher, or provides teacher consultant support to highly qualified teachers.

This general summary of the highly qualified requirements does not address all issues regarding a particular teacher's status, or all issues contained in the MDE documents and Q & A. We will cover this topic in more detail at our 2008 Client Workshop. If you can not wait until then, more information on specific questions can be obtained by accessing the guidance documents on the Department's website, www.michigan.gov/mde, or by contacting one of our School Law Attorneys listed below.

Scholten Fant publishes *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, workshops or seminars, please share your ideas with one of our school law attorneys, paralegals, or support staff.

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FERPA EXCEPTIONS IN ACTION

The Family Educational Rights and Privacy Act (FERPA) is the federal statute which protects a student's education record. In general, FERPA prohibits the disclosure of personally identifiable information contained within a student's education record without prior written consent of a parent, guardian or the student (if the student is an adult). FERPA contains a list of safeguards as well as exceptions to this general rule, which at times become confusing in their application. The Federal Policy and Compliance Office, which is the administrative agency charged with enforcement of FERPA, has recently issued a series of letters which address some of the safeguards available to parents, and the exceptions to the prior consent requirement.

Amendment of a Student's Record.

One of the safeguards provided by FERPA is the right of a parent to request the amendment of a student's education record. This statute provides a process for a parent to challenge information contained in the education record if it is inaccurate, misleading or violates the privacy of others. In *Letter to Anonymous*, 11 FAB 5 (FPCO 2007), a parent sought to amend a student's record to exclude certain comments made by a teacher on the student's report card. The FPCO reiterated that FERPA provides a parent the right to seek amendment of a student's education record if that information is inaccurate or misleading. However, a school district is not required to amend the record merely because a parent makes the request. If the school decides not to do so, it must inform the parent of the right to a hearing. At the hearing, the parent may challenge facts that are inac-

curately recorded in the education record. However, the hearing process may not be used to challenge a grade, evaluation, opinion or a substantive decision made by a school about a student. Therefore, while FERPA permits parents to seek amendment of education records which contain inaccurate information, this cannot be used to challenge a grade or an individual's opinion unless the grade or opinion has been inaccurately recorded. Thus, where a teacher includes comments on a student's report card expressing his or her opinion, or an evaluator expresses opinions within an evaluation report, such statements are not subject to FERPA's record amendment provisions unless the record inaccurately states the person's opinion. Similarly, substantive decisions made through a district's disciplinary process (including manifestation determinations, board hearings, etc.) are not subject to amendment unless the statements inaccurately state the substance of that decision. It must be remembered, however, that many substantive decisions have other procedural safeguards which may be initiated by a parent or guardian to challenge those decisions.

Participants at IEPT Meetings.

FERPA also prohibits the verbal release of information obtained from a student's education record. The verbal release of information occurs in many situations, including during IEPT meetings. In *Letter to Anonymous*, 11 FAB 4 (FPCO 2007), a parent complained that the school district had violated FERPA by including a representative from another school during an IEP team meeting without obtaining written consent to release information to those individuals. The FPCO indicated that one of the exceptions to the rule that prior written consent be obtained prior to releasing education re-

ords is where a student seeks or intends to enroll in another school. FPCO indicated that it interpreted this provision of FERPA to permit non-consensual disclosure of education records or information from those records to other individuals in connection with educational placements made under the IDEA through the IEPT process. Therefore, if the presence of a representative from another school at the IEP team was in relation to the district's attempt to pursue placement options in that school, FERPA would permit that representative to have access to the student's education records.

Consultants and Contractors.

FERPA also permits a school district to release education records to "school officials" with a "legitimate educational interest." In *Letter to Anonymous*, 11 FAB 5 (FPCO 2007), FPCO clarified that "school officials" may include individuals who are "acting for" the school district. Generally, "school official" will include such persons as principals, teachers, administrators, counselors and others employed or contracted with by a school district. The person need not be a full-time employee. If a school official is performing an official task for the school district which requires access to information in the education records, that school official would have a "legitimate educational interest" in that information. Thus, where a school district contracts with an outside person, such as evaluators, attorneys, accountants and medical specialists, those persons would be considered school officials with a legitimate educational interest if in performing their

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duties for the school district that person needed access to information in the student's education record. Therefore, prior written consent for disclosure would not be necessary.

Statements to Police.

In the same letter, the FPCO clarified that education records are those records that contain information directly related to a student and which are maintained by an education agency. Information which is obtained by a school official through observation is not protected. In the

case presented to the FPCO, the student's teacher and instructional aide made comments to the police that the student had pulled another student's hair, was "a big kid that continues to hurt people," was "very strong" and whose "behaviors were escalating." FPCO found that these statements appeared to be observational or of the speaker's opinion, as opposed to education records. Thus, FERPA did not prohibit this disclosure. Districts should be cautious, however, prior to releasing any verbal information regarding a student. While observations

are not protected, other information which may be in the knowledge of a school district employee which could only come from a student's education record are protected. Therefore, while the statement "I saw the student hit another" may not be protected whereas "The Student is emotionally impaired" would be protected. When discussing matters with police, the best rule of thumb is to only relay information which was personally observed by the individual regarding the specific incident being investigated.

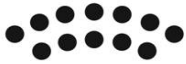
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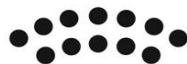
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