

OVERTIME PAY AND THE AMENDED FLSA REGULATIONS

The highly touted amendments to the Fair Labor Standards Act ("FLSA") regulations took effect on August 23, 2004. The amendments modified the standard tests for employee exemption from the Act's overtime requirements.

Based on an increase in the weekly salary test (to \$455 per week) and on a new "highly compensated" employee exemption, the overtime exemption amendments will typically apply to employees earning between \$23,660 and \$100,000 per year. For school employees who satisfy the standard job duty and salary tests, the overtime exemptions generally include the executive, administrative, learned professional, creative professional, computer employee and "highly compensated" employee categories.

Because overtime arrearage litigation, particularly in the Southeast part of the country, has been very costly to a number of districts, the recent amendments to the FLSA regulations provide a compelling reason for all school districts to review their policies, practices and job descriptions with regard to employee eligibility for exemption from the Act's overtime requirements.

Among the numerous situations which may trigger overtime claims are:

- school employees who also perform volunteer work;
- employees who work in multiple job classifications;
- job descriptions which do not accurately reflect job duties;
- failure to keep accurate time records, improper compensatory time policies;
- unpaid work beyond scheduled hours, improper unpaid lunch periods; and
- a wide variety of other practices or conditions.

In an effort to promote compliance with the FLSA and its amended regulations, school administrators are encouraged and advised to:

- Review all job descriptions for positions considered exempt from the Act's overtime requirements, to ensure that they both accurately reflect the actual job duties and satisfy the applicable exemption standards.

- Reclassify employees who have been treated as exempt but who do not meet the new standards for exempt status.
- Ensure that all work is accurately recorded and approved by the employee and supervisor.
- Require supervisory approval for all overtime worked by non-exempt employees, and discipline those employees for overtime worked without such approval.
- Pay any and all overtime due, whether or not properly approved, during the applicable pay period.
- Take appropriate steps to ensure that volunteers are truly volunteers; and be cautious about non-exempt employees volunteering in unrelated positions (e.g. as coaches, etc.).
- Be certain that any compensatory time plan (if used) is appropriate and that it is approved in advance (and in writing) by the employee.
- Conspicuously post FLSA posters in proper locations.
- Avoid (or at least minimize) the use of multiple job assignments where the aggregate hours worked exceed 40 per workweek.
- Be certain that disciplinary deductions from salary, for exempt employees, involve one or more full days. Such disciplinary suspensions must be for violation of safety rules of "major significance" or written policies (for workplace conduct) applicable to all employees.
- Develop and communicate a policy (preferably in writing) which prohibits improper salary deductions, prescribes a complaint procedure, and remedies improper deductions.
- Seek further advice and direction with respect to any practice, policy or situation about which there may be question or doubt in view of the amended FLSA regulations or otherwise.

OPEN MEETINGS ACT AMENDMENT REQUIRES COMPLIANCE WITH FERPA

In August, the Open Meetings Act ("OMA") was amended to eliminate the conflict between the OMA and the Family Educational Rights and Privacy Act ("FERPA"). The OMA now prohibits including student names or other "personally identifiable information" of students in school board minutes in violation of FERPA.

Background. In 1982, the Michigan Court of Appeals ruled that because a school board acts only through its minutes, and because its minutes cannot be altered or supplemented by parol testimony, then in order for a school board to suspend a student, the minutes of the board meeting must include the student's name. Palladium Publishing Company v River Valley School District (1982). While the Court of Appeals considered whether disclosing a student's name would constitute a clearly unwarranted invasion of privacy, it did not specifically address FERPA.

FERPA generally prohibits school districts from disclosing personally identifiable information contained in students' education records without written parental consent. Disclosing the name of a student who has been suspended or expelled in minutes of a meeting therefore arguably violates FERPA unless the school district had first obtained written consent. FERPA provides that a school district that "has a policy or practice of releasing, or providing access to, any personally identifiable information in education records," in violation of FERPA could lose federal funding.

In August of 2003, the Director of the Family Policy Compliance Office, the federal agency in charge of administering FERPA, wrote a letter to the State Superintendent of Public Instruction warning him that "the State must ensure that all local school boards in Michigan comply with FERPA regarding the release of personally identifiable information in board minutes so that the State may continue receiving Federal education funds." Rather than risk the loss of federal funds, the State decided to amend the OMA and eliminate the conflict with FERPA.

Action. A school board must not disclose any personally identifiable information about a student (e.g., name of the student, student number, any information that would make the student's identity "easily traceable"), when acting upon the suspension or expulsion of a student without written consent. If the student's parent or guardian requests a closed hearing, we often provide our clients with a confidential letter pertaining to the district's options in disciplining the student in question, and a resolution to impose the discipline that refers only to a student named in the confidential letter, without identifying the student in any way. The minutes therefore do not contain any personally identifiable information, and the letter is exempt from disclosure under the attorney/client privilege. If the student's parents or guardian do not request a closed hearing, obtain a written FERPA consent enabling the school district to disclose personally identifiable information as part of the hearing. Review with legal counsel an appropriate process to use in disciplining students to ensure compliance with the OMA and FERPA.

IDEA/FERPA PROHIBIT VERBAL DISCLOSURE OF STUDENT INFORMATION

The Colorado State Educational Agency recently ruled that the verbal disclosure of confidential information violated the IDEA's privacy provisions. Douglas County School District RE-1, 41 IDELR 258 (SEA CO, 2004). In this case, the parents filed a complaint against a high school principal claiming that the building principal told another set of parents that the complainant's son was not on the same cognitive or social/emotional level as another student. The comment was made in the context of a discipline situation. The school district argued that no violation of the IDEA privacy provisions or FERPA had occurred because the principal knew the student's cognitive and social/emotional level based upon his own observations.

FERPA does not prohibit the disclosure of information which is known from a person's personal knowledge, even if that same information may be contained in the student's educational record. In the

present case, however, the investigator did not find the school district's claim that the principal knew of the student's cognitive functioning level of his own personal knowledge. Instead, the complaint investigator believed that the principal would rely upon cognitive assessments or other information contained within the student's record. Thus, release of that information violated the IDEA privacy provisions as well as FERPA.

This case reminds us that care must be taken by school officials in discussing matters with parents not to disclose personal information of other students. While typically one thinks of a physical document or record being protected by FERPA, it also covers verbal disclosures of information. Remember also that the IDEA and its regulations prohibit the release or disclosure of confidential student information. See, 34 CFR 300.561 through 300.573.

REFRESHER REGARDING RECENT ELECTION CONSOLIDATION LEGISLATION

The recent election consolidation legislation, portions of which became effective September 1, 2004 and other portions of which will become effective on January 1, 2005, has generated some confusion as it relates to school districts. Following are answers to some of the more frequently asked questions.

First, regarding selection of a new regular election date, a school district that as of September 1, 2004 was holding its regular election date at other than the odd-year general election may choose a new regular election date if the district adopts a resolution before January 1, 2005. (If no date is chosen, then a school district must hold its regular election at the odd-year general election.) The choices for the new regular election date are the odd-year May election date, the November regular election date, or (as most districts are choosing) the May regular election date in both even and odd years. In order to select the new regular election date, the school board must hold at least one public hearing on the proposed resolution. Notice of the hearing must be provided “in a manner designed to reach the largest number of the jurisdiction’s qualified electors in a timely fashion”. Although the law does not define timely notice, we recommend that notice of the public hearing be given in the same manner as is required for election notices in general—i.e., by publication in a newspaper of general circulation within the district at least 10 days before the hearing and again within 10 days preceding the hearing. Notice of the hearing must state that the hearing is being held on the issue of whether to schedule the school district’s regular election at other than the odd-year general election and that if the resolution is not adopted, the school district’s regular election date automatically will be held at the odd-year general election; the notice of the hearing also must state the regular election date on which the school board is proposing that the school district’s regular election be held. Finally, the school board must file the resolution with the Secretary of State. We are happy to provide sample resolutions and notices of hearing for your review.

Second, regarding the Headlee Millage reduction, if a school district selects to hold its regular election on the May regular election date in both even and odd years, ballot questions concerning voter authorized millage may appear on the ballot on the May regular election date without being subject to a Headlee millage reduction using the reduction fraction for that year. Instead, at an election held on the May regular election date, if a ballot question appears on the ballot concerning authorized millage that is subject to a Headlee millage reduction, the new law provides that the county canvassers must not

meet to certify the election until after May 31, the result of which is that the millage will not be subject to millage reduction until the year following the election, when the millage shall be calculated using the millage reduction fraction for the year following the election. For elections held earlier than the May regular election date, and which involve voter authorized millage subject to a Headlee millage reduction, the millage reduction shall be calculated using the millage reduction fraction for the year in which the election is held. The bottom line is that the new law allows a school district to put ballot questions concerning authorized millage on the ballot at a May regular election date and still avoid what otherwise would be a May 31 statutory cutoff date.

Third, the new legislation has generated confusion as to special elections. Effective January 1, 2005, a special election (i.e., an election to submit a ballot question to the electors or to elect an individual to, or nominate an individual for, a partial term in office) may be held not only on the district’s regular election date (for example, the May regular election date in both even and odd years, which most districts are choosing), but on any of the following dates: the February regular election date (the fourth Tuesday in February), the May regular election date (the first Tuesday after the first Monday in May), the August regular election date (the first Tuesday after the first Monday in August), or the November regular election date (the first Tuesday after the first Monday in November). In addition, the new law allows a school district to call a special election on a date other than the four dates set forth above. In order to do this, though, the district must file an initiative petition with the county clerk on the 10th Tuesday before the proposed date of the special election. The petition must contain the lesser of 3,000 signatures or 10% of the electors voting in the last gubernatorial election, and these signatures must be obtained within 60 days before the filing of the petition. As a practical matter, given the timing constraints of the special-election-by-initiative, most districts will hold their special elections on one of the regular election dates set forth above.

Fourth, questions have arisen as to who pays for the cost of elections under the new legislation. This depends on the timing of the regular or special election. Effective January 1, 2005, if a school district’s regular or special election is held in conjunction with another election conducted by a county, city, or township, the school district must pay the county, city, or township 100% of the actual additional cost attributable to conducting the school district’s regular or special election. By contrast, if a school district’s regular or special election is not held

in conjunction with another election conducted by a county, city, or township, the school district must pay 100% of the actual costs of conducting the school district's regular or special election.

The new election laws can be confusing. As always, we welcome you to contact us regarding any questions you may have regarding these or any other aspects of the new election consolidation legislation.

SEXUAL CONTACT BETWEEN STUDENTS IS NOT "CHILD ABUSE"

The Michigan Court of Appeals has ruled that sexual contact between two students does not constitute "child abuse" which is required to be reported to the Family Independence Agency pursuant to the Child Protection Law (CPL). People v. Beardsley, ___ Mich App ___ (Docket No. 246202, August 24, 2004).

In this case, criminal charges were brought against a school administrator and the principal of a middle school claiming that the defendants had failed to report child abuse as required by the CPL to the Family Independence Agency (FIA). In April 2002, the administrator and principal became aware of sexual contact between a 12 year old boy and a 13 year old girl which occurred at school during school hours. The incident was reported to the police and to the student's parents, however not to FIA. The administrators were later charged in district court with a misdemeanor of failing to report suspected child abuse. The school administrators sought dismissal of the charges in district court claiming that the incident in question did not constitute a reportable incident of child abuse pursuant to the statute. The district court denied the motion, and defendants appealed to circuit court, which reversed. The prosecutor appealed to the Court of Appeals.

The Child Protection Law requires that school personnel, among others, immediately report suspected abuse or neglect to the Family Independence Agency.

'Child abuse' means harm or threatened harm to a child's health or welfare by a parent, a legal guardian, or any other person responsible for the child's health or welfare, or by a teacher or teacher's aide, that occurs through non-accidental physical or mental injury; sexual abuse, sexual exploitation; or maltreatment. MCL 722.622(e).

The prosecution argued that the phrase requiring a "parent, legal guardian, or other person responsible

for the child's health or welfare" only modified the non-accidental physical or mental injury portion of the child abuse definition. The prosecutor argued that where sexual abuse, sexual exploitation or maltreatment were involved, the modifier did not apply and thus all sexual abuse, sexual exploitation or maltreatment was required to be reported to FIA. The defendants, on the other hand, argued that the modifying phrase applied to all areas of the definition, and that only abuse perpetrated by a parent, legal guardian or "other person responsible for the child's health or welfare" needed to be reported. Since another student does not fall into one of the identified persons in the statute, the incident was not required to be reported.

The Court of Appeals agreed with defendants. Finding that the required offenses to be reported to FIA were those which were perpetrated by one of the identified individuals in the statute, the court refused to adopt the prosecutor's interpretation since it would lead to absurd results. For example, the court stated that accepting the prosecutor's interpretation would require the reporting of sexual contact between two married persons under the age of 18, as well as every incident of bullying between students. The court stated that if the Legislature had intended sexual contact between unrelated students to be reported, it could have expressly so provided.

This case reiterates a school employee's obligation to report suspected child abuse to FIA. It clarifies that these situations only involve abuse by a person identified in the statute (legal guardian, teacher, teacher's aide, or other person responsible for the child's health or welfare). School district employees, however, must be cautious in these types of situations. While sexual contact between students may not need to be reported to FIA as child abuse, school employees may still be required to report such incidents as crimes to the police, and may have other reporting obligations under the Statewide School Safety Information Policy.

SCHOOL NOT LIABLE IN STUDENT-ON-STUDENT SEXUAL ASSAULT CASES

In three different cases the Michigan Court of Appeals recently ruled that a school district is immune from liability where a student is sexually

assaulted by another student. Two of these cases involve students with special education needs.



In Miller v. Lord, 41 IDELR 183 (Mi. Ct. App., 2004) the parents of the student with a disability brought a lawsuit against a school district and various school employees seeking damages. In this case, Tierra Miller was a tenth grade student who was sent into the hallway by her teacher for misbehaving. A teacher saw Tierra speaking with another student, Matthew Lord, in the hallway, and asked why the two students were not in class. Lord explained that Tierra was upset because she had been reprimanded by her teacher and that he was trying to convince her to return to class. Accepting this explanation, the teacher left the students in the hallway. After the teacher had left, the two students went to a boys' bathroom where Lord allegedly sexually assaulted Tierra.

The school district filed a motion to dismiss the lawsuit, claiming that it was immune from liability based upon governmental immunity. Additionally, the district sought dismissal of a second count brought by the parents under the Persons with Disabilities Civil Rights Act. The trial court denied the motion, and the school district appealed.

In reversing the trial court, the Court of Appeals discussed the requirements for governmental immunity. The Court of Appeals found that the district was not liable since the district's conduct (leaving the students unsupervised in the hallway) was not "the" proximate cause of Tierra's injury. Instead, the direct cause of Tierra's injury was the alleged sexual assault by Lord. Thus, governmental immunity applied and the school district was not liable for Tierra's injuries.

Turning to the student's claims under the Persons with Disabilities Civil Rights Act (PWDCRA), the Court of Appeals reiterated its holding in Wolcott v. State Board of Ed., 134 Mich App 555 (1984) and Jenkins v. Carney-Nadeau Public School, 201 Mich App 142 (1993). These cases stand for the proposition that where two statutes, one general and one specific, cover the same subject matter, the specific statute is considered an exception to the general statute. Since both statutes cover persons with disabilities, and the special education statute specifically addresses the education of students with disabilities, the special education statute controls. In this case, the student's IEP included a behavior intervention plan which provided that the student would be sent to the hallway for misbehavior. Although the parent did not sign the IEP, she also did not appeal by requesting a due process hearing. Since the behavior complained of (sending the student to the hallway) was addressed in the student's IEP, the student is limited to those remedies set forth in the Michigan Special Education

Act, and could not circumvent that Act by filing under the PWDCRA.

In another case, K.S. v. Walled Lake School District, 41 IDELR 130 (Mi. Ct. App., 2004) J.G., a student with a disability, had an IEP which provided that he would be "monitored" between classes and in the lunchroom. J.G. had previously been molested by another student, J.M., who attended the same building. Due to this, the special education teacher agreed to walk J.G. from one class to another. In May 2000, J.G. informed his teacher that he had been molested by J.M. again at school.

J.G.'s parents filed suit seeking damages for the sexual assault claiming that the school district's failure to adequately supervise J.G. amounted to gross negligence. The school district filed a motion for summary disposition asserting governmental immunity. The trial court denied the motion, and the school district appealed.

On appeal, the school district argued that their conduct did not amount to gross negligence, and was not the proximate cause of the student's injuries. Therefore, the district argued it was entitled to governmental immunity. Further, the district argued that the parent had failed to exhaust administrative remedies pursuant to the IDEA since behavioral supports were addressed in the student's IEP.

The Court of Appeals reversed the trial court, finding that the district was entitled to governmental immunity since its actions or inactions (the failure to adequately supervise) was not the proximate cause of the student's injuries. Reiterating that the governmental immunity statute contemplates one proximate cause, the Court found that the proximate cause of the student's injury was the sexual assault by another student, not the district's failure to supervise. The Court found it unnecessary to address the IDEA exhaustion argument since the parent would have been unable to maintain an action against the school district even if she had exhausted administrative remedies.

Finally, in a case involving a general education student, the parents of a seventh grade girl brought suit against the Detroit Public Schools after the student had been sexually assaulted by two male peers following an after-school activity. Fortune v. City of Detroit Public Schools (unpublished opinion). In this case, Dominique Fortune attended an after school activity which was supervised by a Detroit public school teacher. After the activity, the teacher watched Dominique and two other boys walk towards the exit of the school building, but did not see them leave. A school policy requires that students attending after school activities be supervised until they have left the building. Allegedly, the two boys

forced Dominique into an empty classroom where she was sexually assaulted. The parent claimed that this would not have occurred had the teacher followed school policy and supervised the students until they had left the building. The school district sought dismissal of the action based on governmental immunity, which was denied by the trial court. The district appealed.

The Court of Appeals found that the student was not denied substantive or procedural due process, and that typically a governmental entity is not liable for injuries inflicted by acts of violence by private persons. An exception to the general rule is the "state created danger theory." This theory permits recovery where a governmental entity, through an affirmative

act, either creates or increases the risk that a person will be exposed to violence by a third party. The Court found, however, that a failure to act is not an affirmative action which would subject the district to liability.

Turning to the question of governmental immunity, the Court found that the failure to follow school policy amounted to negligence, but not to gross negligence. Turning to the issue of proximate cause, the Court again found that the proximate cause of the student's injuries was the alleged sexual assault by the two boys, not the alleged failure of school personnel to supervise or stop the criminal conduct.

WEIGHTED GRADES

In a recent unpublished decision, the Michigan Court of Appeals rejected a student's claim that his school district deprived him of due process of law by failing to give him an A+ grade. Deleka v Memphis Community Schools (2004).

The student, who was ranked first in his senior class, participated in an employer-based paralegal program through the intermediate school district. He worked at his mother's law office. His mother awarded him an "A+" even though the highest grade authorized by the ISD was an "A." While his high school allowed "A+" grades, the school-issued report card reflected a grade of "A." The Memphis school district had a board policy concerning granting credit for transferred course work, which provided in relevant part that no grades would be considered weighted. The student's mother sought to have the grade changed, and ultimately sued the school district

when it refused to give her son the weighted grade of "A+."

The Court of Appeals found that the lawsuit was without merit. Because the paralegal course was administered through the ISD, not the high school, the highest grade that the student's mother was authorized to award under the ISD policy was an "A." The Court of Appeals ruled that applying the school district's policy prohibiting weighted grades was not "arbitrary or unreasonable." Absent a "clear showing of abuse," the student could not prove that he was deprived of a vested property interest in the higher grade.

Action: Review and follow your board policies regarding transferred courses credit and grades. And always beware of attorneys who are empowered to grade their own children.

REGRESSION-RECOUPMENT STANDARD FOR ESY SERVICES

In a recent case, the Sixth Circuit Court of Appeals reiterated the regression-recoupment standard for determining whether a student needs extended school year (ESY) services. Kenton County School District v. Hunt, _____ F.3d _____ (6th Cir., 2004).

The parents of a student with severe disabilities sought reimbursement of privately obtained summer school services and tuition reimbursement. The student had double spastic hemiplegic cerebral palsy and delayed cognitive and communication development. He had received classroom services through the local school district for several years, and summer programming from a private provider at the parents' expense. When the student was 12 years old, an IEP team was convened to review his educational program and consider extended school year services. The IEP team determined that the

student was not entitled to extended school year services, since there was no supportive data to establish the need for extended school year services. The parents believed that the student was entitled to ESY services because behavior was an ongoing problem and they felt he would not perform as well in the fall without a highly structured program throughout the summer. They also believed that they did not have sufficient data to show the need for extended school year services because they had been privately funding his summer programming. The IEP team determined he did not qualify for extended school year services, and proposed a placement including both part-time general education and part-time special education classes.

Following the IEP meeting, the student began to engage in forced vomiting, and was hospitalized.



During the hospitalization, another IEP team meeting was held. At this meeting, the parents indicated their intent to place the student at public expense in a residential facility when he was released from the hospital. Following his release from the hospital, the student was placed in a residential facility, where he remained for the next one and one-half years.

In anticipation of the student's release from the residential facility and enrollment in the district's middle school program, two IEP team meetings were held during the spring of 2000. The district proposed a part-time summer program consisting of eight weeks of instruction three days per week. The student never attended the proposed summer program, and was discharged from the residential facility in August, 2000.

In January, 2001, the parents requested a due process hearing seeking reimbursement of private school costs and ESY services. The local hearing officer ruled in favor of the District, finding that the student had not been denied FAPE and did not require ESY services. Thus, the parents were not entitled to reimbursement. The parents appealed, and the state review officer reversed. The school district then sought review in federal district court, and requested a hearing to present additional evidence to address issues which it asserted the parents had raised for the first time on state review. While permitting the hearing, the court limited it to two hours, to be shared equally by the parties. Following the hearing, the district court affirmed the decision of the state review officer. The school district appealed to the Sixth Circuit.

The Sixth Circuit reversed the decision of the district court and remanded for further proceeding. In doing so, the court reiterated its decision in Cordrey v. Euckert, 917 F.2d 1460 (6th Cir., 1990) stating that ESY services are the exception rather than the rule, and are appropriate only if necessary to prevent significant regression which would not be adequately recoupable in the fall. The court held that it is the burden of the party seeking ESY services to show significant regression and inadequate recoupment of skills either through the use of empirical data or expert testimony based upon individualized assessment of the student. The court

found that the evidence presented by the parent was "inadequate to meet the high burden that the Cordrey court imposed on those who propose an ESY for inclusion in the child's IEP. In other words, there was no demonstration "*in a particularized manner relating to the individual child*, that an ESY is necessary to avoid something more than adequately recoupable regression." (Emphasis in original, citing Cordrey). While acknowledging the plight of the student's parents, the court indicated that it cannot condone the imposition of a heavy financial burden upon the school district in these types of situations. The court stressed that an appropriate education is not synonymous with the best education.

Having concluded that the district court and state review officer erred in finding that the district failed to provide FAPE, the court remanded the case for further determinations. The court also stated that once the student's parents removed the student for the entire school year, he may not have been entitled to any ESY services for the following summer.

The IDEA regulations require that school districts consider extended school year services for all students with disabilities. While ESY services must be considered, not every student with a disability will be entitled to ESY services. Such services are provided only if it is required in order to provide the student a FAPE. While there are differing criteria utilized throughout the country for determining whether an ESY is necessary, the Sixth Circuit has consistently utilized the regression-recoupment analysis. Some other circuits utilize criteria which may look at "emerging skills" and "critical developmental periods." The Sixth Circuit has not adopted these standards. The Michigan Department of Education has also issued guidance (albeit somewhat dated) on utilization of the regression-recoupment standard in this state. While parent advocates and their attorneys may continue to advocate for use of different standards, extended school year services in Michigan are still determined by utilization of the regression-recoupment analysis, which will require either empirical data or expert opinion that the student will suffer significant regression which cannot be adequately recouped, or expert opinion based upon an individual assessment of the student.

PRIVATE PRE-SCHOOL IS LRE FOR STUDENT WITH AUTISM

The Tenth Circuit Court of Appeals determined that a public school district's pre-school special education program was not the LRE for a student with autism. Instead, the Court determined that the student's private pre-school program was appropriate, and ordered the school district to reimburse the parent for supplemental aids and

services provided by them, including the cost of an individual aide and ABA services. L.B. v. Nebo School District, 41 IDEL R 206 (10th Cir., 2004).

K.B. is a pre-school aged student who is eligible for special education programs and services as a student with Autism Spectrum Disorder. The parents

and the school district, Nebo, met on several occasions attempting to agree upon an IEP for K.B. The parents had requested a private pre-school consisting of all “typically developing” peers. While this setting was considered at the IEP meeting, the school district ultimately offered its special education pre-school program. While the school district’s pre-school program primarily consisted of students with disabilities, it also included approximately 30 to 50 percent of its population as typically developing children. The pre-school program operates for 10 hours per week. In addition to this classroom placement, the district offered speech and occupational therapy, and 8 to 15 hours per week of ABA services. The parents disagreed with the IEP, seeking placement in the private “mainstream” pre-school with 35 to 40 hours per week of ABA instruction, which included 10 hours in the classroom at the private pre-school. The parents requested a due process hearing. The parents sought reimbursement for the “supplemental aide” and cost of the ABA services to support the student’s “mainstream” private pre-school program. The hearing officer ruled that this school district had offered an IEP which would have provided K.B. with a free appropriate public education (FAPE) in the least restrictive environment (LRE) and denied the requested relief. The parents appealed to federal district court, which affirmed the decision of the hearing officer that the school district’s program was appropriate and the LRE for K.B. The parents again appealed to the Tenth Circuit Court of Appeals.

The Tenth Circuit reversed, and ordered the school district to reimburse the parents for the cost of the individual aide (who accompanied the student to the private pre-school and provided ABA services at home) as well as the other costs of the students at home ABA instruction. The Court indicated that it found the school district had violated the IDEA’s mandates “solely on the ground that [the school district’s program] was not the LRE for K.B.”

Prior to this case, the Tenth Circuit had not adopted an “LRE test.” Various circuits across the country utilize differing tests. The Third and Fifth Circuits utilize the “Daniel RR” test which looks to (1) whether education in the regular classroom with the use of supplemental aids and services can be achieved satisfactorily, and (2) if not, whether the school district has mainstreamed the child to the maximum extent appropriate. This test looks at the steps the school district has taken to accommodate the child in the regular education classroom, compares the academic benefits the child would receive in the regular classroom with those the child would receive in the special education classroom, looks at the child’s overall educational experience in regular education and the effect that the student would have on the regular education classroom.

The Ninth, Eleventh and Seventh Circuits utilize a version of the Daniel RR test, adding to it consideration of the cost of providing the program to the student.

The Fourth, Sixth and Eighth Circuits apply the “Roncker” test which looks at whether the perceived benefits of the “segregated” (special education) program can be feasibly provided in the integrated setting, whether the benefits received from mainstreaming are outweighed by the benefits of the services which could not feasibly be provided in the non-special ed setting, the disruptiveness of the student to the regular education setting and the cost of providing the services to the student. Michigan is part of the Sixth Circuit, and utilizes the Roncker test for determining the least restrictive environment for a student with special needs.

The Tenth Circuit, however, adopted the Daniel RR test, and specifically rejected the Roncker test. The Court also stated that it did not need to decide whether the costs of mainstreaming the student should be one of the factors contained in its LRE analysis since the district had not raised cost as a consideration.

In analyzing the district’s placement under its newly adopted LRE test, the Tenth Circuit disagreed with the hearing officer and the federal district court, and found that the private mainstream school was the student’s LRE. The Court did not find that the district’s IEP failed to provide FAPE, but only that the FAPE provided by the District was not least restrictive. The Tenth Circuit disagreed with the weight and credibility accorded to various witnesses by the hearing officer in district court, and found that the evidence weighed in favor of the parents’ experts, and that a preponderance of the evidence showed that the mainstream classroom provided K.B. with appropriate role models, had a more balanced gender ratio and was “generally better suited” to meet the student’s needs.

In considering the issue of reimbursement, the Tenth Circuit granted reimbursement for the supplemental aids and ABA services provided by the parent to support the student’s private pre-school program. The Court did not award tuition, as the parents had never sought reimbursement of the tuition costs of the private pre-school. It is interesting that in doing so the Court paraphrased the test under Florence County v. Carter and Burlington School Committee v. Department of Ed. In Burlington, the Supreme Court found that if a school district failed to provide a student with a FAPE, and the parents placed the student unilaterally in a private school, parents could seek reimbursement if ultimately the Court determined that the parents’



placement was appropriate. In Florence County, the Supreme Court clarified that the parents' placement in a private school need not meet all of the requirements of state standards to be determined appropriate. In the present case, the Tenth Circuit stated the test as permitting reimbursement if the school district "violated" the IDEA, rather than the denial of FAPE language utilized by the Supreme Court in Burlington. In finding that the district violated the IDEA's LRE requirements, the Court justified reimbursement.

The good news is that Michigan is part of the Sixth Circuit, and this case has no precedential value in Michigan. The bad news is that this case implies that even if a school district provides a student with a FAPE, reimbursement may be appropriate if a court ultimately decides that the environment in which the pre-school student was educated was not the LRE. Here, the Tenth Circuit while acknowledging the rule against doing so, substituted its judgment and assessment of the evidence for that of the hearing officer and the federal district court in order to find that the private placement was the student's LRE. The Tenth Circuit did not disturb the lower court or hearing officer finding that the IEP proposed a FAPE for the student. Indeed, the school district's program

offered a special education pre-school with age appropriate peers, with 30 to 50 percent of those peers being typically developing children. In addition to the special education pre-school, the district incorporated in its offer 8 to 15 hours of at home ABA services, and 10 hours of classroom based services. This type of program clearly offered the student a free appropriate public education, and the Tenth Circuit did not disturb that finding. Limiting its reversal to solely the LRE issue, the Tenth Circuit apparently believed that because the district's program included students who had disabilities and functioned lower than K.B., it was not the least restrictive environment.

Providing pre-school programs for students with disabilities is a challenge. Many times, public schools do not operate pre-school programs for three year olds without disabilities, thus do not have any programs for "typically developing" peers. The challenge for school districts is to identify situations in which pre-school students can interact with non-disabled children. The Tenth Circuit opinion in this case exemplifies that challenge, and associates a high cost with its perception that the school district did not meet that challenge.

Legislative Corner

Federal

The Assistive Technology Act of 2004 (HR 4278) is expected to be signed by the President in the next few weeks. The House and Senate have passed a bipartisan bill which reauthorizes legislation originally passed in 1988. The focus of the legislation is to assist individuals with disabilities in accessing assistive technology in school and work environments. The bill contains a new provision that requires states to focus a portion of their assistive technology projects on assisting students with disabilities in transitioning from high school to post secondary institutions or the work place, and is intended to align with the IDEA. The bill also continues the equipment loan program for schools and districts.

The reauthorization of the Individuals with Disabilities Education Act, which has been pending for some time, has new hope of completion prior to the end of this year. The House has appointed 14 members, 9 Republicans and 5 Democrats, to the committee to begin negotiating with Senators in hopes of producing a final bill. Representatives making up the House members of the conference committee includes one Representative from Michigan, Republican Vernon Ehlers. Major differences between the House and Senate bills which will need to be addressed include definitions of

highly qualified teachers, changes in the discipline provisions, changes in the enforcement provisions and attorney fees. If an agreement is not reached by the time Congress adjourns in December, the process of reauthorization must begin again next year.

State

Public Act 351 of 2004 amends the State School Aid Act. The foundation allowance remains \$6,700 per membership pupil. General operations funding for intermediate school districts, however, has been reduced by 15%. Also, the membership definition will now be based on a 75/25 blended count (75% fall and 25% winter). If you want a more detailed summary of the revisions to the State School Aid Act, feel free to e-mail dmartin@scholtenfant.com and request a summary.

Two bills are currently pending to amend Michigan's corporal punishment statute. House Bill No. 6024, introduced by Representative Lipsey, amends the corporal punishment statute and sets forth significant limitations in the use of reasonable force, physical intervention and restraint, "time outs," etc. Senate Bill No. 1443, introduced by Senator George, also amends the corporal punishment statute, and similarly addresses the use of personal restraint and seclusion, though it is much less detailed in its limitations of a school district's use of these

interventions. The House bill has been referred to the Committee on Education, while the Senate bill has been referred to the Committee on Health Policy.

Several House bills have been introduced which would affect the manner in which special education programs and services are delivered to students who are a ward of the state. House Bill Nos. 6253, 6254, 6255, 6256, 6261 and 6263 would amend the Youth Rehabilitation Services Act by adding additional provisions. House Bill No. 6253 requires that a youth agency is required to develop an individualized educational program as required by the IDEA and identifies certain required components, House Bill No. 6254 would require that a general education teacher attend every IEP team meeting held for public wards, House Bill No. 6255 requires agencies to have policies to identify students receiving or in need of special education services, House Bill No. 6256 requires implementation of IEPs pursuant to the IDEA by youth agencies, House Bill No. 6261 requires agencies to identify students who may require special education who have not yet been determined eligible, and to implement modifications in the general education program and House Bill No.

6263 requires the identification and implementation of special education programs for wards under a youth agency's care. The bills have been referred to the Committee on Family and Children Services.

Administrative Rules

New administrative rules relating to special education became effective on September 15, 2004. These rules amend current eligibility rules. Of significant importance are the rules relating to Autism Spectrum Disorder and Deaf Blindness. Copies of the rules are available on the Michigan Department of Education's website, www.michigan.gov/mde.

Proposed rules amending the special education rules relating to due process hearings, teacher qualifications and transition coordinators were released in August, with a public comment period and public hearings being held through September. Public comment closed October 13, 2004. The proposed rules are available on the Michigan Department of Education's website, www.michigan.gov/mde.

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