



PRESIDENT SIGNS THE IDEA - 2004

Reauthorization of the IDEA had been pending for years, with both the House and Senate introducing different bills. In the fall it looked as though we would not see the IDEA completed this school year. But, a compromise bill was finally reached in conference during the “lame duck” session after the elections. The bill, HR 1350, passed the House and Senate on November 19, 2004, and was signed into law by President George W. Bush on December 3, 2004.

The IDEA-2004 has many significant changes. As expected, it seeks to align the IDEA with the No Child Left Behind Act in many ways, including teacher qualifications. It also provides some flexibility in the use of federal funds, modifies the discipline provisions, procedural safeguards, dispute resolution and the requirements regarding IEPs and IEP meetings. While the majority of the IDEA-2004 will not become effective until July 1, 2005, the provisions relating to “highly qualified special education teachers” were effective on the date the President signed the bill into law. The following is a brief summary of some of the significant changes. The reader is cautioned that not all of the changes in the IDEA-2004 are included.

Funding

As in the past, Congress has again set forth a plan to fund 40% of the national average per pupil cost of special education. IDEA-2004 authorized appropriations of 12.3 billion dollars for fiscal year 2005, and had a “six- year plan” to reach the 40% goal. Within days of the President signing the IDEA-2004, Congress appropriated only 10.7 billion dollars, immediately falling short.

IDEA-2004 grants states the ability to reserve 10% of their state level funds to establish a risk pool for “high need” students.

LEAs are still required to maintain their fiscal efforts from the prior years. However, IDEA-2004 allows LEAs to reduce its expenditure of federal funds by 50% of the increase received from the prior year so long as the 50% reduction is used for NCLB activities.

LEAs may reserve 15% of their federal funds to provide “early intervening services” to K-12 students,

with an emphasis on K-3 students. If an LEA does so, this amount is calculated as part of the 50% deduction discussed above.

Alignment with NCLB

The alignment with NCLB is evident. The IDEA adopts many definitions from NCLB, including the definition of “core academic subjects” and “highly qualified” in regard to special education teachers. Under IDEA- 2004, “highly qualified” has the same meaning as the term is defined in NCLB, *except that such term also* requires that special education teachers have full state certification as a special education teacher, without requirements being waived on an emergency, temporary or provisional basis. Further, IDEA-2004 provides that special education teachers may meet the NCLB “highly qualified” definition by meeting the requirements of subparagraph (C) or (D). Subparagraph (C) provides that special education teachers teaching exclusively to alternate achievement standards must meet the requirements of NCLB for an elementary, middle, or secondary school teacher who is new or not new to the profession, OR, meet the requirements of NCLB relating to competency established by test or HOUSSE standards for teachers new or not new to the profession, OR “. . . in the case of instruction above the elementary level, [the teacher must have the] subject matter knowledge appropriate to the level of instruction being provided, as determined by the state, needed to effectively teach to those standards.”

Subparagraph (D) provides that special education teachers teaching two or more core academic subjects *exclusively* to children with disabilities may either meet the applicable requirements of NCLB for any elementary, middle, or secondary school teacher who is new or not new to the profession. Teachers not new to the profession must demonstrate competence in all the core academic subjects in which the teacher teaches in the same manner as is required for an elementary, middle, or secondary school teacher who is not new to the profession under NCLB, which may include HOUSSE. A new teacher who is highly qualified in mathematics, language arts, or science must demonstrate competence in the other core academic subjects in which the teacher teaches in the same manner as is required for an elementary, middle, or secondary school teacher under NCLB, which may include HOUSSE, not later than *two*

years after the date of employment.

Evaluations and Re-evaluations

IDEA-2004 establishes an initial evaluation timeline of 60 calendar days from receipt of parent consent unless the state establishes a different timeline. Currently, Michigan provides for a 30 school-day timeline (45 calendar days).

A district must still seek “informed” consent for evaluation. If a parent fails to provide consent, a district may seek override on initial evaluation, but IDEA-2004 codified OSEP’s interpretation that a district may not seek to override a parent’s refusal to consent to the initial provision of services.

Re-evaluations are still required at least once every three years. At the evaluation review, the district and parent may still agree that no additional evaluation is necessary. IDEA-2004 limits re-evaluations to one time per year unless the parent and district mutually agree that conditions warrant additional evaluation.

Eligibility Determinations

IDEA-2004 modified the provision relative to “lack of appropriate instruction,” to add a new limitation on eligibility for lack of instruction “in essential components of reading” per NCLB. Additionally, while the basic definition of Learning Disability is unchanged, IDEA-2004 eliminates the requirement that a district use a severe discrepancy approach. Although an LEA may not be required to use an IQ discrepancy model, IDEA-2004 does not prohibit such use if an LEA chooses to continue to use a discrepancy model. IDEA-2004 also provides that LEAs may, but are not required to, use a “Response to Intervention” model.

IEPT Meetings and IEP Content

With IDEA-2004, LEAs will have some flexibility in IEPT meeting attendance. While the list of IEPT participants is essentially unchanged, a provision was added that requires that a member of the IFSP team be invited to the IEPT, at parent request, for a 2 ½ - 3 year old student transitioning from Part C to Part B. IDEA-2004 also provides that some participants need not attend or may be excused. Attendance at an IEP meeting is not necessary if the parent and the district agree that the attendance of a particular participant is not necessary because the area of curriculum and/or related service is not being modified or discussed. Any agreement must be in writing. Attendance may be excused if the parent consents in writing to excuse the person and the member being excused submits written input to the parent and the IEPT *prior* to the IEPT meeting regarding the area of curriculum or

related service being considered in the meeting.

IEPs may now be modified or amended in two ways: by convening an IEP team meeting, or by the parent and LEA agreeing to not convene an IEP meeting and amending the IEP by a separate written document. An LEA must provide a revised copy of the entire IEP on parent request.

The content of the IEP has also changed. Now, the present level of educational performance statement (PLEP) is a statement of the child’s “present level of academic achievement and functional performance” (PLAAFP). Also, while the IEP must contain measurable annual goals, IDEA-2004 eliminates benchmarks or STIO’s in most situations. The exception is when the student is being assessed by the alternate assessment to alternate standards (in Michigan, MI ACCESS). In this situation, the IEP must still include benchmarks or objectives in the PLAAFP statement. In addition, special education programs, services and supplementary aids and services are to be based on “peer-reviewed” research, to the extent practicable, evidencing one more aspect where the IDEA attempts to align with NCLB.

Transition planning has been modified to eliminate the requirement that transition planning begin at age 14. A transition plan is required to be in place for the first IEP when a student turns 16, and must include measurable postsecondary goals related to training, education, employment, and if appropriate, independent living skills. These goals are to be based upon age-appropriate transition assessments.

IDEA-2004 also provides for 15 state pilot programs which would be permitted to establish multi-year IEPs (but not to exceed three years).

Discipline

IDEA-2004 made some significant changes to the discipline procedures. A district may now unilaterally change placement for specific offenses to an interim alternative educational setting (IAES) for up to 45 *school* days (rather than calendar days), and the statute adds “serious bodily injury” to the list of offenses (weapons and drugs).

IDEA-2004 adds a new provision which provides that school districts may consider “unique circumstances on a case-by-case basis.” Also, in the discipline context, it appears that all “days” will be “school days.” The 45-day IAES provision has been changed to school days and the “business” day issue only came up in the regulations. It must be remembered, however, that “days” were defined in the 1999 regulations (not the statute). New regulations will probably be out late fall 2005 or early 2006.



As for manifestation determination reviews (MDR), IDEA-2004 still requires an MDR to be convened within 10 school days of the decision to impose a change in placement. However, the review is now conducted by the parent, the LEA, and “relevant members” of the IEP team (as determined by the parent and the LEA). The team then determines (a) whether the conduct in question was caused by, or had a direct and substantial relationship to, the student’s disability, and (b) whether the conduct in question was the direct result of the LEA’s failure to implement the IEP. If the answers to these questions are “no,” the behavior is not a manifestation of the student’s disability, and the student may be disciplined just as any other non-disabled student. If, on the other hand, the team determines that the conduct is a manifestation, then the student cannot be disciplined, and the district is required to complete a Functional Behavioral Assessment (FBA), and implement a Behavior Intervention Plan (BIP).

IDEA-2004 still requires the IEPT to consider PBS as special factors when a student’s behavior impedes his/her learning or the learning of others. However, it eliminated the 10-day FBA/BIP review requirement, and instead requires that a student “**receive, as appropriate**” an FBA, BIP, and “modifications” designed to address the behavior so that it does not recur when a student is suspended in excess of 10 school days (for behavior not a manifestation), or when a student is placed in an IAES (irrespective of manifestation).

Part C

The definitional changes in Part C also show an alignment with NCLB concepts. IDEA- 2004 now requires that a state’s definition of “developmental delay” be “rigorous,” requires a state policy that early intervention services be based on “*scientifically based research, to the extent practicable,*” and adds “homeless” children to those served. It also requires public awareness programs to inform parents of premature infants or other infants with other physical factors associated with developmental or learning complications of Part C services.

IDEA-2004 also allows the statewide system to include a policy to permit the parent of an eligible student under Part B (§ 619 special education preschool programs) who has previously received services under Part C to elect to continue to receive services under Part C. To do so, a state must adopt a policy, and the parent must make an informed choice; then, the child may continue to receive services under Part C until he or she reaches Kindergarten age. A district is relieved of the obligation to provide Part B FAPE to these children; rather, the Part C obligations

continue. If the state adopts a policy, the statewide system must assure that parents are provided annual notice which sets forth the rights and responsibilities of parents in determining whether their child will continue under Part C or participate in Part B preschool programs, an explanation of the differences between the services, including the types of services and the location the service is provided, the applicable procedural safeguards, and any costs or fees to parents. The services to be provided to students continuing under Part C must include an educational component to the program which promotes school readiness, and incorporates pre-literacy, language, and numeracy skills.

The state policy regarding Part B eligible students continuing under Part C also requires mandatory referral of any child experiencing substantiated trauma due to exposure to family violence. Also, the state application for Part C grants must include a description of the state policy requiring referral for early intervention services of any child under three involved in a substantiated case of child abuse or neglect, and any child identified as affected by illegal substance abuse or withdrawal symptoms from prenatal drug exposure.

Procedural Safeguards

Essentially, the types of procedures that a school district must afford a parent of a student with a disability are the same as IDEA-97. The specifics have been modified enough that a district will have to revise the notice provided to parents. The good news is that the number of times a district is required to provide this notice has been reduced. Under IDEA-2004, a copy of the procedural safeguards notice must be given to the parents at least one time per year. In addition, a copy also must be given to the parents upon initial referral or parental request for evaluation, upon the filing of due process complaint, and upon request by a parent.

Coming into the 21st century, Congress has provided that a current copy of the procedural safeguards notice may be placed on the district’s website (although this will probably not take the place of providing the notice in written form). Also, a parent of a child with a disability may elect to receive notices by email, if the district makes such option available.

Dispute Resolution

IDEA-2004 establishes a two-year statute of limitations for the filing of a due process complaint (unless the state establishes a different time period) from the date when the parent (or agency) knew or

should have known about the alleged action that forms the basis of the complaint.

Once received, a LEA must provide “prior written notice” to the parents (if it has not done so previously) and must respond to the factual claims in the complaint within 10 days of receipt. A party may object to the due process complaint notice as being insufficient within 15 days of receiving the complaint, and the hearing officer must rule on the sufficiency within 5 days.

A LEA must also convene a meeting (“resolution session”) with the parents and the relevant members of the IEP team within 15 days of receiving notice of the parents’ complaint. A district cannot have its school attorney attend this meeting unless the parent brings an attorney. If the matter is settled at the resolution session, the parties are to execute a written agreement, which may be voided within three business days of execution by either party.

If the LEA agency has not resolved the due process complaint to the satisfaction of the parents within 30 days of the receipt of the complaint, then the due process hearing may occur and the timelines commence.

IDEA-2004 also limits the issues to be heard at the hearing to those issues identified in the due process complaint notice. This notice may be amended only with consent of the other party, or by order of the hearing officer, but not less than five days before the due process hearing. If a party is permitted to amend their complaint notice, all applicable timelines for a due process hearing recommence from the time the party files the amended notice.

If the state provides a two-tiered system, any party may appeal the hearing officer’s decision for an impartial state-level review, and the SEA must ensure that a final decision on review of the hearing officer’s decision is reached not later than 30 days after the receipt of a request for a state-level review.

IDEA-2004 also establishes a statute of limitations for commencing a civil action in state or federal court within 90 days (unless a different time is established by the state) from the date of the decision of the hearing officer. Remember that MDE’s draft rules relating to due process hearings and proposed to take effect July 1, 2006, provide that any aggrieved party may appeal to a court of competent jurisdiction within 60 days after the date of the final decision.

Attorney Fees

Parents are still able to recover attorney fees if they prevail in a due process hearing. They may not, however, recover fees for an attorney’s attendance at an IEPT meeting or the resolution meeting.

The IDEA-2004 adds a new provision which permits a district who is a prevailing party to recover its attorney fees from the parent’s attorney if the due process complaint or subsequent cause of action is, or becomes, “frivolous, unreasonable, or without foundation.” Additionally, a district may recover attorney fees against a parent or the parent’s attorney if the due process complaint is filed for an improper purpose (e.g., to harass, cause unnecessary delay, or needlessly increase the cost of litigation).

Summary

The above sets forth some of the significant changes in IDEA-2004. It is by no means an exhaustive review, nor does it cover all of the nuances of the provisions discussed. Other IDEA-2004 provisions prohibit LEAs from mandating medication in order to attend school and place limits on the US Department of Education and State Departments of Education in regard to rules and regulations, policy letters, etc. Districts must remember that they will be required to continue following state special education rules even after the effective date of the legislation, as well as the requirements imposed by IDEA-2004, until such rules have been revised. It is not anticipated that new federal regulations will be available until late fall 2005 or early 2006.



**SIXTH CIRCUIT ADOPTS “MEANINGFUL BENEFIT” STANDARD;
ORDERS REIMBURSEMENT AND LOVAAS PROGRAM**

Departing from a long line of cases, the Sixth Circuit Court of Appeals recently adopted the Third Circuit Court of Appeals’ “meaningful benefit” standard in ordering reimbursement to parents for a 40-hour per week Lovaas-style “ABA” program for a student with autism. Deal v. Hamilton County Board of Education, ____ F.3d ____; 42 IDELR 109 (6th Cir. 2004).

Zachary Deal is a student with autism. When he was three years old, the Hamilton County School District developed an IEP which placed him in a preschool “comprehensive development class.” While attending this class, Zachary’s parents began providing him with one-on-one ABA Lovaas-style programming. The following year, the parents requested that the school district provide a 40-hour per week one-on-one ABA program in their home, as well as year-round speech therapy. Instead, the school district (through a 95-page IEP) proposed 35 hours per week of special education instruction with related services, including physical therapy and speech therapy. The parents did not request a due process hearing, but filed a dissenting report and convened several additional IEP meetings through the 1998-1999 school year. Zachary only attended the school’s program for 16% of the time.

In the spring, the parents requested an extended school-year program of 43 hours per week one-on-one ABA therapy and five hours per week speech therapy. Due to the student’s lack of attendance, the IEP team determined that it could not document any regression Zachary would suffer without an ESY and, therefore, declined the ESY services. In the fall, another IEP meeting was held and the school district proposed a program which would provide 35 hours per week of a special education preschool “comprehensive development class” and participation in a regular kindergarten classroom 3 times per week for 15 minutes each session. The IEP also provided that Zachary would participate at lunch with his non-disabled peers, and that regular kindergarten participation would be increased as he could tolerate it. Additionally, a classroom assistant with training in one-on-one discrete trial training would be provided, as would the following: the use of picture cues, incidental teaching, a functional communication program, activity-based instruction, the use of music, story-telling and reading, and other techniques. The IEP also provided for speech and language therapy for 30 minutes per session 5 times per week, occupational therapy 2 times per month, and physical therapy 30 minutes 1 time per week. The school’s program was described as an “eclectic” program,

utilizing multiple methodologies including TEACCH and components of various other methodologies.

Following the August 25, 1999 IEP meeting that proposed the program for the 1999-2000 school year, the parents enrolled Zachary in a private preschool. On September 2, Zachary began attending a regular pre-K classroom for three hours per day, two days per week, with an individual aid. A week later, the parents informed the school district that they were rejecting the proposed IEP in favor of the private preschool program. On September 16, the parents requested a due process hearing. Zachary did not attend public school during the 1999-2000 school year.

In August 2000, another IEP team meeting was held to propose an IEP for the 2000-2001 school year. This IEP proposed that Zachary be placed primarily in a regular kindergarten classroom, with support services for pre-teaching and re-teaching. Additionally, the program included related services of language therapy and occupational therapy. The parents again rejected the IEP, insisting that the district pay for the private ABA home program. Zachary did, however, attend the kindergarten program in the 2000-2001 school year, but only part-time.

The hearing which was requested in September 1999 concluded in February 2001, and encompassed 27 days of testimony. In August 2001, the ALJ made explicit findings on the credibility of all witnesses and provided 191 findings of fact. These included a finding that the school district violated the procedural requirements of the IDEA in that it predetermined the student’s IEP and failed to have a regular education teacher attend the meeting. The hearing officer found that these violations amounted to a denial of FAPE. The hearing officer also found that the district substantively violated the IDEA by failing to provide a “proven or even describable methodology for educating autistic children.” The hearing officer found that it was a substantive violation for the district to fail to provide 30 hours per week of Lovaas-style ABA programming. Further, the hearing officer concluded that the district did not sufficiently consider the LRE requirements of the IDEA, and failed to provide an ESY during the summer of 1999. The hearing officer found that the parents were entitled to reimbursement for up to 30 hours per week of home-based ABA services and that the district would continue to fund such program until such a time as the district convened an IEP team which included at least one expert in and advocate for

Lovaas-style ABA and developed an IEP which included at least 30 hours per week of Lovaas-style ABA programming. The hearing officer refused to award reimbursement for private evaluations and found that the parents were not entitled to reimbursement of tuition costs for the private preschool because they had not provided the required statutory notice prior to enrolling Zachary. The parties cross-appealed to federal district court.

The district court, after hearing additional evidence at the school district's request, reversed the hearing officer's decision, and instead found that there had been no procedural or substantive violations of the IDEA and that the parents were not entitled to any reimbursement. The district court also found that the hearing officer had erred in exalting the parents' preferred educational methodology above other appropriate methods. The parents appealed to the Sixth Circuit claiming that the district court had erred by permitting and relying upon the school district's additional evidence and by reversing the hearing officer's decision which found violations of the IDEA and granted reimbursement.

The Sixth Circuit Court of Appeals essentially reversed the district court. While finding that the district court appropriately admitted additional evidence and considered the credibility of those additional witnesses, the Sixth Circuit held that the district court erred by reversing the hearing officer's award of reimbursement to the parents. The Sixth Circuit found that the school district had violated the IDEA in that the IEP was "predetermined." In doing so, the court cited to evidence of predetermination such as the special education coordinator's failure to mention Lovaas-style ABA programming as a methodology for the parents to explore, the district's history of rejecting ABA services in favor of other methodologies, and the district's rejection of the validity of Lovaas studies in favor of other professional opinions in the field critical of ABA programming, etc. Additionally, in support of the hearing officer's decision that the school district had pre-determined the outcome of the IEP, the court cited comments by school personnel which showed the IEP was predetermined. First, district staff (the special education coordinator) stated that there were things that they could not give to Zachary because they could not give them to everybody. There was also an internal memo flagging Zachary's education program as a "sensitive case." The court held that by predetermining the IEP the school district denied the parents a meaningful opportunity to participate in the development of the IEP for Zachary. Further, the failure to have a regular education teacher present at the IEP meeting was a procedural violation which had a "real impact" on the decision-making process.

Thus, the Sixth Circuit reversed the district court findings regarding these procedural matters.

Turning to the substantive content of the IEP, the Sixth Circuit characterized the disagreement between the district court and the hearing officer as a "fundamental legal disagreement regarding the level of education that must be provided to a disabled child." While acknowledging that Sixth Circuit case law adopted the U.S. Supreme Court's analysis in Rowley (which holds that the IDEA requires an education which is reasonably calculated to enable the child to derive educational benefit), and a long line of Sixth Circuit cases hold that school districts are not required to provide students with autism intensive ABA programming, the court refused to follow these cases. Stating that, "there is a point at which the difference in outcome between two methods can be so great that provision of the lesser program could amount to a denial of FAPE," the court went on to recount testimony relative to the research supporting Lovaas-style programming for students with autism. According to that research, 47% of the students who received intensive Lovaas-style programming became "indistinguishable" from other non-disabled students, whereas only 14% of autistic students receiving the district's "eclectic" approach became "indistinguishable" from other children in regular education classrooms.

Based upon the above, and citing to cases primarily from the Third Circuit, the Court of Appeals failed to follow the holding of Doe v. Smith, 879 F.2d 1340 (6th Cir. 1989), in which the court held that an IEP is only required to provide a student with educational benefit which is more than *de minimis*. Instead, the court adopted a "meaningful educational benefit" approach to determine whether or not an IEP confers the appropriate amount of educational benefit. Relying on these cases, the court determined that, "at the very least, the intent of Congress appears to have been to require a program providing a meaningful educational benefit towards the goal of self-sufficiency, especially where self-sufficiency is a realistic goal for a particular child." Concluding that a school system would likely choose educational options which are less expensive at the expense of the child and society as a whole, the court stated that, "judicial intervention is necessary to fulfill congressional intent and serve the public interest."

Finding that the district court erred in reversing the administrative hearing officer, the Sixth Circuit remanded the case to the district court to consider the additional evidence, giving deference to the hearing officer's findings, and to determine whether the school district provided Zachary with a program which would confer a "meaningful educational benefit."



Turning to the issue of reimbursement, the court held the parents were entitled to reimbursement and that the school district deprived Zachary of FAPE by predetermining his placement and by failing to insure the attendance of the regular education teachers. The case was remanded to the district court to determine the level of reimbursement that would be appropriate.

Action: This case reaches the exact opposite conclusion previously established by years of case law in the Sixth Circuit. See, inter alia, Burilovich v. Bd. of Ed. of Lincoln Consolidated Schools, 208 F.3d 560 (6th Cir. 2000); Renner v. Ann Arbor Public Schools, 185 F.3d 635 (6th Cir. 1999). The opinion, written by a district court judge sitting by assignment, represents one panel’s opinion on the Sixth Circuit. Currently, a petition for rehearing *en banc* has been filed by the school district, and the court has directed that the parents file a response. If granted, all of the judges (including those who authored the opinions which this panel refused to follow) would rehear argument in the case.

Notwithstanding the above, one can take many lessons home from this case. First, be careful what you say. Comments dismissing out of hand any particular program or service will come to haunt you. Further, consideration of a parent’s point of view is important. While you are not required to adopt it, this case at least requires that you seriously consider the parent’s opinions with an open mind. While a district may choose not to adopt those opinions, it may not merely ignore them.

Another important lesson to learn is that failure to have a regular educator at an IEP meeting, or the presence of such a teacher for only part of the IEP meeting, can be held a violation of the IDEA which

results in a denial of FAPE. In this case, one of the parent’s objections to the 1999-2000 IEP was that it did not provide sufficient integration in the regular classroom setting. The court found that a regular education teacher was vitally important to considering the extent to which Zachary could have been integrated into a regular education classroom. The failure to have the regular education teacher at the IEP meeting, therefore, had a “real impact” on the decision-making process. Once again, it is important to remember that the regular education teacher is an important participant in the IEP team meeting. This result has been reached in several recent cases, and includes situations where the regular educator’s participation is “limited.” See, Bd. of Ed. of Wappingers Cent. Sch. Dist., 42 IDELR 131 (SEA NY, 2004).

As stated previously, this decision departs from a long line of cases holding that educational methodology is a matter left to the discretion of the school district, so long as a student receives FAPE. In addressing the FAPE issue, the court acknowledged that Rowely does not require that a school district maximize a student’s potential or make a student self-sufficient. However, the court then seems to ignore this and holds that “meaningful benefit” may require a district to provide an education that will enable a student to become self-sufficient if there is testimony which supports that a child is capable of becoming self-sufficient.

In one felled swoop, this case abandons nearly two decades of Sixth Circuit precedence, both as to a district’s right to select educational methodology and the “level” of educational programming required to provide FAPE. We will see what the entire Sixth Circuit does with the petition for rehearing *en banc*.

MDE SEEKS PUBLIC RESPONSE TO SECLUSION/RESTRAINT DOCUMENT

Corporal punishment and the issue of physical restraint and/or seclusion have been hot topics over the past several months. As you will recall, two separate bills were introduced last year which would modify Michigan’s corporal punishment statute. Michigan Department of Education assembled a referent group to make proposals relative to modifications of the Department’s policies regarding behavioral interventions, the use of restraint and seclusion. The referent group has concluded its deliberations and a draft document is posted on the Department’s website. Persons seeking to review the

document and provide input can access the document at www.michigan.gov/mde. Once at the Department’s website, click on the administrator’s button and then the link to special education. The document, entitled “Supporting Student Behavior: Standards for the Emergency Use of Seclusion and Restraint” (draft) is available in a PDF format, with response forms in word format or an online version. We would encourage school district personnel to respond and provide input, either through the responses in the document or e-mail to the department.

To the uneducated, an A is just three sticks.
~A. A. Milne

USE OF SCHOOL FACILITIES BY BOY SCOUTS UPHELD

The Michigan Court of Appeals recently held that allowing local scout groups to use public school facilities, including access to elementary school students during school hours for recruitment purposes, is not a violation of the establishment or equal protection clauses of the Michigan Constitution. Scalise v. Boy Scouts of America, ___ Mich App ___ (2005).

The Mt. Pleasant Schools permitted the Cub Scouts and Boy Scouts to distribute flyers and posters in its buildings. In addition, scout representatives were allowed to visit elementary school classrooms during school hours to speak with boys of scouting age about becoming scouts and encourage them to attend evening informational meetings with their parents.

One parent, who served as a scout den leader, became upset after having reviewed the scouts' by-laws and mission statements, which included various references to upholding a duty to God. The parent requested an exemption from having to recite the Boy Scout Oath, which was repugnant to his humanistic beliefs. When the scouts refused his request and revoked his membership as a den leader, he removed his son from the scouting program. He then expressed his concerns about the in-school distribution of information, alleging that the scouts were a religious organization. He requested that any subsequent flyers include a disclaimer informing parents of the religious character of the scouting organization. The district requested that the Boy Scouts include such a disclaimer and they complied. The parent was unsatisfied with the disclaimer's language, protested the distribution of flyers within the schools, and sued the Boy Scouts and the school district, claiming that Mt. Pleasant Schools violated the establishment clause of the Constitution.

Both the trial court and the Court of Appeals rejected the parent's claims. The Court of Appeals applied the Lemon v. Kurtzman test and determined that there was no violation of the establishment clause. The first prong of the Lemon test is whether there is a secular (non-religious) purpose. In reviewing the School's policy pertaining to the use of facilities by groups or organizations, the court found that equally allocating resources of a limited public forum is a secular purpose, not a religious purpose, even if religious organizations may take advantage of the limited open forum. The court found that the school's policy, which establishes priorities among qualified community groups, was neutral, had a secular purpose, and it did not advance religion over non-religion. Those community groups that were most closely connected with the purpose of schools would be served first. No similarly situated group

was favored over another. A blanket prohibition on religious groups is not required. Any incidental, indirect, or remote benefit to a religious group would not render the policy constitutionally invalid. The school permitted several organizations to distribute flyers and posters within the schools. The school was not endorsing any of the organizations. The school did not coerce anyone to attend the scouting meetings.

The second prong of the Lemon test is whether the primary effect of the program advances religion. The court found that the primary effect of permitting the in-school visitation by the scouting leadership was to inform students of scouting activities, not to advance religion. Boy Scouts were not permitted to proselytize, but merely get students involved in scouts. The primary effect of allowing access to the facilities, distribution of flyers, posting of posters, and in-school visits did not advance religion.

The third prong of the Lemon test is whether there is excessive entanglement with religion. The recitation of the scout promise or scout oath would occur at a private gathering where students and adult members attended freely and willingly.

While the school district required the scouts to comply with its policies, those were general regulations that would apply to all organizations that sought access to the schools. Requiring compliance with generally applicable policies and regulations did not create excessive entanglement. The school district did not monitor the Boy Scout gatherings. The court found that this was far short of the "comprehensive, discriminating and continuing state surveillance" of religious activities that would be necessary to give rise to excessive entanglements.

Action: Review your policies regarding access to and use of school facilities. Make certain that they are implemented in a neutral manner.

"If you plan for a year, plant a seed. If for ten years, plant a tree. If for a hundred years, teach the people. When you sow a seed once, you will reap a single harvest. When you teach people, you will reap a hundred harvests."

~Kuan Chung

STOP THE PRESS – PAY THE PRICE

The United States District Court for the Eastern District of Michigan recently held that the Utica Community Schools violated the First Amendment and the civil rights of a high school student by censoring an article she wrote for her school newspaper. Dean v. Utica Community Schools, (2004 US Dist Lexis 23238) (2004). The student wrote an article about a lawsuit against the school district, which was filed by residents of a neighborhood adjoining the school district's bus garage. In the lawsuit, the neighbors claimed that diesel fumes from the idling buses constituted a nuisance, violated their right to privacy, and harmed their health. When the student attempted to interview school district officials in preparation of her article, the district official refused and would not comment. The superintendent ordered the removal of the article from the school newspaper because the superintendent ruled the story contained a number of inaccuracies.

Even though the newspaper was a school-sponsored publication, the students essentially controlled the content and production of the paper without any significant administrative intervention. The faculty advisor did not regulate the subjects covered by the students, and merely provided advice on which stories to run, and criticized the grammar contained in articles. Neither the superintendent nor any other administrators had any involvement with the publication of the student newspaper. The court held that the student newspaper in question was a limited public forum because it had been opened for use by the public for speech and discussion concerning matters that are relevant to the high school community and its readers.

The Court reviewed the six intent factors established by the United States Supreme Court in determining whether a school district has established the limited open forum: (1) Whether students produce the newspaper as part of the curriculum; (2) Whether students receive credits and grades for completing the course; (3) Whether faculty oversaw the production; (4) Whether the school deviated from its policy of producing the paper as part of the curriculum; (5) The degree of control the administration and faculty exercise; and (6) Any applicable written policy statements of the board of education. The Court also noted that the Sixth Circuit adds three additional intent factors: (7) The school's policy with respect to the forum; (8) The school's practice with respect to the forum; and (9) The nature of the paper at issue and its compatibility with expressive activity.

The Court noted that even though the newspaper was published as part of the high school curriculum, that in and of itself did not establish an intent with respect to the forum. Likewise, even though students received credit for completing the newspaper, that was not in and of itself determinative. Third, even though there was a faculty advisor, that was not in and of itself determinative. The Court noted that for all practical purposes, the faculty advisor allowed the students to control every major facet of the school newspaper operation from advertising to editorial control.

The Court focused primarily on the fact that the school district deviated from its policy of producing the school newspaper exclusively as part of the curriculum. Because the school district allowed students to take the journalism class for credit more than once, the court viewed this more akin to participation in an extra-curricular activity than a classroom academic activity. Furthermore, the Court found the district deviated from its policy of having the newspaper be a part of the curriculum by allowing the student staff to independently manage the paper's affairs. The Court relied on the fact that the student newspaper accepted and published letters and guest columns from anyone, subject to the approval of the student-run staff.

The Court also relied on the fact that the school, administration and faculty exercised little or no control over the content of the newspaper, with the sole exception of the article in question. Finally, the district did not produce any written document stating that the newspaper is not a limited public forum. The Court found that the actual practice was to create a limited public forum in the newspaper. For approximately 25 years, the school district administration never intervened in the editorial process for any of its newspapers. Thus, the Court found that the school district had violated the First Amendment and civil rights of the student journalist by censoring the article.

The Court also noted that, in this particular instance, even if the newspaper were not deemed a limited public forum, suppression of the article was not viewpoint neutral. The Court found that the only reasonable conclusion that could be drawn from the evidence is that the school district's superintendent ordered the censorship of the article because he disagreed with the viewpoint it expressed.

Action: Develop written policies relative to student newspapers. If the district intends to exercise editorial control, do so on a content neutral basis.

FIFTH CIRCUIT COURT OF APPEALS RULES THAT A CHANGE IN LOCATION OF A PROGRAM IS NOT A CHANGE IN EDUCATIONAL PLACEMENT

The Fifth Circuit Court of Appeals recently ruled that the change in physical location of a program from a neighborhood school to a “cluster” school does not amount to a “change in educational placement.” Veazey v. Ascension Parish School Board, _____ F.3d _____, 42 IDELR 140 (5th Cir., 2005).

The parents of a student with a profound hearing impairment filed an action against a school district claiming that the school district’s relocation of the student’s classroom program from one elementary school to another violated the IDEA. Buddy Veazey is a profoundly deaf student who has used cochlear implants since he was two. In addition to the implants, Buddy utilizes cued speech. To assist in his educational program, Buddy utilizes the services of a cued speech transliterator during classes at school. During the 1995-96 school year, Buddy attended his neighborhood school (Oak Grove). However, at the beginning of the 1996-97 school year, the school board informed the parents that Buddy would be transferred to Gonzalez Primary School, to be clustered with other cued speech students and to facilitate his use of a cued speech transliterator. This decision was memorialized by a “site selection” form being sent to the parents dated August 19, 1996.

The parents requested a due process hearing. The hearing request challenged the board’s authority to unilaterally move the location of a program from one school building to another. Essentially, the program provided to the student remained the same, although Buddy would share the services of a cued speech transliterator at the Gonzalez School, as opposed to the one-on-one transliterator at his neighborhood school. The hearing officer ruled that, “Although the child was receiving appropriate aids and services in his neighborhood school environment; and although he was making satisfactory progress in that environment, the school board had absolute discretion to decide what school the child should attend.” The parents appealed, and a state review panel affirmed. The parents then filed suit in federal court seeking review of the decision. The parties filed cross-motions for summary judgment. The district court affirmed the local hearing officer and state review panel. Citing to White v. Ascension Parish School Board, 343 F.3d 373 (5th Cir., 2003), the district court held that neither the IDEA nor state law precluded the school board from selecting the centralized school site for implementation of the student’s IEP. The parents also argued that the school district was required to provide them with “prior written notice” because the change in school location was a “change in placement.” The district court held that where the centralized school provided

substantially similar classes as the neighborhood school and the same IEP was implemented in that centralized school, no change in educational placement occurred which would require prior written notice under the IDEA. Instead, this was merely a change in site selection to implement the program.

The parents again appealed to the Fifth Circuit Court of Appeals. In a *per curiam* (for the court) opinion, the Fifth Circuit found that a change in the particular school site at which a disabled student’s IEP is implemented does not constitute a change in educational placement. Since the student’s IEP did not require a one-on-one transliterator, the fact that the student would share a transliterator with others did not affect a fundamental change in the IEP. As such, the district court’s decision finding that prior written notice was not required prior to changing the particular school which houses a program was affirmed.

Action: This case reaffirms that a school district has authority to assign special education classrooms to particular schools as an administrative function. There is no right to attendance at a neighborhood school. Further, a school district has the authority to direct which school building a program will be housed in, and this decision does not require that “prior written notice” be provided pursuant to the IDEA. This “site selection” is determined by the Superintendent. On the Michigan IEP form, this determination is set forth on the last page with the Superintendent’s assurances and statement as to the name of the building where the program will be provided.

In Michigan, page 4 or 5 of the State IEP forms (depending on which form one is referring to) typically sets forth the programs, related services, and supplemental aids and services to be provided to the student. The page sets up a grid which includes a statement of the rule number, frequency and duration of the service and the “location” of the service. The comments to the federal regulations make clear that this location is not the name of a school building, but rather the environment in which the special education program or service is to be provided. See, 64 Fed Reg 12594 (March 1999). Districts should take care not to include the name of the school building in this section. The reason for this is that by including the name of the school building in the body of the IEP, a district would be required to reconvene the IEP meeting in order to move the program from one school building to another. As this case points out, if the move is merely a “site selection,” the



requirements of “prior written notice” under the IDEA do not apply. If done properly, the Superintendent would be able to change the geographic location of a program without the district being required to provide all of the information in prior written notice. Thus, if the program that a

student would receive in either location would be the same and no change in services would occur, the building location is left to the school district’s discretion and is not part of the IEP process. Instead, the Superintendent would merely give notice of the change of location.

NO PREVIOUS SPECIAL ED... NO TUITION REIMBURSEMENT

A Federal Court in the Southern District of New York reversed a state administrative hearing officer’s award of tuition reimbursement to the parents of a student attending a private school. Bd. of Ed. of the City Sch. Dist., City of New York v. Tom F. on behalf of Gilbert F., ____ F. Supp. 2d ____, 105 LRP 1052 (SDNY, 2005).

Gilbert F. is a student who had attended a private school since kindergarten. During the summer of 1999, the public school district convened an IEP team meeting to conduct an annual review. Seven people attended the IEP meeting; however, the student’s actual special education teacher from the private school was unavailable because she was in the hospital. An educational evaluator signed the IEP as the special education teacher. Upon completion of the meeting, the school district proposed an IEP, finding the student eligible for services as learning disabled and recommending placement in a “modified instructional services” classroom. This classroom would have a special education teacher and a ratio of 15 students to 1 teacher. The IEP also proposed that the student would receive speech and language therapy in a group setting two times per week and counseling in a group setting once per week. The IEP proposed that these services be provided in a public school. The IEP was provided to the parent for review.

The parent continued the student’s placement at the private school during the 1999-2000 school year and requested a due process hearing to seek reimbursement for the cost of the student’s tuition. The local hearing officer found in favor of the parents and awarded tuition reimbursement. The school district appealed to a state-level review officer, who affirmed the local hearing officer’s award of tuition reimbursement based upon the IEP team not being validly convened due to the failure to have the student’s special education teacher attend. The school district appealed to Federal Court.

The school district argued that the state review officer erred because the plain language of the IDEA prohibits an award of tuition reimbursement where a

student has not previously received special education services from a public school. The district also argued that the IEP team was properly constituted.

Whether a parent can receive tuition reimbursement where a student has never attended or received special education services from a public school was an issue of first impression in that circuit (Second Circuit). The court found that while Burlington v. Department of Education, 471 U.S. 359 (1985) permits a parent who unilaterally enrolls a child in a private school to seek and receive tuition reimbursement and that the court did not limit that remedy to parents of children who had previously received special education in a public school, the decision in Burlington predated the amendments of the IDEA made in 1997. When looking to the language of the 1997 amendments, the court noted that the statute provides that a parent “of a child with a disability, who previously receives special education and related services under the authority of a public agency . . .” may recover the cost of tuition if the public agency has not made a free appropriate public education available to the student in the timely manner. Finding that the 1997 amendments specifically limit the right to reimbursement to those students who had previously received special education services, the court found that there was no authority to reimburse tuition expenses in this case.

The court also addressed an OSEP opinion which concluded that the language did not appear to address this question. See, Letter to Luger, 33 IDELR 126 (OSEP 1999). The court acknowledged that deference to an OSEP letter may be appropriate when the statutory language is ambiguous. However, in this situation, the court found there was no ambiguity in the statutory language and, therefore, deference to the OSEP letter would not be appropriate.

Finding that the IDEA statutory language prohibited tuition reimbursement, the court found it unnecessary to address the issue of whether an educational evaluator could serve as a special education teacher at an IEPT meeting.

COUNTING THE DAYS... THE REST OF THIS SCHOOL YEAR

Regrettably, discipline situations arise in our schools all too often. These situations can be difficult procedurally, especially when it involves students with disabilities. Even though the President has signed the IDEA-2004, its new discipline provisions are not effective until July 1, 2005. Further, state and federal regulations will not have been modified by the effective date of IDEA-2004. Thus, it will be important to remember the basics of the disciplinary process for students, including the special requirements under IDEA-97 that apply to students with disabilities, at least through the balance of this school year, and until further guidance is provided by MDE and the USDOE.

Every discipline situation should begin with a careful review of the student's cumulative record and disciplinary file. Note the number of days the student has been subjected to discipline, whether they involve in-school or out-of-school suspensions. Be sure to pay attention to any pattern in the district's response to behavior: does it always result in suspension, are proactive steps being taken to address behaviors, etc. Also pay attention to patterns of behavior or other information that might raise a suspicion that a child may have a disability. If the district had reason to "know or should have known" of a suspected disability, the student may be able to invoke the protections of the IDEA, even if not currently eligible.

All students are entitled to procedural due process when faced with disciplinary measures. In Goss v. Lopez, 419 US 565 (1975), the Supreme Court held that rudimentary due process must be provided to students facing short-term suspensions of ten school days or less, and more formal due process for long-term (more than 10 school days) suspensions or expulsion. Rudimentary due process requires that a student be provided written or oral notice of the alleged disciplinary infraction, a summary of the evidence supporting the allegation, and the opportunity for a "hearing" where the student is permitted to tell his or her side of the story. In most situations, this "hearing" occurs shortly after the infraction in the principal's office. For longer term suspensions or expulsion, more formal due process is required, and typically involves a hearing before the superintendent or school board. These basics must be provided to all students, as well as any procedural rights set forth in the district's Code of Conduct and board policies.

Students with disabilities, whether eligible under the IDEA or section 504, must be afforded the same rudimentary due process for short-term suspensions. A student with a disability may be suspended for up

to 10 consecutive school days without any additional procedures beyond those afforded all students and without providing educational services during the suspension. Additional procedures apply, however, for suspensions which may *culminate* in removals of students with disabilities for more than ten school days in a school year. Counting "days" becomes extremely important (and confusing) when implementing these requirements. Further, the requirements under IDEA-97 and section 504 are slightly different.

A "change in placement" occurs, both under the IDEA and section 504, whenever a school district imposes a suspension of more than ten consecutive school days, or when a student has been removed cumulatively for more than ten school days in a school year and such removals result in a pattern of exclusion. Under the IDEA, this includes a placement in a 45-day "interim alternative educational setting."

Under the IDEA-97, when a student accumulates more than 10 school days of removal during a school year, the school district must, within ten *business* days of the eleventh day of removal (regardless of whether the removal constitutes a "change in placement"), convene an IEP team to review the student's behavioral intervention plan or to devise a functional behavioral assessment plan if the student does not have a behavior plan. For subsequent removals beyond 10 cumulative days, the team does not need to meet to review the behavior plan again, unless one of the team members believes there is a need to do so. Meeting to review a behavior plan is not required under section 504, but is a good proactive step.

For short-term suspensions that culminate in the student being out of school for more than 10 school days in a school year, but does not yet amount to a change in placement, the district must provide educational services determined by the administration in consultation with the student's special education teacher that will permit the student to appropriately progress in the general curriculum and advance toward achieving his or her goals and objectives. These services do not need to be provided to students eligible only under section 504.

Under both section 504 and the IDEA ('97 and '04), a district must convene an IEP team (or 504 team) to conduct a manifestation determination review meeting when imposing a "change in placement." The IDEA proscribes that this be done within ten *school* days of the *decision* to impose a "change in placement." No specific time line is identified in



section 504, but compliance with the IDEA is one way of fulfilling a district's obligations under 504. At the manifestation determination review meeting, the IEP team (or 504 team) must determine whether the behavior for which the student is to be disciplined was a manifestation of the student's disability. If the behavior is a manifestation, the student may not be disciplined. If it is not, the student may be disciplined as any other non-disabled student.

Section 504 has some additional requirements and some limitations. A district must evaluate a student prior to imposing a significant change in placement, which includes suspension or expulsion in excess of ten consecutive school days. However, if a student is being disciplined for using alcohol or drugs, a district does not need to provide any of the additional protections, e.g., manifestation determinations, etc. These students must still be provided typical due process per the district's board policies.

The IDEA-97 provides that a school district may unilaterally change the placement of a student with a disability to an interim alternative educational setting if a student carries a weapon to school, or if the student uses or possesses illegal drugs, or sells or solicits the sale of a controlled substance at school, for up to 45 *calendar* days. The decision to impose an interim alternative educational setting is made by district administration. The IEP team, however, determines what the setting will be.

Under IDEA-97, a district is only permitted to impose an interim alternative educational setting for weapon and drug violations; it cannot be used for other "mandatory" expulsion offenses in Michigan law, i.e., arson or criminal sexual conduct. A district may, however, seek an order from a hearing officer or a court for situations where the student's behavior is "dangerous."

Remember, the IDEA requires that a student who is suspended for more than 10 school days (or expelled) must still be provided a free appropriate public education. Thus, services must still be provided (beginning the 11th day of removal) to IDEA-eligible students during the time they are subjected to discipline. What level or type of service may depend on the length of time the student is excluded from his or her school program. Even after expulsion, a district must provide an IDEA-eligible student with an IEP which provides FAPE. This is not true for section 504 students, who are not entitled to any services when they have been suspended or expelled.

Issues relating to the discipline of students with disabilities are probably the most common area of concern to building administrators. If handled improperly, the result may be the invalidation of the discipline and compensatory education claims. If in doubt, contact your district's counsel.

U.S. DEPARTMENT OF EDUCATION SEEKS COMMENTS

The Department of Education has begun holding public meetings in various cities around the country. The purpose is to seek comments and input relative to IDEA-2004 and what regulations will be necessary to implement it. A list of the public meeting sites (none of which are in Michigan) are available on the Department of Education, Office of Special Education and Rehabilitative Services, website. E-mail comments or suggestions may be submitted to the Department electronically to comments@ed.gov or may be mailed to the Office of Special Education and Rehabilitative Services, U.S. Department of Education, 400 Maryland Avenue, SW, Potomac Center Plaza, Room 5126, Washington, DC 20202-

2641. Deadline for comments to be submitted is February 28, 2005.

Following receipt of comments, the Department of Education will prepare proposed regulations in the spring, and a second series of public hearings will be scheduled later this year.

Preliminary results of the first public hearing show that parents and disability rights organizations are actively submitting comment. It is important that school districts and their staff provide input to the Department.

"Who dares to teach must never cease to learn."

~*John Cotton Dana*

"More money is put into prisons than into schools. That, in itself, is the description of a nation bent on suicide. I mean, what is more precious to us than our own children? We are going to build a lot more prisons if we do not deal with the schools and their inequalities."

~*Jonathan Kozol*

FOIA PERMITS FLAT FEE FOR SUBSCRIPTION TO MINUTES

The Michigan Court of Appeals recently ruled, in an unpublished decision, that a public body may impose a flat fee, payable in advance, for a subscription to a copy of the minutes from meetings of the public body. Haley v. Nunda Township (January 18, 2005).

Nunda Township offered a subscription to the minutes of its township board meetings. The township charged a flat fee of \$25, payable in advance, for a six month subscription, or \$50, payable in advance, for a one year subscription. In addition, copies of the minutes were available for review at the public library, the township hall, and were distributed at each meeting of the township board, as well as being published in the local newspaper. The township acknowledged that the exact cost of preparing and mailing the minutes on a subscription basis would vary with the number of pages of minutes for each meeting, but argued that the actual cost would exceed \$50 for any six month period.

The Court of Appeals noted that Section 3 of FOIA grants the right to subscribe to a regularly created public record. The Court of Appeals noted that Section 4 of FOIA authorizes a public body to charge a fee for providing records, and limits that fee to the actual cost of duplicating and mailing public records. The question of whether a public body may impose a pre-paid flat fee for a subscription, rather than charging the actual costs of providing the public records, was a novel question.

The Court noted that Section 4 of FOIA, which limits a fee to the actual cost of duplicating and mailing a document, deals with existing records, not subscriptions for future records. Section 3 of FOIA, which covers future records and subscriptions, says nothing about either prohibiting or requiring advance payments or pre-billings. Because the FOIA does not define the term “subscription”, the Court reviewed the common definitions provided in various dictionaries. The Court concluded that the plain and ordinary meaning of the word “subscription” implies an advance payment of a sum certain in order to receive written material for a set period of time. As such, a public body cannot require that such a prepayment be the “actual cost” as it would be impossible to determine in advance what the actual cost would be, since the number of pages would ultimately vary. The Court held that because the plain and ordinary meaning of the word “subscription” implies an advance payment for a sum certain in order to receive the material during a set period of time, Section 3 of FOIA authorizes such a fee in order to subscribe to mailings of minutes of the meetings of a public body.

Action: If your district charges a flat fee, payable in advance, for a subscription to your board meeting minutes, ensure that the fee charged is reasonable. The fee should not be a means to prevent requests or circumvent the purposes of the FOIA. Minutes should also be available in alternative formats, such as by having them available at school libraries, community libraries, subsequent board meetings, etc.

REMINDER REGARDING PARENTAL INVOLVEMENT PLANS

Section 1118(a)(2) of the No Child Left Behind Act of 2003 requires the adoption and implementation of a parental involvement plan. Furthermore, Public Act No. 107 of 2004, MCL §380.1294, also requires school districts to adopt and implement parental involvement plans effective January 1, 2005. If your district has not yet adopted such a plan you should do so as soon as possible. A parental involvement plan must include, but need not be limited to, the following six components: (1) actions to involve parents in the development of the Title I Part A planning process; (2) coordination of

technical assistance and other support for schools; (3) coordination and integration of parental opportunities with Head Start and other programs; (4) actions to conduct annual evaluation of parental involvement; (5) involvement of parents in school activities; and (6) building school capacity for parental involvement to improve academic achievement. Sample parental involvement plans are available on the Michigan Department of Education’s website. If you need assistance, please feel free to contact Brad Springer for a sample parental involvement plan/policy at bspringer@scholtenfant.com

“The important thing is not so much that every child should be taught,
as that every child should be given the wish to learn.”

~ John Lubbock

SCHOOL DISTRICTS SUE OVER NCLB

Two Illinois school districts filed a lawsuit on February 3, 2005, challenging the No Child Left Behind Act. The lawsuit was filed by the school districts with four special education students as plaintiffs, against the U.S. Department of Education and the Illinois State Board of Education seeking a declaratory judgment finding that several sections of NCLB (regarding accountability) are invalid because they conflict with the mandates of the IDEA. The complaint alleges that NCLB's requirement that districts adopt systemic measures to maintain or improve student performance and achievement directly conflicts with the IDEA's mandate that districts individually assess and program for the unique needs of students with disabilities. Several schools within the districts were in school improvement status. The complaint alleges that the districts failed to make adequate yearly progress solely because of the disaggregated subgroup of special education students' failure to make AYP. Even though these subgroups did not make AYP, the complaint alleges that many of the students were making "meaningful and significant progress on their individualized goals and objectives contained in their IEPs". Notwithstanding this progress, the complaint alleges that the mandates of NCLB would require the district to change the students' IEP to conform with the systemic measures and require achievement at grade level by the year 2014. It is the conflict between the systemic measures of NCLB and the individualized programs of the IDEA that the lawsuit claims places the two statutes in direct conflict.

This is not the first lawsuit filed over NCLB. As you may recall, a school district in Reading, Pennsylvania has been fighting the battle in court since 2003. Two additional lawsuits have recently been filed against the State's Department of Education claiming that the State was not providing the technical assistance or funding to carry out the mandates of the Act.

Similarly, a southern California school district intends to file suit based upon the assessment and achievement expectations for its limited English proficient subgroup.

Other states, such as Utah, are considering seeking waivers of NCLB provisions. Specifically, Utah is considering passing

legislation which would permit local school districts to seek waivers on certain NCLB requirements because they conflict with Utah's accountability system. Section 9401 of NCLB allows the U.S. Department of Education to grant waivers where there is a conflict between State and Federal accountability systems.

LEGISLATIVE CORNER

Senate Bill 4 was introduced on January 12, 2005, and would amend the Revised School Code to extend the compulsory age of school attendance to age 18. The bill would also permit various options for providing programs for students aged 16 and 17, and would modify the language permitting school districts to assign students to "ungraded" schools for habitual truancy or incorrigibility. The bill has been referred to the Committee on Education.

SB 15 was introduced on January 12, 2005, and proposes to limit the average class size in grades kindergarten through third grade to no more than 17 pupils per class, with no more than 19 pupils in any particular class. The bill proposes the limitation to be phased in over the next several years, with classroom sizes first being limited in buildings where there are higher numbers of pupils eligible for free lunch. All average class sizes in grades K through 3 would be limited to 17 pupils per class by year 2009-2010. The bill has been referred to the Committee on Education.

SB 20, also introduced on January 12, 2005, would require a school district or public school academy to develop and adopt standards for the promotion of students from one grade to the next. The policy would require that parents be notified if the child is not performing at grade level, and that education plans be prepared for students who are at risk of not being promoted. The bill has been referred to the Committee on Education.

The Michigan Department of Education has posted an updated document relative to highly qualified teachers on its website, www.michigan.gov/mde. The website also has the draft document relating to restraint and seclusion. People are encouraged to visit the website, review the documents and provide input to the Department.