

COUNCIL NEWS

MICHIGAN COUNCIL OF SCHOOL ATTORNEYS



President's Letter



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Challenges of a New IDEA

Change. The one true constant in life is that everything will change. How many times have we joked that if you don't like the weather in Michigan, just wait five minutes and it will change? With all changes come challenges, and with all challenges we can, if we choose, create opportunities.

Special education, and the recent final regulations issued implementing the Individuals With Disabilities Education Improvement Act of 2004, is no different. Increased accountability and further alignment of IDEA with NCLB requires change, poses challenges and creates opportunities. One of the areas which poses both challenges and opportunities is the response to intervention model for determining eligibility for learning disabilities under IDEA. While the changes are embedded in the statute and regulations implementing special education services, the response to intervention model will require educational reform and change in both general education and the special education arenas.

The IDEA regulations encourage the use of a response to intervention model, which focuses on appropriate instruction in the general education classroom setting. If a student is not achieving with age appropriate or grade level expectations, a school is to examine the instruction provided in general education prior to finding the student eligible for special education services. A district is prohibited from finding a student eligible for special education services if the student's failure to meet age or grade level expectations is due to a lack of appropriate instruction in reading or math. Regrettably, this seems to place special education personnel in the position of judging general education teachers – a precarious place to be at best.

So what is one to do? Are special educators supposed to deny services to students who are not achieving by pointing the finger at general education? To do so would polarize these two "systems." Since the reauthorization of IDEA in 1997, the effort has been to narrow the gap between special education and general education and to eliminate the dual "systems" of instruction and separate expectations. Placing special education personnel in the position of critiquing general education instruction has the potential to destroy progress made over the past several years.

So again we ask, what is a district to do? The answer lies in forming partnerships. Partnerships need to be cultivated in all areas. Partnerships in the community and with the parents of our students are crucial. Partnerships between local school districts, the intermediate school districts that serve them and the State

Department of Education are also absolutely critical. And while every school district should be working hard to create those partnerships, the most fundamental partnership is between special education and general education teachers.

Collaborative approaches between teachers by co-teaching or peer mentoring provide the best opportunity for each system to support the other with instruction and with data collection on the quality education. Special education personnel cannot "teach" general education personnel how to implement a response to intervention model. Nor is the reverse possible. Instead, the result will require 110 percent given by each system in the partnership, and elimination of attitudinal barriers within our school environment. Too long has special education been an alternative to making modifications and changes to the way we teach in the general education classroom. Such attitude has been encouraged by special education teachers. But the changes confronting school districts require that this must end.

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As attorneys representing school districts and as persons in leadership positions in our school systems, we must all foster and encourage the partnership between general education and special education. We must all support this partnership by whatever means we can, be it through our work in collective bargaining, by providing professional development opportunities or efforts in the larger educational community or at the State Board. General and special education personnel alike must avoid the “glass half empty” attitude, and we must provide the resources and support necessary to foster those partnerships.

These times in education are changing, and like the weather in Michigan, will continue to do so. It is only by forging a lasting partnership between general and special education that we will weather those changes, and through those partnerships we will find that opportunities abound.

Constitutional Parameters of Public Comment at School Board Meetings

by Brad Banasik, Michigan Association of School Boards, Lansing

“You can’t take an employee of a school board to task in an open session. It’s not the public’s meeting; it’s the school board’s meeting.”

“A board of education meeting is a public meeting, not a meeting of the public.”

These two statements provide an indication of how school officials struggle with public participation at board of education meetings. The first comment was offered by a West Virginia school district’s attorney who stopped a group of citizens from identifying school employees in their comments about problems in the district.¹ Two weeks later, the school board rescinded its policy of suppressing critics at its meeting based upon a recommendation by the state Ethics Commission.² The second statement was found on a school district’s Web site under the heading “What is a Meeting?”

Both statements emphasize that the business of the board of education always takes precedence over any input from the public. While such an opinion makes life easier for a board and its employees, it, however, provides an oversimplified approach to balancing the First Amendment rights of citizens with the school board’s interest in having an orderly and efficient business meeting. In order to avoid a possible constitutional infraction, it is crucial that school boards and their presiding officers recognize that administering the public comment portion of a board meeting requires careful consideration of the speakers’ free speech rights.

The following information discusses the critical issues involved in protecting the free speech rights of citizens at school board meetings. Special attention will be given to the court decisions that have provided guidance on determining the legal parameters of regulating public comment.

Board Meetings as Limited Public Forums

A school board may establish public participation rules that assist in balancing the board’s interest in conducting a meeting in an orderly manner with individuals’ rights under the First Amendment. The extent to which public entities may adopt rules that impose limits on speech is determined by a forum analysis, which examines the character of the public property on which the speech occurs. The analysis sets the standards for balancing the government’s interest in limiting the use of its property to its intended purpose with the interests of those wishing to use the property for other purposes. Thus, different rules may govern speech at different times and places on public property, depending on the nature of the forum.

Because the Open Meetings Act mandates that a person “shall be permitted to address a meeting” of a school board,³ the Michigan Legislature has designated school board meetings as “limited public forums.”⁴ This type of forum exists when the government opens up public property for use by the public as a place for expressive activity for use by certain speakers or for the *discussion of certain subjects*.⁵

Due to the “necessities of confining a forum to the limited and legitimate purposes for which it was created,” a public body may reserve public comment for the discussion of certain topics.⁶ To determine whether a public body’s speech restriction is a legitimate effort “to preserve the limits of the forum,” the Supreme Court has observed a distinction between content and viewpoint discrimination.⁷ Speech restrictions can legitimately be based on content/subject matter so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.⁸ Thus, school boards may limit public comment to the discussion of subjects relating to the operation of the schools.⁹ While this restriction is content-based, it preserves school board meetings for the purpose for which they were created – conducting business related to the operation of schools at a public meeting.

According to the U.S. Supreme Court, if a limited public forum exists, reasonable, content-neutral time, place and manner regulations regulating speech are also permissible, but content-based prohibitions, aside from those that preserve the purpose of the forum, must be narrowly drawn to effectuate a compelling state interest.¹⁰ A regulation that restricts speech on the basis of the message will be strictly scrutinized by the courts and will almost always be found unconstitutional.

Restrictions on Time, Place or Manner

The “when, where and how” of expressive activity at board meetings may be regulated by reasonable time, place and manner restrictions if such regulations are (1) narrowly tailored and serve a significant government interest; (2) content-neutral; and (3) leave ample opportunity for speech in alternative areas or forums. The nature of the place and the pattern of its normal activities dictate the kind of regulations of time, place and manner that are reasonable. The Supreme Court has recognized that the crucial question for such restrictions is whether the manner of expression is basically incompatible with the normal activity of a particular place at



a particular time.¹¹ Thus, for school board meetings, time, place and manner restrictions may be placed on speech that materially and substantially interferes with the board's ability to conduct business at its meeting.

Examples of content-neutral time, place and manner regulations include rules that designate the place or time on the agenda when public participation may occur or impose a time limit for individual speakers. Both of these rules serve the interest of conducting an orderly and efficient public meeting, and while they limit a person's ability to speak at meetings, they still allow citizens to comment on matters that school boards are competent to act on.

Personally-Abusive Attacks

In the recent case of *Timmon v. Wood*,¹² the U.S. District Court for the Western District of Michigan examined the question of whether a rule that prohibits personally-abusive attacks during public comment is a reasonable time, place and manner restriction. The rule in question stated the following:

[T]he city council shall not permit a personally-abusive attack upon any person during debate or public debate. Nothing herein is intended to limit or restrain negative, positive or neutral comment about the manner in which an individual employee, officer, official or councilmember carries out his or her duties in public office or employment.

In deciding whether the rule complied with the First Amendment, the court focused on whether it serves a purpose that is unrelated to the content of expression, regardless of whether it has an incidental effect upon some speakers or messages but not others. The court ultimately concluded that a rule that prohibits personally-abusive attacks is content-neutral, because it applies to all citizens regardless of the message or viewpoint. Therefore, such a rule is subject to the lower standard of serving a "significant interest" rather than a "compelling interest," which is the applicable and more exacting standard of scrutiny for determining the constitutionality of content-based rules. Because it has been universally recognized by courts that the government has a significant interest in the orderly and efficient conduct of meetings of public bodies, the court found the rule in question to be constitutional for the reason that it furthers the interest of running a meeting without disruption by ensuring that speakers focus only on public issues and not personal disputes.

To illustrate the fine line between a content-neutral and content-based rule, compare the above rule with the following bylaw that was challenged in the case of *Bach v. Sch. Bd. of City of Virginia Beach*:¹³

Persons addressing the board shall...avoid references, statements, or conduct reasonably likely to result in disruption or undue delay in the orderly transaction of the business scheduled for consideration by the Board. This provision means and includes, but is not limited to, attacks or accusations regarding the honesty, character, integrity, or other like personal attributes of any identified individual or group. Such comments are prohibited because, by virtue of their personal nature, character, and/or manner of presentation, they would fairly call

for an immediate response by the person or group so identified, thus delaying or disrupting consideration of agenda items scheduled for consideration by the board.

In this case, the court found the bylaw to be unconstitutional because it constituted a prior restraint on speech in a limited public forum. It found that the provision that prohibited attacks or accusations regarding the honesty, character or integrity of an individual restricted speech based on content that is characterized as negative criticism, while allowing speech with content that is characterized as positive or neutral.

The court in *Timmon* also addressed the application of the of the city council's rule. Under some circumstances, a constitutionally valid rule can be applied in an unconstitutional manner. In this case, the plaintiff claimed that members of the city council invoked the rule because they disagreed with her message. The city council applied the rule to comments made by the plaintiff about the city's newly-elected clerk and his decision to introduce his same-sex spouse at a city function. In the eyes of the plaintiff, the actions of the city clerk were inappropriate based upon the Michigan constitution, which legally defines marriage as the union of one man and one woman.¹⁴

The court concluded that the comments did not relate to a matter of public concern, but rather to the clerk's own personal life. While the acknowledgement occurred at a city function, the court was not convinced that it involved city business. If the clerk had been performing an official function of his office or advocating that the city take a particular position regarding same-sex marriages, then, as observed by the court, his actions would have amounted to a matter of public concern subject to negative or positive comment during the public comment portion of the city council meeting. But, instead, the comments were legitimately restricted by the city council in an effort to preserve the governmental purpose of its business meeting.

Restrictions Based on Content or Viewpoint

As noted above, in a limited public forum, any content-based exclusion must be necessary to serve a compelling state interest and must be narrowly tailored or specifically designed to meet that government interest. A compelling government interest means an interest of the greatest importance, such as protecting the health, safety and welfare of the community.¹⁵ For example, the U.S. Supreme Court has "recognized that there is a compelling interest in protecting the physical and psychological well-being or minor."¹⁶

Complaints and Criticisms against School Employees

Can a school board adopt a rule that prohibits citizens from publicly criticizing or making complaints against school employees by name during public comment? No, if the complaint relates to the manner in which an employee carries out his or her public duties. First of all, such a rule is content-based because it allows citizens to make positive or neutral comments about employees, but it prohibits a negative viewpoint from being expressed.¹⁷ Further, while a school district could arguably have a *significant* interest in protecting the privacy and due process rights of its employees, this interest falls well short of the compelling interest threshold that is needed to sustain a content-based restriction on protected speech.



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In *Gault v. City of Battle Creek*,¹⁸ the U.S. District Court for the Western District of Michigan held that a city commission improperly restricted the First Amendment and Open Meetings Act rights of citizens who were ruled out of order for attempting to speak on the city's police chief's alleged transgressions during public participation. The plaintiffs attempted to discuss allegations that the police chief had an affair with the wife of a police officer and the chief had "cloned the pager" of the same officer. The city recognized that its actions were based upon the content of the plaintiff's speech, but argued that the plaintiffs were properly ruled out of order because the affair was a purely personal matter that was totally unrelated to the police chief's duties. The Court disagreed, finding that both allegations were a matter of public concern appropriate for discussion at the city commission's public meeting:

Sexual affairs have caused government ministers to lose power, corporate presidents to resign, spouses to commit murder, not to mention dissension and disruption in offices and organizations. This type of behavior is of even greater public concern when it involves a paramilitary organization such as a police department. The allegation...could directly relate to the morale, leadership, and teamwork of the Battle Creek Police Department and its officers.¹⁹

Because the allegations were matters of public concern and were appropriate for the limited public forum that existed at the city commission's public meetings, the fact that they were prohibited based upon content resulted in a free speech violation under the First Amendment.²⁰

Disorderly Conduct

If, during public comment, a citizen engages in "disorderly conduct" or acts in a manner resulting in a "breach of the peace," a school board may take steps to control the behavior or even remove the individual from the meeting. The Open Meetings Act qualifies a citizen's right to attend a public meeting by allowing exclusion for "a breach of the peace actually committed at the meeting."²¹ Additionally, the Revised School Code permits the board president to order the removal of a citizen who, after notice from the president, persists to behave in a "disorderly manner."²² This provision also empowers the president to "order a law enforcement officer or other person to take the disorderly person into custody until the meeting is adjourned" if the person refuses to withdraw from the meeting.

Neither statute, however, includes definitions for the terms that permit dismissal. Thus, the determination of whether someone's conduct amounts to "breaching the peace" or being "disorderly" will likely be based upon the president's viewpoint, which should be objective rather than subjective. A president who has "thin skin" or heightened sensitivities about keeping an orderly meeting may be too quick in ordering an agitator's removal from a meeting, which could result in a First Amendment violation.

The courts have provided some guidance on defining the terms. In 1884, in *Davis v. Burgess*,²³ the Michigan Supreme Court set forth a commonly accepted definition for a "breach of the peace" that is still applied today:

Now what is understood by a 'breach of the peace?' By 'peace,' as used in the law in this connection, is meant the tranquility enjoyed by citizens of a municipality or community where good order reigns among its members. It is the natural right of all persons in a political society, and any intentional violation of that right is 'a breach of the peace.' It is the offense of disturbing the public peace, or violation of public order or public decorum.⁷

This definition permits removal of someone who refuses to follow the public comment rules established by the board and such actions violate the public order or public decorum of the meeting.²⁴

Regulating Profanity

While helpful, the *Davis* definition is also subject to interpretation and it still requires consideration of First Amendment principles to determine whether specific speech is protected. For example, based on the definition alone, it is unclear whether using profanity during public comment amounts to a "breach of the peace." Therefore, it is necessary to look at the context in which the profanity was used to determine whether it might receive protection from the First Amendment. If profanity amounts to "fighting words," the actions of the speaker would not constitute free speech and his or her removal from the meeting for a "breach of the peace" could be justified under the definition. In *Chaplinsky v. New Hampshire*,²⁵ the U.S. Supreme Court recognized that "fighting words" – those by which their very utterance inflict injury or tend to incite immediate breach of the peace – are among the certain well-defined and narrowly limited classes of speech that may be prohibited and even punished by the government.

Today, *Chaplinsky* still remains viable for the principle that the government may forbid "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke a violent reaction."²⁶ However, the Supreme Court has declined to uphold any convictions for fighting words since *Chaplinsky*. Notably, in *Rosenfeld v. New Jersey*,²⁷ the Supreme Court vacated a conviction against a teacher who used a profane descriptive adjective four times during his remarks at a school board meeting.²⁸ The New Jersey Supreme Court originally found his words to be "fighting words" and not protected by the First Amendment. The Supreme Court issued its order without expressing an opinion, but the ruling implies that such a conviction cannot stand if it is based only upon a profane utterance to a captive listener.²⁹

The U. S. Court of Appeals for the Sixth Circuit has also recently declined to extend the "fighting words" designation to profanity that was used by a citizen at a Michigan township board meeting. In *Leonard v. Robinson*,³⁰ a speaker was arrested for uttering the phrase "G ___ D ___" while addressing a township board.³¹ The Court found that using the phrase "G ___ D ___" was not, as a matter of law, likely to cause a fight, and "prohibiting [the speaker] from coupling an expletive to his political speech is clearly unconstitutional."³²

Thus, despite the fact that profanity may be offensive, it is protected by the First Amendment. In making a determination to rule a speaker out of order and demand his or her removal from



a meeting, the decision should not be based solely upon whether the speaker's words are profane or vulgar. A "breach of the peace" or "disorderly conduct" results from a speaker creating an actual, immediate threat to public safety, peace or order, not merely from the content of his or her words.

Conclusion

Presiding over a public meeting is not an easy task. Not only must the presiding officer be knowledgeable of parliamentary procedure, board policies and the open meetings law in order to conduct meetings effectively, he or she must be prepared for handling unexpected "disruptions." Take, for example, the school board president in West Virginia who was presiding over a meeting that was interrupted by a citizen who "pranced about the room" dressed in a devil costume. This person, who prior to the meeting asked to be placed on the agenda under the fictitious name of "Mr. DeVille," sought to convey his concern about the use by the high school of a devil image as the school mascot. During his appearance, which began when he unexpectedly entered the boardroom during the middle of the meeting, he addressed the board outside of the public comment period, he ignored instructions to take a seat or leave, and was twice called out of order by the president. In his statement to the board, "Mr. DeVille" represented that he was the red devil and thanked the board for keeping the devil in the schools and keeping God out. He departed from the meeting only when the president stood up and moved toward him.

While the president was not forced to demand the removal of this individual, such action would have been justified; "Mr. DeVille's" conviction of willfully disrupting a public meeting was upheld by the West Virginia Supreme Court.³³ Though certainly out of the ordinary and unexpected, this example presents a pretty easy decision for a president on whether or not to restrict a citizen's speech and order that the person be removed from the meeting. Unfortunately, not all cases present such easy decisions. To handle the difficult decisions, school boards and presidents should always keep in mind the following general rules:

- School board meetings in Michigan are limited public forums. Because the Legislature has given citizens the right to address school boards, that right may be limited only within constitutional parameters.
- In restricting public participation, a school board must not discriminate on the basis of the particular views expressed.
- However, speech restrictions can legitimately be based on content/subject matter so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.
- Thus, a school board may place limitations on personal attacks on board members or employees that are unrelated to how they perform their public duties.
- But, rules cannot restrict citizens' rights under the First Amendment to address the board about complaints against employees or board members that relate to the manner in which they carry out their public duties.

- A presiding officer has discretion to stop speech or other conduct that he or she reasonably perceives to violate or threaten the public order or public decorum of the meeting.

By observing these rules, school boards and presidents will be able to maintain a proper balance between furthering the board's interest in conducting a meeting in an orderly manner and protecting the rights that citizens enjoy under the First Amendment.

- ¹ Associated Press, 3/10/05, First Amendment Center, http://www.firstamendmentcenter.org/news.aspx?id=14952&SearchString=attorney_muzzles_critics (accessed 1/20/07).
- ² Associated Press, 3/22/05, First Amendment Center http://www.firstamendmentcenter.org/news.aspx?id=15014&SearchString=rescinds_policy_muzzling (accessed 1/20/07).
- ³ MCL 15.263(5).
- ⁴ The Supreme Court has recognized two other forums for speech on government property in addition to limited public forums: traditional public forums and nonpublic forums. The traditional public forum includes places like parks and streets that have traditionally been devoted to public debate. The nonpublic forum is not open for public communication.
- ⁵ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985).
- ⁶ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995), citing to *Cornelius, supra*, at 806.
- ⁷ *Id.*
- ⁸ *Id.*
- ⁹ *Featherstone v. Columbus City Sch.*, 92 Fed. Appx. 279 (6th Cir. 2004).
- ¹⁰ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 46 (1983).
- ¹¹ *Grayned v. City of Rockford*, 408 U.S. 104 (1972).
- ¹² ___ F.Supp.2d ___, 2006 WL 2033903 (W.D. Mich. 2006).
- ¹³ 139 F.Supp.2d 738 (E.D. Va. 2001).
- ¹⁴ The city clerk and his spouse were married in a Canadian ceremony.
- ¹⁵ See *Schenck v. United States*, 249 U.S. 47 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.... The question in every case is whether the words used...create a clear and present danger.")
- ¹⁶ *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1986).
- ¹⁷ The U.S. Supreme Court has long since warned about the pernicious effects of artificially controlled public debate and have held that the First Amendment serves to prevent such manipulation. See *City of Madison Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) ("To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees.")
- ¹⁸ 73 F.Supp.2d 811 (W.D. Mich. 1999).
- ¹⁹ *Id.* at 815.
- ²⁰ Even though the defendants claimed they had a compelling interest in the orderly conduct of meetings, the Court did not comment on this issue. Of course, the Court's holding means that a compelling interest did not exist. Other courts, however, have specifically stated that the interests in protecting the privacy and liberty interests of employees or conducting an efficient, orderly meeting are not sufficiently compelling to justify a ban on employee criticism. See *Baca v. Moreno Valley Unified School District*, 936 F.Supp. 719 (C.D. Cal. 1996) and *Leventhal v. Vista Unified School District*, 973 F.Supp. 951 (S.D. Cal. 1997).
- ²¹ MCL 15.263(6).
- ²² MCL 380.1808.
- ²³ 54 Mich. 514, 517; 20 N.W. 540 (1884).
- ²⁴ See *Jones v. Heyman*, 888 F.2d 1328 (11th Cir. 1989) (holding that the chair of a city commission meeting may, without violating the First Amendment, have a speaker removed when she becomes disorderly by speaking off-topic); *White v. City of Norwalk*, 900 F.2d 1421 (9th Cir. 1990) (a meeting is disrupted if a public body is prevented from accomplishing its business in a reasonably efficient manner and such conduct may interfere with the rights of other speakers).
- ²⁵ 315 U.S. 568 (1942).
- ²⁶ *Cohen v. California*, 403 U.S. 15, 20 (1971).
- ²⁷ 408 U.S. 901 (1972), on remand, *State of New Jersey v. Rosenfeld*, 303 A.2d 889 (N.J. 1973).
- ²⁸ The teacher was convicted of violating a statute that prohibited indecent words spoken loudly in a public place that were of such nature as "to be likely, in the light of the gender and age of the listener and the settings of the utterance, to affect the sensibilities of a hearer." *Rosenfeld, supra* at 583.
- ²⁹ Thomas W. Pickrell, *School Board Meetings and the First Amendment* <http://www.nsbba.org/cosa/Members/archives/firstamend.htm> (accessed November 21, 2000).
- ³⁰ ___ F.3d ___, 2007 WL 283832 (6th Cir. 2007).
- ³¹ The speaker was arrested for possibly violating four laws, including MCL 750.103, which states: "Any person who has arrived at the age of discretion, who shall profanely curse or damn or swear by the name of God, Jesus Christ or the Holy Ghost, shall be guilty of a misdemeanor."
- ³² *Leonard, supra* at 9.
- ³³ *State v. Berrill*, 196 W. Va. 578; 474 S.E. 508 (1996).



When My Space Affects Your Space

by Daniel R. Martin, Scholten Fant

Students used to write in their journals to vent angry emotions about their classmates or teachers, to express inner feelings of devotion for their latest crush, or to reflect on their personal experiences with alcohol, drugs and sex. If students desired to share such thoughts with others, they would pass a handwritten note in class, gossip in person or over the phone, scrawl graffiti on bathroom walls, or the more industrious might publish an underground newspaper to distribute among likeminded friends. Today kids use a computer or cell phone to e-mail, text message, blog or post Web pages. Social networking sites such as MySpace.com, Facebook.com, and myriad others have transformed the way kids express what was once considered fairly private thoughts.

When does a school district have any responsibility or authority to discipline students for such expressive activities? In a nutshell, when a student's use of MySpace adversely affects the educational activities at school (your space), discipline may be appropriate, but a district must carefully consider the student's rights under the First Amendment.

Overview of Three Landmark First Amendment Cases

Three landmark decisions of the United States Supreme Court form the basic guidelines for school officials to follow in addressing whether to discipline a student for expressive activities.

First, students do not shed their constitutional rights to freedom of expression at the schoolhouse gate. *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969). In *Tinker*, students engaged in symbolic speech by wearing black arm bands in protest of the Vietnam war. The Supreme Court held that a school district may not prohibit student speech merely because of the discomfort or unpleasantness of unpopular views. Instead, in order to prohibit student speech, school authorities must be able to reasonably forecast that the speech would cause substantial disruption of, or material interference with, the school's educational activities.

Second, schools may discipline students for engaging in indecent, obscene or vulgar language while at school. *Bethel School District #403 v. Fraser*, 478 U.S. 675 (1986). In *Fraser*, a student gave a speech at a school assembly that was filled with sexual innuendo and double entendre. The Supreme Court held that the "school need not tolerate student speech that is inconsistent with 'its basic educational mission' . . . even though the government could not censor similar speech outside the school."

Finally, school officials may exercise editorial control over student speech in school sponsored publications if such control is reasonably related to legitimate pedagogical concerns. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 266 (1988). In *Hazelwood*, the school principal censored a school newspaper article on teen pregnancy and effects of divorce. The Supreme Court upheld the prerogative of educators to exercise editorial, content-based control, over a student newspaper which was produced as part of a school's journalism curriculum.

All of these landmark cases involved student speech that occurred on-campus as opposed to online. While neither the Supreme Court nor the Sixth Circuit has yet to issue a decision regarding student online speech, a number of lower courts have.

Lower Court Cases Involving Student Internet Speech

In *O'Brien v. Westlake City Schools*, (E.D. Ohio, 1998), a high school junior lampooned his band teacher on a Web site he created on his home computer. He referred to the teacher as "an overweight middle-aged man who doesn't like to get haircuts" [OUCH!] and claimed that the teacher "Likes to involve himself in everything you do, demands that band be your number one priority, and favors people who kiss his ass." School officials learned about the Web site and used school computers to access the material. The student was suspended for 10 days. As a result of his suspension, he received an "F" in band and reduced grades in his other courses. He successfully sued the school board. His attorneys compared his Web site to students sitting in a coffee shop sharing comments about disliked teachers, as distinguished from a situation where a student shouts obscenities at a teacher face-to-face on school grounds in front of other students. The court ordered school officials to restore him as a student in good standing. School officials ultimately settled the case, agreed to pay the student \$30,000, expunged the suspension from his record, and wrote a letter of apology.

In *Beussink v. Woodland*, (E.D. MO., 1998), a high school junior used his home computer to create a home page highly critical of the school administration and which used vulgar language in commenting on the principal, teachers and the school's official Web site. He included a link to the school's official Web site from his home page. While he did not intend his home page to be viewed or accessed at school, a classmate, after an argument with and as a means to retaliate against the student, showed the Web page to the computer teacher. Only one other student was present at that time, and that other student did not view the Web page. The computer teacher went directly to the principal, who then viewed the Web page. He decided immediately that the student must be disciplined. The principal originally, suspended the student for five days, which he later extended to 10 days. The court applied the *Tinker* standard and held in favor of the student. The court stressed that school officials disciplined the student because they were upset by the content, not because the home page caused any substantial disruption at the school.

In *Emmett v. Kent School District*, (W.D. WA., 2000), a senior honor student (3.95 G.P.A.) used his home computer to post a Web page that included commentary on school administration and faculty, as well as mock obituaries of two of his friends, and allowed visitors to vote on who should die next (receive a mock obituary). The Web page included a disclaimer that the site was not sponsored by the school (it was entitled "Unofficial Kentlake High Home Page"), and that it was for entertainment purposes only. The mock obituaries not only became a topic of discussion at school among students, faculty and administrators, but also the topic of a television news story which depicted the site as containing a "hit list" of people to be killed. The night



the story aired, the student immediately removed the Web page. The next day, the principal placed him on an emergency expulsion, though that was later reduced to a five-day suspension. The court discussed the three landmark Supreme Court cases, noting that this was not part of an assembly (like *Fraser*) or a school sponsored publication (like *Hazelwood*). The court stated, "Although the intended audience was undoubtedly connected to Kentlake High School, the speech was entirely outside of the school's supervision or control." The court acknowledged that school officials in the post-Columbine world are in "an acutely difficult position" when it comes to balancing the interests in student safety with student expression. But because the school officials did not present any evidence that either the mock obituaries or the voting for who should die next were intended to threaten anyone or manifested any violent tendencies whatsoever, the court found the student would likely succeed on the merits of the case. The school district ultimately settled the dispute by agreeing to pay one dollar and attorney fees, and removed the suspension from the student's record.

In *J.S. v. Bethlehem Area School District*, (PA., 2002), an eighth grade student used his home computer to create a Web site that included many vulgar and derogatory comments about his algebra teacher ("Why Should She Die?"), the school principal (that he engaged in sexual relations with the principal at another school), and others. The web site contained a disclaimer indicating that by entering the site, the visitor was not a staff member of the school and would not disclose the site to school district employees or administration, or disclose the identity of or intend to cause trouble for the creator of the site. As for the reasons listed under "Why She Should Die?" the page offered "Some Words from the writer" and listed 136 times "F___ You Mrs. Fulmer. You Are A B___. You Are A Stupid B_____." [His creative writing teacher is not proud.] A drawing of his teacher showed her head cut off with blood dripping from her neck. Visitors were asked to give him \$20.00 to help pay for a hitman. The student not only told other students about his site, he even showed it to a student while at school. The site was viewed by students, faculty and administrators. The principal contacted local police and the FBI, though law enforcement officials refused to press charges. The algebra teacher, after viewing the site, suffered stress, anxiety, loss of appetite, loss of weight, loss of sleep, and a general sense of loss of well being, which included an inability to go out of the house. The teacher took anti-anxiety/anti-depressant medication, and was unable to return to school to finish the school year. Three substitute teachers were used, which disrupted the educational process. According to the principal, the Web site also had a demoralizing impact on the school community, causing the school to be at a low point that was worse than anything that he had encountered in 40 years of education, comparable to the death of a student or staff member. While the court found that the statements did not constitute a "true threat", which is unprotected by the First Amendment, the court nonetheless upheld a permanent expulsion, applying the *Tinker* standard. The court found that the student's Web site was specifically aimed at the school district and seemed designed to create upheaval. Further, the school district demonstrated that the Web site created an actual and substantial interference with the work of the school.

In *Coy v. Board of Education of the North Canton City Schools*, (N.D. OH., 2002), a middle school student created a Web site on his home computer that contained pictures and biographical information about the student and his friends, and a section entitled "losers" that contained pictures of three classmates. The "losers" section had a few insulting sentences written under the pictures, the most objectionable being a sentence describing one of the boys as being sexually aroused by his mother. A group of students told a teacher about the Web site. After viewing the site, the teacher showed it to the principal, who took no immediate action. The following day, the student was observed by a teacher in computer class toggling between screens while supposedly doing school work. The teacher reported this to the principal, who asked the IT specialist to check the computer to determine what Web sites had been accessed. It was determined that the student accessed his own Web site from the school computer. The principal originally suspended the student for four days, and the school district subsequently expelled him for 80 days. The court found the facts in this case closer to *Tinker* than *Fraser*: the extent of the student expressive activity was "the private viewing of his own private Web site" that he created off-campus; there was no evidence he had displayed it to any other students at school; he did not express himself to a captive audience at school. Further, while the Web site was crude, it was not like the "elaborate, graphic and explicit sexual metaphor" at issue in *Fraser*. Because his expressive activity was not in any way sanctioned by the school, nor did the school knowingly provide any material to support the expression, *Hazelwood* did not apply. The appropriate test was the *Tinker* analysis. The court noted that if the school disciplined the student because they did not like what was contained on the personal Web site, the student would prevail; however, if the school disciplined him for accessing the inappropriate Web site while at school, the school must show that his expressive activity "materially and substantially interfered with the requirements of appropriate discipline in the operation of the school."

In *Mabaffey v. Aldrich*, (E.D. MI., 2002), a couple of high school students created a Web site entitled "Satan's Web Page" that contained various sections subtitled "people I wish would die," "people that are cool," "movies that rock," "music I hate," and "music that is cool." Near the bottom of the page, a statement suggested Satan had a mission for visitors to the site to accomplish that included stabbing "someone for no reason then set them on fire throw them off a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face." The site included the following disclaimer; "PS: Now that you've read my web page please don't go killing people and stuff then blaming it on me. OK?" A parent notified the police about the site, and the police notified the school administration. One of the students involved in the creation of the Web site admitted to police officers that he contributed to the Web site and that school computers "may have been used to create the Web site." That student was suspended pending an expulsion hearing. The student enrolled in a neighboring school district, and sued his former district. The court found no evidence that the student communicated the statements on his Web site to anyone. While other students viewed the site, there was no evidence they did so because the student communicated the Web site to them.



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The court also found that there were not threats made against any of the students named on the Web site. The court noted the disclaimer, and ruled that the “listing of names under the heading ‘people I wish would die’ did not constitute a threat to the people listed therein any more than Plaintiff’s listing of names under the heading ‘people that are cool’ make those listed therein ‘cool.’” The court held that the school’s regulation of the student’s protected speech without any proof of disruption to the school or on-campus activity in the creation of the Web site violated the student’s First Amendment rights.

Summary and Guidance

There are two fundamental factors that a school should examine when deciding whether to discipline a student for posting on a Web site: the connection between the student’s expressive activity and the school environment, and the likelihood that the expressive activity could cause substantial disruption of, or material interference with, the school’s educational activities.

In determining the connection between the student’s expressive activity and the school environment, consider the following types of questions.

- Did the student create the Web site as part of a class project, or post it on the school’s official Web site?
- Did the student use a school computer, network, or server to create, access, or update the Web site?
- Did the student distribute the material at school?
- Did the student electronically or otherwise send the expressive material directly to a school computer or directly to a teacher or school administrator?
- Did the student bring attention to the Web site while at school, such as by logging on and showing it off to classmates?

In determining the likelihood that the expressive activity could cause substantial disruption of, or material interference with, the school’s educational activities, consider the following types of questions.

- Did the student bring attention to the Web site while at school, such as by logging on and showing it off to classmates?
- Did any students complain to school officials about harassment resulting from the information posted?
- Has any instructional time been wasted by addressing student or staff concerns about the Web site?
- Has the Web site resulted in a loss of authority of the targeted staff member?
- Has the Web site resulted in a loss of control in the school?
- Has a targeted staff member been unable to do his job due to the emotional stress created by the Web site?
- Has a student been unable to attend school because of the emotional stress created by the Web site?

- Is the expressive activity lewd or vulgar?
- Could the expressive activity be considered a true threat?

If there is a sufficient connection between the student’s online expressive activity and the school environment, and if the expressive activity has caused substantial disruption of or material interference with the school’s educational activities, then discipline may be appropriate. Otherwise, the school district should tolerate the student’s expression.

Sixth Circuit Holds Early Retirement Payments are ‘Wages’ Subject to FICA

By Laura Katers Reilly, Kendricks, Bordeau, Adamini, Chillman & Greenlee P.C.

In a case decided this past summer, *Appoloni v. United States*, 240 F.3d 185 (6th Cir. 2006), the Sixth Circuit settled a split among Michigan’s Western and Eastern District Courts by holding early retirement payments to tenured public school teachers are “wages” subject to FICA tax. By settling one split, however, the Sixth Circuit created another. *Appoloni* is at odds with the Eighth Circuit’s decision in *North Dakota State University v. United States*, 255 F.3d 599 (8th Cir. 2001), which reached the opposite conclusion regarding early retirement payments to tenured university professors.

Appoloni was a consolidated appeal from *Appoloni v. United States*, No. 5:02-CV-176 (W.D. Michigan, July 21, 2004) in the Western District, and *Klender v. United States*, No. 02-10082-BC (E.D. Michigan, August 2, 2004) in the Eastern District. The plaintiffs in each case were members of a class of retired public school teachers who were tenured under the Michigan Teachers’ Tenure Act (“Tenure Act”) at the time of their retirement. The teachers were offered a monetary incentive to retire early, which ranged from approximately \$30,000 to \$53,000, paid in installments. Participation in the program was voluntary, and only those teachers who had served the school district a certain number of years were eligible (a minimum of 10 or 20 years, depending on the program). Teachers who chose to participate were required to complete a release and waiver that relinquished their rights to continued employment with the school district, including their rights under the Tenure Act. In both cases, the school districts deducted FICA taxes from the early retirement payments received by the plaintiffs. When the plaintiffs were denied refunds by the IRS, they filed suit, relying on the Eighth Circuit’s decision in *North Dakota*.

The Western and Eastern District Courts issued opposite holdings on the matter. In *Klender*, the Eastern District followed the Eighth Circuit, concluding that like the tenured professors in *North Dakota*, the tenured public school teachers under the Tenure Act were not receiving payments for services but rather payments for relinquishment of a property right (tenure), and thus the payments were not “wages” subject to FICA tax. In *Appoloni*, the Western District determined that “wages” broadly included all payments to employees in an existing employment relationship



that were based on prior service, and therefore concluded that the early retirement payments were “wages” subject to FICA.

In a 2-1 majority opinion, the Sixth Circuit affirmed the Western District. The Court approved of the lower court’s broad interpretation of “wages” under the Internal Revenue Code, noting that “[b]oth the Supreme Court and this circuit have emphasized the broad, inclusive nature of this definition.”¹

Section 3121 of the Code defines “wages” as “all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash.”² “Employment” is defined as “any service, of whatever nature, performed (A) by an employee for the person employing him.”³ Like the Western District, the Sixth Circuit focused on the terms “remuneration” and “services” contained in these definitions. The Court noted that all of the early retirement programs of the plaintiffs required some minimum number of years of service to be eligible for payments. The true goal of the programs, the Court reasoned, was not to buy out tenure rights, but to induce teachers at the highest end of the pay scale to retire. Therefore it was years of service, not tenure, that served as the basis for the early retirement payments. The Court pointed out that the primary requirement for tenure under the Tenure Act was working a “probationary period” of four years. Accordingly, tenure was *incidental* to the 10 or 20 years of service needed for the early retirement programs, but not their focus. In this way, the Court saw no difference between the early retirement payments and other payments “aris[ing] out of the employment relationship . . . conditioned on a minimum number of years of service” which the federal courts have determined to be FICA wages.⁴ The Court found support in cases where supplemental unemployment benefits,⁵ severance payments,⁶ and ERISA claim settlement proceeds,⁷ all computed with the employee’s years of service as a factor, were deemed “wages” subject to FICA tax.

The idea that tenure under the Tenure Act is more or less “automatic” after four years of service to a school district was important to the majority in this case, as it was for the lower court. This view not only bolstered the Court’s conclusion that tenure was merely incidental to years of service; it also distinguished the case on its facts from *North Dakota* in the Eighth Circuit. The Court explained: “[T]he tenure rights in *North Dakota* were created by a single contract made at the onset of the tenure relationship [citation omitted]. Tenure, moreover, was not automatic; the North Dakota Board of Higher Education considered several factors in making tenure determinations, including scholarship, in teaching, contribution to a discipline or profession through research, other scholarly or professional activities, and service to the institution and society.”⁸

The Court also saw no distinction between tenure rights and other rights earned during the course of employment that may be released in exchange for a typical severance package, such as seniority, the right to strike, and the right to make legal claims against the employer—all of which have been held to be “wages” subject to FICA. The Court acknowledged that rights under the Tenure Act are “guaranteed and protected by statute,” but “fail[ed] to see how

the fact that this right is protected by statute takes away from the point that it still must be earned through services to the employer.”⁹ “Relinquishment of tenure rights was simply a necessary and incidental part of accepting the buyout,” the Court reasoned; “we see no reason to differentiate the relinquishment of tenure rights from the relinquishment of other benefits earned during the course of employment.”¹⁰ Thus the Court concluded that because the early retirement payments were “remuneration” for past “services,” they qualified as “wages”—indistinguishable from payments under a typical severance package.

Judge Griffin dissented as to all plaintiffs who had expressly released their tenure rights under the early retirement programs.¹¹ He disagreed with the majority’s broad interpretation of “wages” as “remuneration” for past “services,” pointing out that the plaintiffs would not have received the payments had they not relinquished their tenure rights. He also saw no correlation between the early retirement payments and “service” performed by the plaintiffs for the district, as there was no tie between the amount of the payment and an individual recipient’s wage history or future lost earning capacity. Like the Eastern District, the dissent also saw more fact similarity between the tenure rights of the plaintiffs and those of the university professors in *North Dakota*. “While the tenure-qualification process at issue was more rigorous,” the dissent acknowledged, “Michigan law similarly recognizes tenure as a property right and provides procedural safeguards, qualifications, and protections for the tenure rights of public school teachers.”¹² In support, the dissent cited the *Klender* court’s analysis of the due process rights afforded a tenured teacher under the Tenure Act as well as Michigan case law.¹³

Judge Griffin also noted the most recent federal district court to pass judgment on the FICA status of early retirement payments. In *University of Pittsburgh v. United States*, a magistrate decision adopted in November 2005, the District Court for the Western District of Pennsylvania was persuaded by the Eighth Circuit’s reasoning in *North Dakota* and held that early retirement payments to tenured faculty at the University of Pittsburgh were given in exchange for a relinquished property right and therefore not subject to FICA. The case arguably had a more predictable outcome under *North Dakota* because it also featured the tenure rights of university faculty, unlike the statutory tenure rights of public school teachers featured in *Appoloni* and *Klender*. Regardless, it appears the Third Circuit will be the next federal circuit to tackle this issue.

The Sixth and the Eighth Circuits are the only federal circuits to date to consider the issue of whether early retirement payments to tenured teachers are “wages” subject to FICA tax. Time (or perhaps the United States Supreme Court) will tell whether *Appoloni* is distinguishable on its facts from *North Dakota*, involving nothing more than an elaborate severance package for public school teachers, or whether *Appoloni*’s holding will signal a growing split among the circuits over the taxability of payments for all types of tenure rights. As Judge Griffin noted in the dissent, “[u]niformity among the circuits is especially important in tax cases to ensure equal and certain administration of the tax system.”¹⁴ Nowhere will this be more keenly felt than in public

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school districts outside of the Sixth and Eighth Circuits. Those of us in the Sixth Circuit have a bright-line rule to follow, at least for now: withhold FICA tax as to all early retirement incentive payments.

¹ *Appoloni*, 450 F.3d at 190.
² *Id.* at 189-90 (citing I.R.C. § 3121(a)).
³ 450 F.3d at 190 (citing I.R.C. § 3121(b)).
⁴ 450 F.3d at 191.
⁵ *Id.* (citing *Sheet Metal Workers Local 141 Supplemental Unemployment Benefit Trust Fund v. United States*, 64 F.3d 245 (6th Cir. 1995)).
⁶ 450 F.3d at 191 (citing *Associated Elec. Coop. Inc. v. United States*, 226 F.3d 1322 (Fed. Cir. 2000); *Abrahamsen v. United States*, 228 F.2d 1360 (Fed. Cir. 2000); *Choen v. United States*, 63 F.Supp.2d 1131 (C.D.Cal. 1999)).
⁷ 450 F.3d at 191 (citing *Hemelt v. United States*, 122 F.3d 204 (4th Cir. 1997)).
⁸ 450 F.3d at n5 (citing *North Dakota State University v. United States*, 255 F.3d 599,601 (8th Cir. 2001)).
⁹ 450 F.3d at 192-93.
¹⁰ *Id.* at 193.
¹¹ The release signed by *Klender* plaintiff William Rose did not specifically waive Tenure Act rights, but Rose claimed by affidavit he had nevertheless agreed to do so in exchange for the early retirement payment. Judge Griffin deemed the affidavit a "conclusory assertion" with "no factual evidence," and thus concurred with the majority as to plaintiff Rose. 450 F.3d at 198-99.
¹² *Appoloni*, 450 F.3d at 203.
¹³ *Id.* (citing *Tomciak v. Hamtramck Sch. Dist.*, 426 Mich. 678, 397 N.W.2d 770, 780 (Mich. 1986)).
¹⁴ *Appoloni*, 450 F.3d at 196 (citing *Nickell v. Comm'r*, 831 F.2d 1265, 1270 (6th Cir. 1987)).

where for another purpose not prohibited by state or federal law. Lastly, the law requires the destruction of personal identifying information such as mother's maiden name, health insurance identification numbers, passport numbers, vital records and medical records, among others. Failure to destroy the data may result in a misdemeanor conviction punishable by a fine of not more than \$250 for each violation.

Vendor Substitute Teacher Contracts & Joint Employer Relationship

By: Marshall W. Grate, Clark Hill, P.L.C.

Substitute teachers are a stubborn fact of education life. As public school districts confront difficult economic times, it has become increasingly popular to acquire substitute teachers through third party vendors. A school district is not obligated to pay the MPSEERS contribution for substitute teachers furnished by third parties. A school district can also avoid the statutory requirements of Section 1236, MCL 380.1236 of the Michigan Revised School Code.

Section 1236 contains the 60-day and 150-day rule for substitute teachers. If a school district employs a substitute teacher with an assignment to a specific teaching position, then after 60 days of service in that assignment, the district must grant the substitute teacher, for the duration of the assignment, the same leave time and other privileges granted to regular teachers, including a salary not less than the minimum salary in the current salary schedule. Under the 150-day rule, if a teacher is employed as a substitute teacher for 150 days or more during a legal school year of not less than 180 days, or employed as a substitute teacher for 180 days or more by an intermediate school district that operates any program for 220 days or more as required by administrative rule, then the district must give that teacher, for the balance of the school year, or during the next succeeding school year, the first opportunity to accept or reject a contract, for which the substitute teacher is certified, after all the teachers of the school district are reemployed in conformance with the terms of the collective bargaining agreement.

However, these two mandates do not apply to a substitute teacher who is contracted from a third party pursuant to Section 1236a, MCL 380.1236a. Often, school districts enter into these contracts without much or any regard to the requirements of 1236a. Under Section 1236a, a contract with a third party to furnish substitute teachers must include the following provisions:

- (a) Assurance that the person or entity will furnish the school district or intermediate school district with qualified teachers in accordance with this act and rules promulgated under this act.
- (b) Assurance that the person or entity will not furnish to the school district or intermediate school district any teacher who, if employed directly by the school district or intermediate school district, would be ineligible for

Database Security Breaches May Result in Significant Personal and Business Liability

By: Claudia D. Orr, Plunkett & Cooney, P.C.

Failing to protect personal information in your school district's database could result in imprisonment and/or up to \$750,000 in penalties for violating a recently signed law.

On January 3, Governor Jennifer Granholm signed Senate Bill No. 309, which prohibits certain practices concerning identity theft, requires notification of a security breach of a database containing personal information, and provides significant penalties for violations.

The new Michigan law, which takes effect on July 2, applies to the "breach of the security of a database" containing personal information such as the first name or first initial and last name of individuals linked to such information as social security numbers, driver's licenses or state personal identification card numbers, or to financial account information or credit/debit card numbers in combination with security access or password codes. The law requires very specific and prompt notices be provided to persons whose information has been exposed. Failure to provide the requisite notices may result in civil fines of \$250 for each failure, with a total aggregate liability of not more than \$750,000.

In addition, where personal information is maintained in a database, the law requires the destruction of such data when it is removed from the database and it is no longer retained else-



employment by the school district or intermediate school district as a substitute teacher under this act.

- (c) A description of the level of compensation and fringe benefits to be provided to employees of the person or entity who are assigned to the school district or intermediate school district as substitute teachers.
- (d) A description of the type and amounts of insurance coverage to be secured and maintained by the person or entity and the school district or intermediate school district under the contract.
- (e) Assurance that the person or entity, before assigning an individual to serve as a substitute teacher in the school district or intermediate school district, will comply with sections 1230 and 1230a with respect to that individual to the same extent as if the person or entity were a school district employing the individual as a substitute teacher and will provide the board of the school district or intermediate school district with the criminal history record information obtained under section 1230 and with the results of the criminal records check under section 1230a. The department of state police shall provide information to a person or entity requesting information under this subdivision to the same extent as if the person or entity were a school district making the request under section 1230 or 1230a.

If these provisions are included in a contract, then the statutory 60 day and the 150/180 day requirements of Section 1236 do not apply. In addition, a school district can save substantial money by avoiding MPERS payroll contributions for the substitute teachers.

However, this does not end a school district's inquiry. Sections 1236a and 1236 do not necessarily supersede requirements for substitute teachers in a collective bargaining agreement. Some school districts may include substitute teachers within the collective bargaining unit. Other agreements may shorten the 60-day period for granting a substitute teacher the same benefits enjoyed by regular teachers. Instead of the 60-day threshold, for example, a substitute teacher who is employed for 30 days may qualify for the benefits and salary schedule of a collective bargaining agreement.

A school district may still be found to be, at a minimum, a joint or co-employer with the third party vendor. Even though the vendor may hire a substitute teacher, it is the school district that will determine the assignment and placement of the substitute teacher. The substitute teacher is employed at the school, the substitute teacher will be subject to the district's policies and procedures, and the substitute teacher will be under the supervision and control of the school district administration.

The Michigan Employment Relations Commission ("MERC") and Michigan courts have recognized that co-employer relationships can exist under the Public Employment Relations Act ("PERA"). MCL 423.201 *et seq.* For example, in *St. Clair Prosecutor*

v AFCME, 425 Mich 204 (1986); the Michigan Supreme Court ruled that the St. Clair County Prosecutor was a co-employer with the St. Clair County Commission with respect to the employment of county prosecutor employees. In *St. Clair County Sheriff v AFCME* 1976 MERC Lab Op 708, MERC recognized that a county sheriff was a co-employer with the county commission for sheriff department employees. One significant factor in MERC's reasoning was the sheriff's responsibility for the day-to-day operation of the sheriff's department.

Since the school district does not give up day-to-day control over the supervision of substitute teachers, it is quite possible that MERC would find that a collective bargaining agreement, that addresses the terms and conditions of employment for substitute teachers, is binding and enforceable. The Michigan Supreme Court has consistently held that PERA is the dominate law in public sector labor relations and that it prevails over any conflicting legislation. See, *Int'l Ass'n of Firefighters v City of Warren*, 411 Mich 642 (1981); *Ranta v Eaton Rapids Pub Sch Bd of Educ*, 271 Mich App 261 (2006).

Therefore, the collective bargaining provisions regarding substitute teachers, or for that matter any other substitute employees, may still be enforceable. Until a definitive answer is obtained through a published decision, the prudent course of action is for a school district to follow its collective bargaining agreement with respect to substitute teachers who are furnished through a third party vendor contract. The same principle applies to any substitute employee that is provided through a third party vendor contract. A school district should determine whether a collective bargaining agreement grants any benefits to substitute employees. Future collective bargaining negotiations should clarify the status of substitute employees, preferably excluding them from the bargaining unit and/or from receiving the same contractual wages and benefits as afforded to regular employees.

Third party vendor contracts to furnish substitute employees can save money for a public school district. In the case of substitute teachers, these contracts must comply with the provisions of Section 1236a. With respect to both substitute teachers and non-certified staff, a school district should scrutinize applicable collective bargaining agreements to determine if there are any provisions which apply to substitute employees.

¹ M.C.L.A. §§ 380.1230 and 380.1230a.

2007 Spring Law Conference

School Funding Crisis: The Legal Consequences

Friday, April 27, 9 a.m. – 3:30 p.m.

Lansing Radisson Hotel

The Michigan Council of School Attorneys has scheduled a legal seminar on the school funding crisis in conjunction with MASB's Legislative Conference. If you are planning to attend the Legislative Conference to hear lawmaking issues relating to Michigan's budget shortfall, make plans to stay an extra day in Lansing to learn about the legal ramifications of the funding crisis for school districts. This seminar will look at legal issues caused by financial distress, including adopting deficit budgets, appointed emergency financial managers, complying with the Uniform Budgeting and Accounting Act, Chapter 9 bankruptcy proceedings, early closures, privatizing, creating new revenue, reducing personnel, and reorganizing. The cost of the conference is \$100 for MASB and Michigan Council of School Attorneys members.

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