Summer 2006

Council News

MICHIGAN COUNCIL OF SCHOOL ATTORNEYS

President's Letter

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All Is Not Lost

We are facing the highest unemployment rates in the nation and the housing market certainly has not experienced a boom as has the rest of the country. Every time you pick up a newspaper or watch a news story there is more bad news about our local economy. It goes without saying our school districts are facing challenges as never before as the state is simply unable to provide the needed dollars.

Along with struggling revenues, our schools are facing ever increasing expenditures. Labor costs are increasing with the aging work force, health care is out of control, and don't forget rising energy costs. Throw in more unfunded legislation like NCLB and, on the state level, the student safety act and graduation requirements, and you have a recipe for financial disaster.

What is a school district to do?

As vendors of our school systems, we have an obligation to assist in these tough financial times. Okay, before you curse me as an archenemy, no, I don't necessarily mean lowering your hourly rate! Although the schools may appreciate that, I suggest more enduring tactics. The legislature has introduced many bills which would increase funds to our schools and there are also many initiatives in Lansing which are aimed at the same goal. Whether it's endorsing the K-16 Coalition, the Affordable Benefit Coalition, or whichever coalition your political views support, the idea is to use your voice to help. Let Lansing know how you feel with your vote as well as financial and time support.

There are glimmers of hope out there as well, such as the privatization of services and the ability of some districts recently to introduce other health benefit plans into their contract besides MESSA. I'm sure we all have worked with our respective districts to negotiate the best vendor contracts, counsel troubled employees out of the district, and assist with implementation of policies to keep our districts running as smoothly and cost efficiently as possible. Let's all keep up the good work.

Every year I am amazed at the nothing less than miraculous management of our struggling school districts. Let's hope that in the coming years changes continue to be made to assist our school districts. Let's all do what we can to support.

Frequently Asked Legal Questions: Single-Sex Education

By: Brad Banasik, Legal Counsel, Michigan Association of School Boards

The Michigan Legislature is currently considering two bills that seek to remove legal restrictions that currently hinder the establishment of K-12 single-sex educational programs. The bills, discussed in more detail below, appear to be on a fast track to the governor's desk. Because the signing of the bills will likely put the discussion of same-sex classes and schools on the agendas of school boards over the summer, school attorneys will see an increase in the number of legal inquiries they traditionally receive on the matter. If you have not recently researched the issue of single-sex education programs, the following questions and answers will provide you with an overview of the current state of the law.

Q. ***What laws cover discrimination on the basis of sex by school districts?***

A. Title IX of the Education Act Amendments of 1972[1] prohibits discrimination on the basis of sex in educational programs and activities that receive federal financial assistance. The federal regulations implementing Title IX provide that students may not be given "different aid, benefits, or services" because of their sex.[2]

Gender-based classifications in educational programs also implicate the protection afforded by the Equal Protection Clause of the 14th

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Amendment to the United States Constitution as well as the corresponding provision of the Michigan Constitution, Article 1, § 2.

Michigan's Elliott-Larsen Civil Rights Act prohibits an educational institution from discriminating against an individual in the full utilization of or benefit from the institution or the services, activities, or programs by the institution because of sex.[3] Additionally, educational institutions cannot "exclude, expel, limit or otherwise discriminate against an individual seeking admission as a student or an individual enrolled as a student in the terms, conditions, or privileges of the institution because of sex."[4] However, Senate Bill 1305, which was introduced on June 14, 2006, would amend the Civil Rights Act to specifically allow a board of education to establish "a school, class, or program within a school in which enrollment is limited to pupils of a single gender if a comparable school, class, or program is made available to pupils of each gender."

Further, Section 1146 of the Revised School Code includes the following prohibition: "A separate school or department shall not be kept for a person on account of race, color, or sex."[5] The passage of Senate Bill 1296, however, would create the following exception for the prohibition: "The board of a school district may establish and maintain a school, class, or program within a school in which enrollment is limited to pupils of a single gender if a comparable school, class, or program is available to pupils or each gender." Senate Bill 1296 was introduced on June 7, 2006 and was passed by the Senate on June 15.[6]

Q. ***Do the federal discrimination laws currently allow school districts to establish same-sex classes or activities?***

A. Yes, but under limited circumstances.

Title IX

Subsection 1681(a)(7)(B) of Title IX specifically permits a school to develop a program intended for the selection of students for Boys or Girls State Conferences. Subsection 1681(a)(8) states that Title IX does not prohibit father-son or mother-daughter activities at an educational institution as long as the activities are provided on an equal basis.

The current Title IX regulations are very limiting and generally prohibit single-sex classes or activities. They prohibit school districts from offering any course or otherwise carrying out any program or activity separately on the basis of sex.[7] The regulations, however, include two categorical exceptions for specific types of classes or portions of classes that may be segregated by sex. The exceptions allow (1) single-sex groupings within physical education classes that result from the application of objective standards or physical ability;[8] (2) separation of students by sex in physical education classes during participation in contact sports;[9] (3) separation of students by sex for portions of classes in elementary and secondary schools dealing exclusively with human sexuality;[10] or choruses based on vocal range or quality, which may result in a single-sex or predominantly single-sex grouping.[11] Additionally, separation of students by sex is permitted if it constitutes remedial or affirmative action.[12]

Equal Protection

As recognized in a United States Supreme Court case that is discussed below, under the 14th Amendment, a proponent of a sex-based classification must demonstrate that the classification serves an important governmental objective and that the sex-based classification is substantially related to the achievement of that objective. Further, it is not inherently discriminatory under the Equal Protection Clause to offer single-gender instruction when substantially equal instruction is offered to both genders.

Q. ***Do the federal discrimination laws currently allow school districts to establish same-sex schools?***

A. Yes, but under very limited circumstances.

Title IX

The Title IX Statute exempts from its coverage the admissions practices of non-vocational elementary and secondary schools.[13] Accordingly, the Title IX regulations do not specifically prohibit schools from adopting single-sex admissions policies in non-vocational elementary and secondary schools. Although, the regulations do implicitly prohibit using a single-sex admissions policy that causes students, on the basis of sex, to be excluded from participation in, be denied the benefits of, or be subjected to discrimination under an education program. According to the regulations, students may be denied admission to a non-vocational secondary or elementary school on the basis of sex *only* if the school makes available courses, services, and facilities comparable to each course, service, and facility offered in or through the single-sex school.[14] It has been the United States Department of Education's longstanding interpretation, policy, and practice to require that the "comparable school" must also be single-sex.[15]

Equal Protection

The United States Supreme Court has issued no opinions regarding elementary or secondary single-sex schools. However, in *Mississippi v. Hogan*,[16] the Supreme Court held that the exclusion of an individual from a publicly-funded post-secondary school because of his or her sex violates the Equal Protection Clause, unless the school can show an exceedingly persuasive justification for the gender-based exclusion. The classification must serve important governmental objectives and that the discriminatory means employed must be substantially related to achieving those objectives."[17] In this case, the State of Mississippi unsuccessfully attempted to justify its all female professional nursing school by arguing that it compensated for historical discrimination against women. In striking down the school's women-only admissions policy, the Court found that the policy perpetuated the stereotyped view of nursing as an exclusively woman's job rather than compensating for discriminatory barriers faced by women.

Later, in *United States v. Virginia,*[18] the Supreme Court found that Virginia's practice of categorically excluding women from the Virginia Military Institute (VMI) denied equal protection to women even though Virginia established a separate program for females at a neighboring women's college. Virginia had created the separate program in an attempt to remedy the constitutional violation that had previously resulted from VMI's male-only admissions policy. The Court concluded that the two schools were far from equal in respect to the range of curricular choices and faculty stature, funding, prestige, alumni support and influence. Thus, Virginia failed to show substantial equality in the separate educational opportunities that were created by the schools' gender specific admission requirements, which amounted to a constitutional violation as a result of the categorical exclusion of women from a unique educational opportunity afforded men. Additionally, the Court found that, under *Hogan*, Virginia had also failed to meet the burden of justifying the gender-based admissions policy at VMI.

While the Supreme Court has not officially issued an opinion on single-sex elementary and secondary schools,[19] the issue has been addressed by some lower courts. In between the *Hogan* and *Virginia* decisions, a federal district court in Michigan considered the con-

stitutionality of all-male academies proposed by the Detroit Public Schools. The court applied the *Hogan* equal protection standard ("exceedingly persuasive justification") and determined that the single-gender program was unconstitutional.[20] The court concluded that the school district did not satisfy the burden of showing how the exclusion of females from the academies was necessary to achieve the identified objective of reducing unemployment, dropout and homicide rates among urban males.

Based on these cases, a single-sex school is constitutionally acceptable if an exceedingly persuasive justification is established. The justification may not create or perpetuate the legal, social and economic inferiority of women, but it must serve important governmental objectives. And, it must not rely on overbroad generalizations about the different talents, capacities or preferences of males and females. However, if substantially equal educational opportunities are afforded to the members of each gender, a voluntary gender-segregated program would comply with the Equal Protection Clause even if an exceedingly persuasive justification is not present. Although, it remains an open question under Supreme Court jurisprudence of whether substantial equality would require a school district to provide a substantially equal single-sex school for students of the excluded sex or whether providing those students the opportunity to attend a substantially equal coeducational school would be sufficient. Lastly, the Court in *Virginia* emphasized that if any program restricted to one sex is "unique," such as VMI, then it must be open to members of the opposite sex who have the will and capacity to participate in it.

Q. ***Are different legal standards used when Michigan's Elliott-Larsen Civil Rights Act is applied to same-sex classes and schools?***

A. No. In *Civil Rights Dept. v. Waterford,* 425 Mich. 173, 387 N.W.2d 821 (1986), the Michigan Supreme Court held that "when evaluating whether a classification by gender amounts to impermissible sex discrimination under the…Civil Rights Act, Article 1, § 2 of the Michigan Constitution, or under the Equal Protection Clause of the 14th Amendment of the United States Constitution, the standard to be applied is the same."

Q. ***Does the No Child Left Behind Act specifically allow same-sex classes and schools without the restrictions of the Title IX regulations or the Equal Protection Clause?***

A. No. A provision of the No Child Left Behind Act only provides for the allocation of federal funds to local educational agencies for "innovative assistance programs," including "[p]rograms to provide same-gender schools and classrooms (*consistent with applicable law*)."[21] Thus, the current Title IX regulations and equal protection case law that limit the circumstances for same-sex classes and schools must still be followed.

Q. ***Is the Department of Education, Office of Civil Rights amending the Title IX regulations to expand the flexibility in providing single-sex schools or classes?***

A. Yes. On March 9, 2004, the United States Department of Education, Office of Civil Rights (OCR) released proposed amendments to clarify and modify the Title IX regulatory requirements pertaining to the provision of single-sex schools and classes.[22]

Single-Sex Classes

Under the proposed amendments, a school district could offer a voluntary[23] single-sex class as long as it satisfies three requirements. First, the single-sex class must be based on a school district's important governmental or educational objective. Such an objective can either be to provide a diversity of educational options, provided that the single-sex nature of the class is substantially related to achievement of that objective, or it could involve meeting the particular, identified educational needs of students, provided that the single-sex nature of the class is substantially related to meeting those needs. In either case, the second requirement mandates that the school district implement the objective evenhandedly.[24] Lastly, the school district must offer a substantially equal coeducational class in the same subject.

Additionally, the proposed regulations provide a non-exhaustive list of factors that the OCR will consider in comparing single-sex classes to each other and to coeducational classes in making the determination of whether they are "substantially equal." The list includes the following factors:

- Admissions policies and criteria.
- Educational benefits provided, including the quality, range and content of curriculum and other services and the quality and availability of books, instructional materials and technology.
- Qualifications of faculty and staff.
- Quality, accessibility and availability of facilities and resources.

Each factor evaluated does not have to be identical, but each must be substantially equal.

The proposed rules also require school districts to perform periodic evaluations of all single-sex classes to determine that such classes are "based upon genuine justifications and do not rely on overly broad generalizations about the different talents or capacities of male and female students and that any single-sex classes are substantially related to achievement of the objectives for the classes."

Single-Sex Schools

Under the proposed amendments, a school district may not operate a single-sex elementary or secondary school unless it provides students of the other sex substantially equal opportunities in a single-sex school, single-sex educational unit, or coeducational school. This proposed amendment changes the OCR's interpretation of 34 C.F.R.106.35(b) of the current regulations that the benefits provided to students excluded from a single-sex school must be provided in a single-sex setting.

The proposed regulations also provide a non-exhaustive list of factors that the OCR would consider in determining whether two schools, a single-sex school and a school available to students excluded on the basis of sex from that school, are substantially equal. The list includes the same factors used in determining the substantial equality of classes, with additional consideration given to the quality and range of extra-curricular offerings and geographic accessibility. The OCR will assess the aggregate of benefits provided by each school as a whole in making the determination.

Q. ***When will the proposed regulations be finalized?***

A. No one knows for sure. Traditionally, final rules are published a few months after the 45-day public comment period expires. With these rules, they have yet to be issued in final form even two years af-

ter the expiration of the comment period. The delay is likely attributed to the 5,000 comments that the Department of Education received in response to the proposed regulations. It has been said that all but 100 of the 5,000 comments objected to the proposed changes.

Q. *Assuming the proposed regulations are finalized and Senate Bills 1305 and 1296 are signed into law, can school districts establish same-sex classes and schools without fear of getting dragged into court?*

A. No, unfortunately. The limitations on single-sex education established by the Equal Protection Clause are more restrictive in certain respects than those imposed by the proposed Title IX regulations and our proposed state laws. The exemptions that are being proposed by the Department of Education and the Michigan Legislature are not exemptions from constitutional obligations. In fact, Supreme Court Justice Antonin Scalia declared that single-sex public education was "functionally dead" in his dissent in response to the Supreme Court's *Virginia* decision. He noted that the "costs of litigating the constitutionally of a single-sex education program, and the risks of ultimately losing that litigation, are simply too high to be embraced by public officials."[25]

Thus, while it appears that Michigan school districts will have fewer federal regulatory and state law hurdles to clear in establishing same-sex educational programs in the future, the *Hogan* and *Virginia* Supreme Court decisions need to be followed to ensure the programs comply with the Equal Protection Clause.

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1 20 U.S.C. § 1681 *et seq.*

2 34 C.F.R. § 106.31(b)(2).

3 MCL 32.2402.

4 *Id.*

5 MCL 380.1146.

6 Please refer to MASB's *Headlines* for further updates on the status of Senate Bills 1296 and 1305.

7 34 C.F.R. § 106.34.

8 34 C.F.R. § 106.34(b).

9 34 C.F.R. § 106.34(c).

10 34 C.F.R. § 106.34(e).

11 34 C.F.R. § 106.34(f).

12 34 C.F.R. § 106.3.

13 Section 1681(a)(1) of Title IX states that in regard to admissions to educational institutions, the law applies to only institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education.

14 34 C.F.R. § 106.35(b).

15 67 Fed. Reg. 31103 (2002).

16 458 U.S. 718 (1982).

17 *Id.* at 724.

18 518 U.S. 515 (1996).

19 The Supreme Court accepted such a case for review, but with one justice not participating, it affirmed the decision below by an evenly divided vote and without a written opinion. The Third Circuit Court of Appeals had previously upheld a school district's educational program that included two comparable single-sex high schools along with two coeducational schools. *Vorchheimer v. School District of Philadelphia,* 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided court,* 430 U.S. 703 (1977) (per curiam).

20 The district court also found that the formation of the academies violated Section 1146 of the Revised School Code.

21 20 U.S.C. 7215(a)(23) (Supp. I 2003) (emphasis added).

22 69 Fed. Reg. 11276 (2004).

23 To make sure attendance in single-sex classes is voluntary, districts must notify parents that enrollment in such classes is voluntary and receive parental authorization.

24 Evenhandedness requires the school district to provide each sex an equal opportunity to benefit from the important governmental or educational objective it seeks to achieve by providing single-sex classes. The Department of Education notes, however, that the provision generally does not require a single-sex class for each sex in the same subject.

25 *United States v. Virginia,* 518 U.S. at 597.

Courts Begin Interpreting Requirements of IDEA 2004 Due Process Procedures

By: Michael Bevins, Scholten Fant

School districts have been implementing IDEA 2004 since July 1, 2005. One of the areas which had significant statutory changes was the due process hearing procedures. Of course, the U.S. Department of Education (DOE) "promised" to release regulations in December 2005 to assist school districts in implementing the requirements of IDEA 2004. DOE has since extended the release time for regulations to "before the beginning of the school year," (though it did not indicate which school year). Even without final regulations, school districts are required to implement IDEA 2004. Courts and hearing officers have been called upon to interpret these new procedures and have given guidance as to these requirements.

Sufficiency of Due Process Complaint Notice

No longer is merely "checking a box" sufficient to initiate due process procedures. Instead, IDEA 2004 expanded upon the requirement that a party seeking a due process complaint must file a notice which meets certain statutory requirements. The notice is required to set forth, among other things, a description of the nature of the problem of the child relating to the district's proposed initiation or change, including facts relating to such problem, and a proposed resolution of the problem. A party is prohibited from having a due process hearing unless a sufficient due process complaint notice has been filed. What constitutes a sufficient due process complaint notice has been the focus of a number of cases.

In regard to the first requirement that a party set forth the nature and facts relating to the problem, hearing officers have held that the complaint notice must provide sufficient specificity to enable a district to file a response which includes an explanation of why the district proposed or refused to take the action raised in the complaint, a description of the other options considered, a description of the evaluation procedures assessment or records relied upon by the school district, and a description of other relevant factors.[1] To do so, the due process complaint notice may not merely set forth general allegations and a summary of events covering several years. For example, in *Howard County Public Schools*,[2] the parent filed a due process complaint notice which included a comprehensive summary of medical issues and allegations spanning a five year period, including falsification of documents and failure to disclose the student's IEP. While the hearing officer indicated that some of these allegations may rise to the level of a "complaint," the hearing officer held that the parent did not specifically identify the nature of the problem or provide supporting facts relating to the problems sufficient to permit the district to respond and prepare for hearing. As a result, the hearing officer granted the district's request for a "more definite statement" and directed the parent to file an amended due process complaint notice.

In *Portland Public School District*,[3] the hearing officer specifically addressed the three components of the required complaint notice. While more general descriptions of the nature of the problem may be sufficient, there must be sufficient facts supporting the allegation. For instance, the parent alleged an issue for the hearing as being "whether the district should reimburse the parents for educational services and experiences privately obtained from July, 2000 through June, 2004." The hearing officer stated that this notice failed to set forth the nature of the problem or any facts relating to the problem. By example, the hearing officer stated that the notice did not identify what educational services or experiences had been

provided, or what reimbursement was being sought. Further, the allegations covered nearly a four-year period of time, some of which are possibly barred by the statute of limitations. Similarly, an allegation that the district failed to assess the student in all areas related to the suspected disability and failed to provide a free appropriate public education (FAPE) by failing to provide an adequate individualized education plan (IEP) lacked sufficient specificity. While this issue may set forth the nature of the problem, no facts were alleged describing the nature of the failures or the resulting denial of FAPE. Lastly, the hearing officer looked to the parents' proposed resolutions, and found that no resolutions were set forth in the complaint notice, and there had been no attempt to provide information as to why the proposed resolutions would be appropriate. For these reasons, the hearing officer found the due process complaint notice failed to meet the requirements of the statute and dismissed the due process complaint.

In *Baltimore City Public Schools*, [4] the parent alleged that the district had neglected to provide appropriate IEPs or hold required IEP meetings. As a resolution, the parents merely requested that the matter be resolved by a "higher authority" such as a hearing officer or court. When addressing the sufficiency of the notice, the hearing officer first held that "nothing in the law gives the parent the right to respond" to the school district's objection as to the sufficiency of the due process complaint notice.[5] Instead, the hearing officer must determine whether "on its face" the notice meets the requirements of the statute. The hearing officer held that merely asking that a hearing officer make a determination was not a proposed resolution, but rather a request for the forum in which the complaint would be resolved. Such a request was insufficient and the due process complaint notice was dismissed.

In *ISD No. 719, Prior Lake Public Schools*,[6] the hearing officer found the complaint notice sufficient because the notice described the nature of the student's problems, the neurological deficit that affected his abilities, which had not adequately been addressed through the alleged inappropriate IEP because of a lack of adequate services. While not describing the extent of the facts, the hearing officer found that the complaint notice alleged "some facts relating to such problems," and that was all that was required. Turning to the resolutions, the hearing request set forth 11 specific changes to the IEP which were requested, and found that this constituted a proposed resolution. Thus, the due process complaint notice was found to be sufficient.

District's Response to Due Process Complaint Notice

Once a sufficient due process complaint notice has been filed, a school district is required to respond within 10 days. In *Massey v. District of Columbia Public Schools*,[7] a federal court found that the district had failed to provide a response which met the requirements of the statute. Specifically, the district court found that the district's response must meet the requirements of the statute, which requires the district to provide an explanation of why the agency proposed or refused to take an action, a description of the other options considered by the IEP team (along with the reasons those options were rejected), a description of each evaluation procedure, assessment or record used for the basis of that proposal or refusal and a description of other relevant factors. While the school district claimed that its placement notice fulfilled these requirements, the district court disagreed. The statute sets forth specific content for the school district's response, and there is no evidence that Congress "intended an exemption for 'close enough'."

Resolution Sessions

Also in *Massey*, the court addressed the scheduling of a resolution session. The school district had attempted on several occasions to contact the parent and reach a mutually agreeable time for the resolution session. The parent, however, failed to return the calls, and the district did not schedule the resolution session. The court stated:

> For purposes of compliance with the IDEA's requirement to hold a resolution session within 15 days of receipt of a due process hearing request, this Court finds that it is immaterial how many times DCPS called the Masseys. It was appropriate for DCPS to attempt to consult with the Masseys in order to schedule the conference, but it should not have used their lack of response as an excuse for allowing the statutory deadline to pass unheeded. The statute obligates DCPS to hold a session within 15 days. It does not make allowances for difficulties in communicating. Particularly since DCPS knew the Masseys were represented by counsel, there is no excuse for their failure to call counsel or to simply schedule the conference within the statutory time frame and advise counsel or the parents thereof.

In *Spencer v. District of Columbia Public Schools*,[8] the court held that a parent may not "side-step" the requirement of a resolution session. In that case, the parent had initiated the due process procedures, and a resolution session had been scheduled. The parent, however, withdrew the request for a hearing prior to the resolution session. On the day the resolution session was to have been held, the parent again filed a due process complaint notice, and the district rescheduled the resolution session. The parent filed an action in federal court seeking to have the judge order the district to hold a due process hearing, and find that the district had violated her rights by failing to hold the resolution session within 15 days. The court denied the request, finding that the resolution session had been appropriately scheduled, and that by failing to participate in the due process procedures, the parent had failed to exhaust administrative remedies. Since the time line for a due process hearing had not expired, the court refused to issue the requested injunction against the district.

Action. It is imperative for a district to pay close attention to the procedures set forth in IDEA regarding due process complaints. The time lines are specific, and failure to comply with time lines may have significant effects. Additionally, the Michigan Department of Education still requires that a school district notify it within one business day of receiving a due process request (regardless of whether the complaint notice has been filed or is sufficient) to allow it to begin the process to appoint a hearing officer. Whether a hearing officer has been appointed or not, several actions must be taken within the appropriate time lines.

If the due process complaint notice is not sufficient, an objection must be filed. It is recommended that this objection be filed within 10 days, though it is not required until 15 days following the receipt of the due process complaint notice. However, if the objection is not filed, the district must file its response, meeting the statutory requirements, within 10 days. As the court held in *Massey,* relying on the prior placement notice (in Michigan we use the IEP document for this purpose) may not be sufficient.

Whether to object to the sufficiency of the complaint notice and seek dismissal or a "more definite statement" (amendment) is a matter of strategy which the district should discuss with its counsel. Holding that a parent has no right to file a response to the district's objection, hearing officers have decided these issues on the face of the complaint notice. When a district has sought a "more definite statement," the hearing officers have directed amendment of the complaint notice. Where districts have sought dismissal, however, complaint notices have been dismissed. While the notice may be dismissed, nothing would prohibit the parent from filing an additional due process complaint notice which would meet the statutory requirements alleging the same or similar issues, and the process would begin anew.

A district is required to schedule a resolution session within 15 days. There is no requirement in the statute that this session be set at a "mutually agreeable" time and place. As the court also held in *Massey,* the statute requires the scheduling of the meeting and does not provide for difficulties in communication with the parent. At the very least, the district should schedule the meeting and notify the parent (and/or their counsel) of the date and time. If the parent fails to attend, they are prohibited from having a due process hearing until such a time as they do, or until the parties agree to waive the resolution session or utilize mediation. As with manifestation determination reviews, do not let a parent's lack of response push the district into noncompliance with its statutory obligations.

The due process procedures have become increasingly complicated and time sensitive. Upon receipt of a due process complaint, the best advice is to immediately notify your special education director and your school district's counsel.

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1 See *Howard County Public Schools,* 105 LRP 57809 (SEA Md., 2005).
2 *Id.*
3 44 IDELR 232 (SEA Or., 2005).
4 105 LRP 57759 (SEA Md., 2005).
5 See also *Howard County,* holding the same.
6 106 LRP 1882 (SEA Mn., 2005).
7 400 F. Supp. 2d 66, 44 IDELR 163 (Dist. Ct. D.C., 2005).
8 45 IDELR 11 (Dist. Ct. D.C., 2006).

New Minimum Wage Increase Causing More Angst than Intended

By: Robert Boonin, Butzel Long

On March 28, Governor Granholm signed into law the first increase to Michigan's minimum wage in nearly 10 years. The current state minimum wage is $5.15 per hour. It will increase in three steps, as follows:

Oct. 1, 2006	$6.95 per hour
July 1, 2007	$7.15 per hour
July 1, 2008	$7.40 per hour

The increase was enacted to neutralize the ballot initiative which would have increased the minimum wage to $6.85 on Jan. 1, 2007, and again each year thereafter based on the CPI. The ballot initiative has been neutralized, but now it appears that the legislative preemption did more than what was intended.

The unintended consequences arise by operation of a provision in the state law which those in Lansing apparently failed to appreciate back in March. That provision states that Michigan's minimum wage law (which also controls overtime pay) does not apply to any employer subject to the federal Fair Labor Standards Act (the federal law governing minimum wages and overtime pay) so long as the federal minimum wage is no less than state minimum wage. On Oct. 1, this proviso will no longer be satisfied since the federal minimum wage is $5.15 per hour. Thus, as of Oct. 1, Michigan employers will have to comply with both the state and federal minimum wage laws.

Why does this matter? Since the state law has not been applicable to most Michigan employers since its enactment, its regulations and case law precedent is extremely undeveloped – at least when compared to its federal counterpart. For example, under federal law there are nearly two dozen types of employees who are exempt from being paid for working overtime; none of these exemptions exist under Michigan law, however. These federal exemptions include outside sales employees, commissioned retail and service employees, salesmen and mechanics of automobile dealerships, employees of small market newspapers and domestic caregivers, to name a few. Unless Michigan law changes before Oct. 1, as of that date these employees (and others) may, for the first time, be eligible for being paid an overtime premium (on their base pay, commissions and bonuses) for all hours worked over 40 in a workweek.

Employers may be impacted in other ways, as well. For instance, in order for most executive, administrative and professional employees to be exempt from being paid overtime, they must be paid on a salary basis. While the basic definitions of being paid on "salary basis" under state and federal law are similar, only federal clearly allows for deductions to be made from an employee's salary for various types of absences during a workweek in which the employee provides any service. State law does not recognize an employer's right to make these deductions while still treating the employee as exempt from being paid overtime premiums. State law also does not recognize the special federal proviso for public schools and other public employers allowing their exempt employees to be docked for partial days missed. Therefore, school districts may have to change their payroll practices if the new law goes into effect without some official corrective measure taken.

There is another special proviso in the federal law which does not exist under Michigan law. Federal law specifically does not require teachers to be paid on salary basis in order for them to be treated as exempt. Thus, teachers can have their pay docked or be paid on an hourly or class basis and still be exempt. After Oct. 1, however, this will not be possible.

In addition, it is also far from clear that the methods for calculating the regular rate of pay, which is needed for calculating the overtime premium due to employees, as well as what constitutes "hours of work," are the same under the state and federal rules. Unless the state clearly adopts the federal standards, it is likely that the question of how extensive these differences may be will have to be resolved by the courts.

Your action is needed. Efforts are underway in Lansing to obtain a legislative correction to the above concerns. In fact, only one sentence in the law needs to be amended so that the status quo as to all of these issues can be preserved, and so the Act increasing the minimum wage does only just that. Legislators need to know that the status quo must be preserved if chaos is to be avoided, our economy is to avoid another blow, and incomes for some workers will not be reduced (due to their employers limiting the number of hours they work). Districts and other employers are therefore encouraged to contact their legislators now for their support of the efforts to avoid these consequences from occurring.

In the meantime, districts should also review their payroll practices to see what adjustments may have to be made should a sufficient legislative correction not be obtained in time. Counsel should be consulted in this regard.

More information on this issue and the status of the legislative efforts can be obtained at Butzel Long's Wage and Hour Information Center, www.butzel.com/prind.cfm?I_ID=9.

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Internet Threats

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Hypothetically speaking, suppose a student decides one day that he dislikes some of his classmates, and rather than take any sort of physical action against them, he decides to create a "hate list" and post it on a personal Web site. Now suppose further that the school district discovers the existence of the "hate list" on the Internet after students learn about its existence and report it to teachers or administrators. In such a hypothetical circumstance, what is a district to do?

In today's climate of erring on the side of caution for the safety and well-being of all of the students at the school, the district in this hypothetical will no doubt feel obligated to begin the disciplinary process against the student who created and posted his "hate list." In light of recent cases involving student threats conveyed through the use of instant messaging[1] and involving the discovery of disconcerting information on a student's computer at school[2] (among many other highly publicized cases), districts simply cannot be "too careful" when it comes to assuaging parent concerns about the safety of their kids.[3]

So, back to the original question – what to do about a student "hate list"? For purposes of this hypothetical, let's presume that the Web site contains a list of about 40 classmates that the student is thankful he will never see again. The student first states "I Hate You" under the title "Hit-List," then lists individual names (sorted by grade level) with the phrase "Go Die. Go Die. Go Die." in large bolded font on the right side of the page.

Your first instinct, more than likely, will be to search the applicable student code of conduct to determine whether our hypothetical scenario is covered. Student codes of conduct will vary by district, of course, but as a general rule all districts will likely agree that an act of "misconduct" includes "an act which does or may interfere with the efficient operation of the school by endangering the health and safety of any person; infringing on the rights of others; causing disruption of educational programs or discipline; or causing loss or destruction of facilities."

For the "hit list" hypothetical posed here, the school district should be able to defend the position that the list caused some psychological concern and trauma to several students (thereby endangering their health), and on the grounds that the circulation of the list disrupted educational programs by causing several students to stay home from school after the list was discovered.

However, most districts require more than simple "misconduct" in order to impose a long-term suspension or expulsion. In addition, the act must fall within the purview of a state statute that permits or requires discipline, or it must amount to a "major infraction" under the code of conduct. A typical code of conduct will include one or more of the following "major infractions":

> **Intimidation/Stalking** – an attempt to influence a person through fear;
>
> **Verbal Assault** – a violent verbal attack on a person;
>
> **Disruption of Educational Process/Programs** – actions such as force, threats, boycotts, riots or demonstrations which interfere with school personnel or the operation of the school or school programs;
>
> **Acts of Disrespect** – Insubordination, gross misdemeanor, persistent disobedience, abnormal or disorderly behavior, violations, or bodily conditions detrimental to the school, harmful to health and safety, and inhibiting the rights of others. Includes, but is not limited to, unwelcome comments or gestures (written or verbal) or other behavior which creates an intimidating, hostile or offensive environment.

Although most of the above infractions are self-explanatory, for purposes of our hypothetical, a more in-depth analysis regarding the definition of a "threat" may prove useful in a school district's disciplinary process.

The federal Sixth Circuit Court of Appeals has defined a "true threat" as a "statement, written or oral [made] in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm or take the life of [the target], and that the statement not be the result of mistake, duress or coercion."[4] The Court has also held that, at their core, "threats are tools that are employed when one wishes to have some effect, or achieve some goal, through intimidation. This is true regardless of whether the goal is highly reprehensible or seemingly innocuous."[5]

Although Michigan's appellate courts have not addressed this subject, courts in other jurisdictions provide additional guidance regarding how to define threats. In Pennsylvania, the courts will consider "how the recipient and other listeners reacted to the alleged threat; whether the threat was conditional; whether it was communicated directly to its victim; whether the maker of the threat has a propensity to engage in violence."[6]

In Texas, a threat of physical harm is not required to be directly expressed, but may be contained in veiled statements which nonetheless imply injury to the recipient when viewed in all the circumstances. Alleged threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners.[7]

According to the United States Supreme Court, "intimidation" is a type of threat, where the speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.[8] Therefore, the Student Code of Conduct provision regarding "intimidation" is directly related to the concept of "threats" which are punishable as violations of criminal law.

Under the circumstances presented by our hypothetical, then, a school district should consider the factors set forth in the court opinions cited above when considering whether to pursue and/or impose discipline for an Internet "hit list." In addition, the American Heritage Dictionary of the English Language (4th Ed.) defines "hit list" as: (1) a list of potential murder victims; and (2) a list designating a target, as for attack, coercion, or elimination. The school district may also consider these, or other, dictionary definitions when attempting to determine whether the list at issue is truly a "hit list" which rises to the level of a threat.

In addition to code of conduct provisions, Michigan's anti-terrorism laws may also apply to the "hit list" at issue in our hypothetical. In Michigan, a person is guilty of making a terrorist threat if the person threatens to commit an act of terrorism and communicates the threat to any other person. The term "terrorism" includes acts that are intended to intimidate or coerce a civilian population.[9]

Additionally, Michigan law provides that a person shall not use the Internet to disrupt the functions of educational or other governmental operations with the intent to commit a willful and deliberate act that is a felony, and which the person knows is dangerous to human life, and which is intended to intimidate or coerce a civilian population.[10]

Each of the above statutes sets forth a felony carrying a maximum sentence of up to 20 years in prison.

Based on all of the above, a school district should be able to impose a long-term suspension or expulsion upon the student who created and

published the "hit list" in the hypothetical presented here.[11] The school district would need to establish, however, that the "hit list" constituted intimidation, or that it disrupted the educational process by the use of a "threat," or that it constituted abnormal or disorderly behavior that was detrimental to the school.

Prior to the imposition of such discipline, of course, a school district should consider all pertinent factors involved in the "hit list" scenario. For example, some communities throughout the country have considered whether the "hit list" was simply a prank (Littleton, Colorado[12]); or whether the student had the means to carry out the killings (Tempe, Arizona[13]); or whether the students took any steps to carry out the threats or had access to weapons (Minnesota[14]). Such "mitigating factors" may (and, in light of the opinion in *Emmett* (see note 11), perhaps *should*) be weighed against the analysis of any threat posed by the list, or any disruption caused by the list, when making the final disciplinary decision.

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1 People v Andrew Osantowski (www.crime-research.org/news/27.09.2004/665).

2 *See* the recent Detroit Free Press article regarding Joel Thomas (May 24, 2006).

3 For additional well-publicized cases, please see: (1) www.keystosaferschools.com/Littleton041902.htm (two Columbine students who scribbled a "Hit List" on a pillar at a park); (2) www.azcentral.com (May 20, 2005 story about a seventh-grade girl who created an "assassination list"); (3) www.twincities.com (May 4, 2005 story about a "hit list" created online by two eighth grade boys); (4) www.culpepercitizen.com (May 12, 2005 story about two 14-year-old girls who created an online "hate list"); (5) www.usatoday.com (April 23, 2006 story about two seventh-graders with a "hit list" and weapons in Alaska); and the list goes on and on. For more, type "student hit list" (without the quotation marks) into the online Google search engine.

4 *U.S. v. Lincoln,* 462 F. 2d 1368, 1369 (1972).

5 *U.S. v. Alkhabaz,* 104 F. 3d 1492, 1495 (1997).

6 *J.S. v. Bethlehem Area School District,* 907 A. 2d 847 (2002).

7 *Manemann v. State,* 878 S.W. 2d 334, 337 (1994).

8 *Virginia v. Black,* 538 U.S. 343, 344 (2003).

9 MCL 750.543m(1).

10 MCL 750.543p(1).

11 Of course, the courts may not always agree. A federal court in Washington addressed circumstances involving a student-created Web site containing mock obituaries and the ability to vote for future mock obituaries. Without more, the court held that the school district should be enjoined from disciplining the student in the absence of any evidence that the mock obituaries and the voting "were intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever. This lack of evidence, combined with the above findings regarding the out-of-school nature of the speech, indicates that the plaintiff has a substantial likelihood of success on the merits of his claim." *Emmett v. Kent School Dist No 415,* 92 F. Supp. 2d 1088, 1090 (W.D. Wash., 2000). Consider by contrast, a suspension in Culpeper, Virginia of two 14-year-old girls who created and posted a "hate list" of approximately 130 fellow students, even though the list was created away from school and did not involve the use of school resources. See www.culpepercitizen.com/news/articles/051205/news5.shtml.

12 See www.keystosaferschools.com/Littleton041902.htm.

13 *See* The Arizona Republic, May 20, 2005 (seventh-grader who created an "assassination list" did not have the means to carry out an attack).

14 Story originally posted at www.twincities.com (no longer online).

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