



President's Letter



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Times are tough out there for Michigan school districts. How do districts manage uncertain and shrinking budgets, more federal and state regulation than ever before, and increased liability at every turn, and yet continue to put kids first?

As attorneys who represent school districts, it's our job to do what we can to ease these burdens with advice and information. The Michigan Council of School Attorneys works hard

to see that Michigan school attorneys and districts stay current in these areas with regular conferences, newsletters and other resources. School law was new to me when I first became a member of MCSA five years ago, and over the years the resources of MCSA and MASB have been invaluable to my practice. It is my privilege to serve as president of MCSA this year.

Because I practice in the Upper Peninsula, my school clients tend to be small and rural school districts. In many ways, no school district experiences the burdens of decreased funding and increased regulation and liability more acutely than small and rural school districts. That's why I was excited to see MASB begin a partnership with the Michigan Small and Rural Schools Association in 2006. The pairing of MASB and MSRSA has created a

renewed focus on the special challenges faced by small and rural districts.

This year, MCSA joins this effort by offering a special audio conference designed for small and rural districts and their counsel. The audio conference, slated for March 13, 2008, will offer presenters on three topics of special interest to small and rural districts for saving money, increasing efficiencies and meeting legal requirements. In the 90-minute conference, Christopher Iamarino of the Thrun Law Firm will discuss consolidation of school services; Michele Eaddy, also of the Thrun Law Firm; will talk about meeting the "highly-qualified" teacher requirements of No Child Left Behind; and I will offer districts some tips for saving money on legal services. All of this great content will be available from the comfort of your own speakerphone with online materials, for a budget-minded price. Watch your e-mail and your mailbox for more information about this audio conference, and if you or a superintendent, administrator, board member, or attorney you know would benefit from this conference, please spread the word.

Enjoy the information-packed articles in this issue of *Council News*, and look for the other resources MASB and MCSA have to offer at www.masb.org. If there's anything you think the MCSA should include in its conferences, newsletters and other member services, share your ideas by contacting MASB Legal Counsel Brad Banasik, bbanasik@masb.org or me, lreilly@kendrickslaw.com. The MCSA Board is always looking for ways to better serve MCSA members and their clients.

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Mark Your Calendars

March 13, 1–2:30 p.m.

MCSA Audio Conference

**Legal Issues for
Small and Rural School Districts**

Visit www.masb.org for details.



Student Discipline

By: Donald P. DeNault Jr., O'Reilly Rancilio, PC

Prologue: At the end of 2007, I authored a series of articles for my local bar association's monthly publication. The articles were prepared with an eye toward educating general practitioners about the nuances associated with representing students in serious student discipline proceedings. Because some of the research may also be of value to school attorneys, I have revised the series in an effort to tailor it for a very different audience. Nevertheless, some of the material may seem a bit out of place for the school attorney audience, thus compelling me to first author this prologue to provide a rather long-winded explanation that will hopefully prove to have been unnecessary. Nevertheless, if a phrase reads funny or if I missed a passage that addresses the "student attorney" and not the "school attorney," please do me the courtesy of simply ignoring it. Thanks and enjoy!

Over the course of the past few years, I have encountered and observed a number of lawyers who endeavor to represent public school students who are facing serious disciplinary action by the school district for any number of reasons. Invariably, each lawyer has a different style and a different approach to the disciplinary hearing process. Equally invariably, each lawyer could have used a few pointers before braving this "great unknown" area of the law.

This article is not designed to provide any "secrets" or "tips" that might enable the enterprising attorney to secure an undue advantage. Rather, the intent is to educate the reader about the nature of the process, and perhaps to encourage an aspiring student discipline attorney to properly prepare for a process that can be extremely difficult for students, parents and school officials alike.

We begin our exploration of this little-known area of the law by first examining the conduct that the Michigan Legislature has deemed appropriate for "mandatory expulsion." Contrary to some widespread myths, school districts generally have broad discretion to determine whether expulsion is an appropriate

penalty for an offense committed by a student. However, in a few limited circumstances, expulsion is not discretionary, but mandatory.

The first, and probably most well-known, of those circumstances involves the possession of a dangerous weapon. If a student possesses a dangerous weapon in a weapon-free school zone, the school district is required to permanently expel the student.¹ The term "dangerous weapon" means a firearm, dagger, dirk, stiletto, knife with a blade over three inches in length, pocket knife opened by a mechanical device, iron bar, or brass knuckles.² The term "weapon-free school zone" includes not only school property, but also a vehicle used by a school to transport students to or from school property.³

In my experience, most of the contested cases (with attorneys and without) have involved a knife with a blade over three inches in length. Usually, the parents or the attorney attempt to plead ignorance on the part of the student: "It was left in his backpack after a fishing trip"; "He switched coats with his brother"; "It isn't his knife." These explanations, under the statute, are not sufficient to avoid expulsion. But we'll get back to this in a moment.

First, any lawyer who has continued reading this far must surely be asking for a definition of "blade" and how one would go about measuring such a thing. Interestingly, the word blade is not defined in the Michigan statutes. However, standard dictionaries include several definitions of the term blade, including:

1. The flat cutting part of a sharpened weapon or tool. (*The American Heritage Dictionary of the English Language*, Fourth Edition, 2000)
2. The cutting part of an instrument; as, the blade of a knife or a sword. (*Webster's Revised Unabridged Dictionary*, 1996, 1998)
3. The flat part of a tool or weapon that (usually) has a cutting edge. (WordNet 1.6, 1997)

Few court opinions throughout the country have addressed these definitions in the context of interpreting a "dangerous weapons" law. An appellate court in Texas reviewed these common meanings of the term "blade" and determined that they were insufficient to convey the legislature's intent. The court held that the common meaning of the term "merely distinguishes the cutting part of a knife from the handle." Therefore, the court held that a "blade," as used in the Texas statutes, is the "flat-edged part of the knife, which includes the sharpened part of the instrument and any remaining flat-edged part up to, but not including, the handle."⁴

The reasoning of the Texas court is persuasive, and would arguably be followed in Michigan because the Michigan Legislature likely intended to prevent the type of injury which would be caused by the insertion of a sharp



object more than three inches into a person's body. If only the "cutting surface" is measured, then a person could defeat the legislative intent by crafting a "hinge" or some other connection mechanism which would effectively penetrate more than three inches, yet include less than three inches of actual "cutting" surface. This result is likely not what the Legislature intended.

Presuming, then, that a student is found with a knife at school or on the school bus, and presuming the "blade" was more than three inches in length, it would seem that the school district has no choice but to permanently expel the student under state law. In reality, however, a few factual findings remain to be made before expulsion is mandatory. The Legislature has carved out a few exceptions to the "mandatory expulsion" requirement in the following circumstances:

- (a) The object or instrument was not possessed by the student for use as a weapon, or for direct or indirect delivery to another person for use as a weapon.
- (b) The weapon was not knowingly possessed by the pupil.
- (c) The pupil did not know or have reason to know that the object or instrument possessed by the pupil constituted a dangerous weapon.
- (d) The weapon was possessed by the pupil at the suggestion, request, or direction of, or with the express permission of, school or police authorities.⁵

These, and only these, are the final weapons (pun intended) in the attorney's arsenal when attempting to save a student from permanent expulsion for possession of a dangerous weapon. Reflecting on the "common excuse" paragraph set forth a few paragraphs ago, we see now that those excuses were not contemplated by the Legislature. So, no matter how unfair it may

seem that little Nicky will be expelled for essentially taking his brother's backpack to school, that will be the final result unless one of the above exceptions is established.

The first exception—that the item was not possessed as a weapon—presents intriguing possibilities. The sharp (pun intended once again) attorney could argue that little Janey brought the large knife to school because she planned to assist her art teacher with varied and very difficult cutting projects. This will be difficult to prove by the time of the actual hearing, of course, because by that point the school district will have finished a thorough investigation to determine how and why the knife came to be in Janey's possession. If she has reached the point of an expulsion hearing, it is pretty unlikely that her art teacher verified that story.

The second exception—that the knife was not knowingly possessed by the student—is usually quite difficult for even the "best" attorneys to effectively establish. In order to have been caught, the administrators must (usually) have heard about the knife from another student, or perhaps they observed young Joey holding the knife or showing it off. It will be unlikely (though not impossible) that the administrators found the knife without any evidence that the student knew it was there.

The third exception—that the student did not know the item constituted a dangerous weapon—is also very difficult for even the most proficient attorney to demonstrate. Most students who find themselves in an expulsion situation involving a knife (not usually a butter knife) have the mental fortitude to know that the knife is or can be a dangerous weapon. The Legislature likely included this exception only for situations involving less than obvious potential weapons, such as baseball bats and hair spray.

The fourth exception—that the student had express permission to possess the weapon—will rarely be an option. Just like the first option, if the student has gotten to the point where he or she is facing expulsion, it's pretty unlikely that anyone in a position of authority granted the student permission to bring the weapon to school. Not impossible, of course, but really, really, really unlikely.

There are only three other specific offenses that require mandatory expulsion: (1) The commission of arson in a school building or on school grounds; (2) The commission of criminal sexual conduct in a school building or on school grounds; and (3) The commission of an assault upon a school employee, volunteer or contractor.⁶ Yes, that is correct, you don't see drug offenses, assaults on other children or bomb threats on this list. A high school cheerleader might beat up her rival for the affections of the star quarterback, and the school district will have the *option* of suspension all the way up to expulsion for 180 days. But if that same sweet cheerleader shoves the janitor in an isolated release of anger, she must be permanently expelled.

This is not to say that a school district *can't* permanently expel a student for bomb threats and other offenses that are not on the "mandatory expulsion" list. Of course they can. However, such decision would need to be an exercise of *discretion* rather than a directive from the Michigan Legislature. True, certain weapon offenses and certain assaults (oh, and let's not forget arson, even if it only involves setting a small amount of toilet paper on fire in a rare moment of scientific curiosity while in the restroom) will result in at least 180 school days for a student to spend away from all of his friends, but for *most* situations



encountered by a school, the Revised School Code provides significant discretion to local school boards. Section 1311(1) of the Revised School Code provides that the board, the superintendent, a building principal, or another school district official if designated by the board, may authorize or order the suspension or expulsion from school of a student who is guilty of a gross misdemeanor or persistent disobedience if, in the judgment of the board or its designee (as applicable), the interest of the school is served by the authorization or order.⁷

So, most of the time, the accused student is not facing mandatory expulsion. This affords legal counsel an opportunity to try to minimize the punishment the student may face. The first thing the student's counsel should consider is that this is not a trial, and a call to the school district's counsel should not be an effort to "plea bargain." School district counsel is not the equivalent of "city attorney"—he or she will not be "prosecuting" the case against the student. However, if counsel *does* make that call, use the opportunity to explain the procedures that the school district has in place for disciplinary proceedings. When I receive calls like that, I usually explain the hearing process (opening statements, testimony, questions, closing statements, etc.), the setting (formal or informal), the arbiters (those deciding the pupil's fate), the rules (disclosure of information, cross-examination, etc.), the notification process (how the decision will be communicated to the attorney or the family), and the appeal process. Every school district handles these hearings differently (sometimes *extremely* differently). In my experience, a higher comfort level for the student's attorney results in a less combative and more professional hearing process.

Every school district is a bit different, of course, but certain basic rules apply. For instance, the "due process" that a juvenile might be accustomed to in a criminal case is very different from the "due process" that must be provided in a school discipline setting. For the latter, only "rudimentary" due process is generally required.⁸ But before we get too far ahead of ourselves, let's start at the beginning.

Student discipline matters always begin with an underlying incident or event. A few real-life examples: (1) student brings knife to school and shows it to his buddy; (2) student brings knife to football game and asks buddy to hold onto it for him; (3) student posts a "hate list" on the Internet that lists the names of students he wants to die (but doesn't actually threaten to kill); (4) student (drug mule for another student) is caught with multiple baggies of marijuana strapped to his belt; (5) student stabs another student in the leg with a screwdriver taken from a classroom; (6) student gets into a fight in the cafeteria with another student, then assaults administrators during her detention; (7) student buys Vicodin from another student for her headaches; etcetera and so on. You get the idea.

After the event, if it wasn't witnessed by an administrator, someone inevitably "tells on" the offender. Either way, an investigation is then undertaken by the administration. In some ways, this investigation is the most important part of the process, because the findings of the administrators will be afforded great deference by the hearing panel and/or the school board. Courts generally presume that school officials will gauge the veracity of each student who is interviewed, and conclusions about such veracity will be reflected in the presentation of evidence to the hearing body. In other words, the courts allow hearing bodies to accept the conclusions of administrators regarding truthfulness.⁹ If

the administrators conclude that Johnnie, Jamie and Billie were being truthful, and that Damien and Hannibal were not, the administrators may render their conclusions and recommended "sentence" accordingly.

Those conclusions and recommendations should, more often than not, end up in a written report, chronology of events, and/or a letter to the parents explaining the nature of the "charge" against the pupil and the discipline that is being recommended by the administration. If a family is going to retain an attorney for the disciplinary process, this is likely the point when that will occur.

The attorney's first thought will probably be to protect his or her client's rights. The attorney's second thought might be that the student has rights much like an accused criminal. Well, that second thought is erroneous. Case law in this area makes clear that students in disciplinary contexts are only entitled to "rudimentary" due process. In other words, students charged with misconduct must be advised of the charges against them (usually already done by the time an attorney gets the call), and must be provided an explanation of the evidence relied upon by school authorities in moving ahead with disciplinary action (this will usually be presented, in a more formal manner, at the first hearing). Where the student offers a different version of the facts, the student must also be provided an opportunity to be heard (again, usually at the first hearing, although by that point the student has no doubt already been "interviewed" by the administration to the extent that his or her version of the facts is reasonably understood).

Attorneys who represent students in disciplinary hearings will no doubt be alarmed by the notion of the student being "interviewed" by the administration. Nevertheless, students don't



have *Miranda* rights prior to questioning by school officials. That could change if the police become involved, but in general the investigating administrators may question the student without any sort of “advice of rights.”¹⁰

So, other than the right to know the charges, to hear the evidence, and to be heard, students generally do not have any other due process rights. Attorneys have argued with me over the years about their ability to subpoena witnesses for the disciplinary hearing. My answer? Sorry, no one has subpoena power in these matters. An attorney’s natural instinct is to gather witnesses and scrutinize discovery information, and schools generally understand that those instincts are controlling the student’s attorney, but such efforts are generally wasted because the school has no obligation to honor such requests.¹¹

In addition to lacking subpoena power, students also have no right to cross-examine witnesses or school officials.¹² The hearing is not a trial. In the interests of creating a thorough record and affording some deference to the attorney’s need to do the best possible job, I have generally never precluded an attorney from asking questions of the administrators who provide testimony at the hearing, so long as the attorney respects the procedural rules and is not abusive. Nevertheless, it is important for attorneys to know going into the hearing that they do not generally have a “right” to cross-examine anyone about anything. At most, they arguably have a “right” to hear all of the facts and evidence (thus creating perhaps a limited right to question someone), but when all is said and done they won’t be breaking an elementary school principal with “You can’t handle the truth!”¹³

Finally, students generally don’t even have the right to learn the identities

of students who provided information to school officials. This is probably the number one concern expressed by attorneys at student discipline hearings. Attorneys want to know who accused their client and who said what about their client so that they can test the veracity of the statements. In general, that isn’t going to happen.¹⁴ The courts presume that the school officials have already gauged the veracity of each student who was interviewed and reached conclusions about their truthfulness and the accuracy of their perceptions. These determinations will essentially “substitute” for first-hand testimony by, and cross-examination of, the student witnesses. Perhaps the only real exception to this rule is that a student’s identity might be revealed when a question is raised about the accuracy of a student’s identification of the offending student. For the most part, though, this issue is a rare one. In my experience, identity is almost never at issue.

In the end, courts will focus their analysis on whether the student was afforded a fair and impartial opportunity to be heard. So long as that occurred, the courts will be deferential to the hearing bodies that make factual findings and impose discipline. At best, an educated student discipline attorney will know that he or she should focus more on minimizing the events and the punishment rather than trying to secure an “acquittal” in the eyes of the school.

Because the courts grant so much discretion to school districts and so little due process to students (particularly when compared against criminal proceedings), the deck is certainly stacked in favor of school districts when it comes to disciplinary proceedings. Nevertheless, the student’s attorney may have a few arrows in the quiver that can make the proceedings more equitable. The timeless cliché “knowl-

edge is power” is rarely more potent than in student discipline proceedings.¹⁵

Before the Hearing

Although every circumstance is unique, the student attorney’s first step might be to make contact with the appropriate school official(s) handling the investigation of the student. Well-counseled school officials should be leery of speaking with attorneys, but some will see it as an opportunity to explain why the student must be expelled. Administrators who feel the case against the student is ironclad may be the most likely to “show the attorney how much information the investigation has yielded.” Certainly, a meeting or discussion along these lines might reveal evidence or information that the attorney will later utilize to discredit or mitigate the investigation and its conclusions.

Attorneys may also try the “FOIA approach” by submitting a request for information under Michigan’s Freedom of Information Act (FOIA). School districts are public bodies, and they must honor a written request for public records (unless an exemption or restriction applies that would allow denial of the request).¹⁶ True, the FOIA does contain a specific exemption that allows school districts to withhold public records and information if disclosure would cause the district to violate the Family Educational Rights and Privacy Act (FERPA). However, FERPA is not so broad and extensive that it would prevent the district from providing much of the information related to the student’s case. For example, the attorney may not get the names of students who prepared witness statements for the administration’s investigation, but he or she might get the statements themselves if they do not disclose any personally identifiable information about students. Similarly, the attorney



may not get student information in the administration's chronology of events or other investigative summary, but he or she will likely be able to get the summary itself.

Attorneys have two other means of obtaining information before the hearing. Prior to commencement of the hearing, the district may provide a redacted packet of information to the attorney for use during the hearing. Of course, if the attorney just can't wait until then, he or she could try pursuing a circuit court action for relief. In addition to an appeal under the FOIA (if the requests were denied, even in part), the attorney might also argue for equitable relief on the grounds that the student is about to be expelled from school without having any advance access to the specific information that will be used to justify the expulsion. The attorney won't have any case law to cite, because the student's due process rights are very limited, but the argument might be sufficiently compelling from an equity standpoint to convince a judge to grant a temporary stay or other injunctive relief until the issue of "disclosure" can be sorted out.

During the Hearing

Irrespective of whether the attorney obtained much information from the school district before the hearing, he or she will still have some means of obtaining information *during* the disciplinary hearing itself. Although the attorney will not have subpoena power, the student might still be able to find other students (and perhaps even school employees or outside third parties with knowledge of the events) who are willing to voluntarily attend the hearing on his or her behalf. This is probably the one "element of surprise" in student disciplinary hearings that actually favors the student. In most cases, the evidence will be strong

enough to withstand any surprises that the unanticipated witnesses might create during the hearing. Nevertheless, a school attorney should always be prepared for the possibility that the student's attorney will bring new or additional witnesses.

Another approach that attorneys might consider: retaining a court reporter to record the proceedings. Although they know this could be perceived as adversarial, an attorney might pursue this option in an effort to ensure that the committee and the administrators are "extra thorough" in their deliberations and testimony. In fact, it may even have the effect of inspiring the hearing body to grant most of the attorney's requests (*i.e.*, requests to ask questions of a witness, or to review a document, or to present witness testimony, or to present opening and closing statements, etc.). The attorney will be banking on the notion that the school district will not want to appear "unreasonable" when the transcribed record is presented to a circuit court on appeal.

In the end, even for fact patterns where expulsion is mandatory, the hearing body still has the discretion to find that the facts are not what the administration paints them to be. The student's attorney will want to make every effort to minimize the facts and soften the student in the eyes of the panel. Similarly, in "non-mandatory" expulsion cases, a sharp attorney will educate the hearing body regarding all of its options. Sure, it can simply accept the facts presented by the administration and implement the recommended penalty. However, the hearing body may also consider additional facts and may fashion its own penalty, customized for the individual student and/or the unique facts at issue. For example, perhaps the knife was an heirloom, or perhaps the student is an exceptional

student with no prior disciplinary record, or perhaps the student and her family really just need counseling during a long-term suspension... Even the slightest "tweak" of a pertinent fact could make all the difference between expulsion and suspension. As school district counsel, it's important to recognize this approach when we see it, and to counsel our administrators regarding how to handle it.

Lest we overlook it, the Fifth Amendment was briefly mentioned earlier in this article. In my experience, I have seen attorneys assert it, and I have also seen them ignore it. From a discipline perspective, ignoring the Fifth Amendment tends to be much more effective with the discipline committee. The people deciding the student's educational fate are parents and/or residents of the school district, and they very much want to hear from the accused student. Remorse, honesty, eye contact and explanations (not excuses) are very valuable commodities for students in these situations. A good attorney will prepare the student client and his/her family accordingly. By contrast, approaching the committee with a snippy attitude about the student's Fifth Amendment rights and an argument that discipline should not be imposed is akin to simply drafting the expulsion order and handing it to the school board for a signature.

A student's attorney may also ask the committee or board for a closed hearing under Michigan's Open Meetings Act.¹⁷ In most cases, a closed hearing should protect the student's admissions and statements from disclosure, because the information discussed at a closed meeting of a public body may not be disclosed outside of the meeting.¹⁸ Arguably, a criminal court might compel a committee member to testify about the information presented at the closed disciplinary hear-



ing, but I have yet to see this occur. Although this risk is a valid concern for the student's attorney, the need for sincerity in the disciplinary hearing likely outweighs it.¹⁹ The attorney needs to balance the school discipline hearing against the criminal prosecution and determine which one is more important to the student's future. Unless the student is facing significant jail time, the attorney will likely choose honesty, rather than silence, as the best approach at the hearing.²⁰

After the Hearing

Even if the discipline hearing ends with a recommendation of expulsion (and/or the school board orders expulsion), many school districts afford the student one appeal. Although it should not be a "retrial" of the case (the school district's attorney should limit the appeal to consideration of the record and any argument the parties may desire to make), this will be the attorney's last chance to convince the school district that the facts and circumstances warrant a different penalty. For districts that do not allow an appeal to the school board, or after the school board has issued its final order, an attorney still has the right to file an appeal with the local circuit court. The student's burden will be difficult due to the discretion afforded to school districts, but if the student was denied a significant due process right, or if a compelling error was commit-

ted during the hearing process, he or she may have a chance to reverse or remand. However, that's a subject for an entirely separate article.

Finally, the Revised School Code allows students who have been permanently expelled to eventually petition for reinstatement (sort of like being given a life sentence in a criminal case, but being permitted to seek parole). The process is set forth at MCL 380.1311(5).

¹ MCL 380.1311(2).

² MCL 380.1313(4).

³ MCL 750.237a.

⁴ *McMurrrough v State*, 995 SW2d 944 (Tex App 1999).

⁵ MCL 380.1311(2).

⁶ MCL 380.1311; MCL 380.1311a.

⁷ MCL 380.1311(1).

⁸ See, e.g., *Coss v Lopez*, 419 US 565 (1975) and its progeny.

⁹ *Newsome v Batavia Local School District*, 842 F3d 920 (CA 6, 1988) ("[T]he veracity of a student account of misconduct by another student is initially assessed by a school administrator—in this case, the school principal—who has, or has available to him, a particularized knowledge of the student's trustworthiness. The school administrator generally knows firsthand (or has access to school records which disclose) the accusing student's disciplinary history, which can serve as a valuable gauge in evaluating the believability of the student's account. Additionally, the school administrator often knows, or can readily discover, whether the student witness and the accused have had an amicable relationship in the past. Consequently, the process of cross-examining the student witness may often be merely duplicative of the evaluation process undertaken by the investigating school administrator.").

¹⁰ This somewhat begs the question whether students have Fifth Amendment rights in this context. The answer is a qualified yes, of course they do, especially when the act they are accused of committing carries potential or concurrent criminal prosecution. Unfortunately for their lawyer, discipline hearings usually take place much earlier than the criminal trial. So here's a quick tip, as a thank you for reading the endnotes: discipline committees *really want to hear from the accused student*. Silence is NOT golden. Unless every other phrase out of the kid's mouth will be "Yeah I did it," or "I'm not sorry," or "He deserved it," the student's attorney is best served by getting that kid singing like a canary. The more remorse, the more sincerity, the more maturity, and the more explanations the committee can hear, the better for the student. Excuses might not win the day, but reasonable explanations buried within piles of remorse could mean the difference between expulsion (if it isn't mandatory under state law) and suspension. Better yet, in rare cases the committee might even be persuaded to find alternative facts in order to avoid mandatory expulsion in the first place. However, in my experience, the attorney won't even have a chance at such results unless the student addresses the committee.

¹¹ This doesn't mean that the student can't secure the attendance of his or her own witnesses by some other means. The student or the attorney may be able to convince a friend, a character witness, or some other third party to attend the hearing and offer testimony. So long as they generally follow the rules of procedure and decorum, the hearing panel will likely entertain their testimony. However, the school district has no obligation to undertake this effort on the student's behalf, or to honor a document entitled "subpoena" that has no legal force or effect.

¹² See, e.g., *Newsome v Batavia Local School District* ("In this turbulent, sometimes violent, school atmosphere, it is critically important that we protect the anonymity of students who 'blow the whistle' on their classmates who engage in drug trafficking and other serious offenses. Without the cloak of anonymity, students who witness criminal activity on school property will be much less likely to notify school authorities, and those who do will be faced with ostracism at best and perhaps physical reprisals."); *Birdsey v Grand Blanc Community Schools*, 130 Mich App 718 (1983).

¹³ If you're a lawyer, shame on you if you don't know which Hollywood movie this comes from! Extra credit if you can name the two actors involved in the exchange.

¹⁴ In addition to a strong public policy interest in protecting children from being dragged through these sorts of proceedings (see *Newsome, supra*), a little federal statute known as the Family Educational Rights and Privacy Act, or FERPA, really gets in the way of an attorney's ability to convince school districts to potentially forfeit federal funding because they released personal information about other students to you.

¹⁵ The famous phrase *scientia potentia est* is a Latin maxim "For also knowledge itself is power," stated originally by Sir Francis Bacon in *Meditationes Sacrae* (1597) (at least if you believe Wikipedia and various other internet sources). So, perhaps "timeless" is a slight exaggeration when referring to the age of this oft-used cliché.

¹⁶ If the student's conduct was investigated by the police, the student's attorney might also send a FOIA request to the local police agency in charge of the investigation. Although the request might initially be denied if the investigation is still ongoing, in general the process should be sufficiently far along that the police agency will provide a copy of the relevant report. If that particular municipality does not protect privacy interests, the attorney might also be lucky enough to obtain the names of other individuals involved in the matter, whether as witnesses, victims, co-defendants, or school officials.

¹⁷ MCL 15.268(b).

¹⁸ A member of a public body who discloses closed session minutes to the public risks both criminal prosecution and civil penalties under the OMA. 2000 Mich OAG No. 7061.

¹⁹ And, if the student's attorney becomes desperate, he or she can always argue in the criminal proceedings that none of the statements made by the student at the discipline hearing were made under oath. Not the greatest argument, to be sure, but it's something of a fallback position to convince the criminal court that the disclosures during the discipline hearing are not necessarily reliable in a criminal proceeding, which administers oaths of truthfulness and is concerned with a much greater burden of proof.

²⁰ If the student's attorney does have concerns about incriminating statements made at the discipline hearing, he or she may not want to utilize a court reporter's services after all. Although the committee members are prohibited from revealing the information disclosed during the meeting, a prosecutor might obtain the transcript from *the attorney* as part of a reciprocal discovery demand (although there is no discovery in district court misdemeanor cases, but that's a topic for an entirely separate article).

Students, FERPA and Videotape

By: Brad Banasik, Michigan Association of School Boards

As a safety measure, many school districts have installed video cameras in school buses, buildings and parking lots. The cameras provide administrators with an extra set of eyes to deter and watch for unacceptable or illegal conduct. Another benefit of video cameras is the strong evidence they can preserve on tape for disciplin-

ary decisions and liability claims.

However, when a school district uses video cameras, it may be creating an "education record" that is subject to the requirements and regulations of the Family Educational Rights and Privacy Act (FERPA). If a surveillance videotape is found to be an "education record," then the disclosure of

the recording to a parent of a student appearing in the tape or to anyone in general could be restricted. FERPA prohibits school districts from releasing personally identifiable information (other than directory information¹) contained in a student's education records to anyone but certain enumerated federal, state and local officials



and institutions, unless authorized by the student's parent.

The question of whether surveillance videotape constitutes an education record for a particular student is, unfortunately, not an easy question for school districts to answer. Accordingly, this article will attempt to clarify the issues involved in determining whether a video recording qualifies as an education record and provide guidance to school districts on the possible legal implications associated with disclosing or withholding video recordings.

The Likely Scenario

A fight erupts in the high school cafeteria. The altercation, at first, is limited to two students, but other students get involved either as peacemakers or as additional aggressors in defending one of the original combatants. In particular, most of the additional participants include members of the football team because the instigator of the fight is the high school's starting quarterback. In the aftermath of the altercation, the quarterback is suspended for five days from school and prohibited from playing in the final two games of the football season. His adversary was taken to the hospital for treatment on cuts and a broken nose; he was suspended for two days. The other members of the football team who were aggressors received the same disciplinary treatment as the quarterback.

The altercation was recorded by four video cameras positioned in the cafeteria. The recordings, which contain recognizable images of all the students who fought in the cafeteria, are stored on a CD-ROM disk. The video system used by the school does not allow the recordings to be edited or the video images to be altered for the purpose of ensuring that footage can always be considered legitimate evidence.

In time, the school district receives several requests to view the alterca-

tion or receive a copy of the CD-ROM disk. The parents of the quarterback wish to view the footage to prove that their son was only acting in self-defense. Several other parents are certain that the video would show that the other football players were trying to break up the fight, rather than teaming up on the other student. The parents of the injured student are considering a civil lawsuit against the quarterback and would like to have a copy of the disk for evidence. The local police department would like to use the disk as evidence to commence a criminal proceeding against the quarterback. And, of course, the local newspaper would like to receive a copy of the disk for a story on the disciplined football players.

Does FERPA permit the parents of the disciplined students to view or receive a copy of the CD-ROM disk? Does Michigan's Freedom of Information Act require the disk to be disclosed? The answers to these questions depend on whether the disk is an "education record" under FERPA for the identified students.

What is an "Education Record?"

As noted above, FERPA generally prohibits the disclosure to third parties of "personally identifiable" information contained in "education records," without the consent of a parent or eligible student.² The term "education records" is defined by FERPA as all records, files documents and other materials containing information directly related to a student; and maintained by the education agency or institution, or by a person acting for such agency or institution.³ This includes all records regardless of medium, including, but not limited to, handwriting, videotape or audiotape, electronic or computer files, film, print, microfilm, and microfiche.⁴ "Personally identifiable" information includes, but is not limited to,

a list of personal characteristics that would make the student's identity easily traceable, or other information that would make the student's identity easily traceable.⁵

Thus, without considering any of the five exceptions relating to the definition of an education record, a surveillance videotape would appear to constitute an education record if the images on the video directly relate to specific students and it is maintained by the school. And, if the video images personally identify individual students, the disclosure of the videotape would, accordingly, be restricted. However, varying and conflicting interpretations by the Family Policy Compliance Office (FPCO),⁶ courts, and state attorney generals in regards to how the definition of education records applies to surveillance videotapes complicate the status of video images for purposes of complying with FERPA and state public records laws.

The FPCO's Original Interpretation

In *Letter re: Berkeley School District*,⁷ (hereinafter "Berkeley Letter") the FPCO concluded that a parent may only inspect a school videotape showing his or her child engaged in misbehavior if no other students are pictured. It stated in relevant part:

If education records of a student contain information on more than one student, the parent requesting access to education records has the right to inspect and review, or be informed of, only the information in the record directly related to his or her child.... If, on the other hand, another student is pictured fighting in the videotape, you would not have the right to inspect and review that portion of the videotape.

Consequently, based on the Berkeley Letter, videotapes are education records



for each student depicted in a video image.

The FPCO's New Unofficial Interpretation

After issuing the Berkeley Letter, the FPCO has apparently provided "informal advice" to attorneys and school districts on a case-by-case basis in regards to questions about how the definition of education records applies to surveillance videotapes. The new unofficial guidance by the FPCO provides that video images are education records only for the students "directly related" to the focus or subject of the video (i.e., a fight, drug deal, or some other disturbance that causes the students to be the focal point of the video). In other words, if a camera captured an altercation, the resulting videotape would constitute an education record for the students actively involved in the altercation. Other students in the background of the video, whether walking down the hall, sitting on the bus, or eating lunch, would be considered "set dressing" (not relevant to the incident) and their images would not be covered by FERPA.

Additionally, the Texas Attorney General refers to the FPCO's new unpublished position in two opinions⁸ that address the disclosure of a school's surveillance videotape that includes footage of an altercation. The opinions note:

[T]he Family Policy Compliance Office of the Department of Education (DOE) has determined that videotapes of this type do not constitute the education records of students who did not participate in the altercation. The DOE has, however, determined that the images of the students involved in the altercation do constitute the education records of those students. Thus, FERPA does apply to the students involved

in the altercation. Further, DOE has determined that the students involved in the altercation are directly related to each other because of the altercation.⁹

The opinions ultimately allowed the parent whose son was involved in the altercation to review and inspect the videotape. While the videotape included images of other students who were part of the focus of the videotape as a result of their participation in the altercation, the opinions determined that consent from their parents was unnecessary for the review and inspection of the videotape because the students' images were directly related to the requestor's son.¹⁰

Court Cases

In a 2005 case, a New York state court reached the conclusion that a school district surveillance tape was not an education record within the meaning of FERPA and, therefore, was subject to disclosure.¹¹ In deviating from the FPCO's Berkeley Letter, the court based its decision on the purpose of FERPA:

This Federal statute is intended to protect records relating to an individual student's performance. FERPA is *not* meant to apply to records, such as the videotape in question which was recorded to maintain the physical security and safety of the school building and which does not pertain to the educational performance of the students captured on this tape.

The court did refer to the FPCO's Berkeley Letter, but determined that, in this case, the student's due process rights outweighed the school district's interest in protecting any claimed confidentiality on the tape.

More recently, the Washington State Supreme Court ruled that a videotape from a school bus surveillance camera was subject to public dis-

closure under state law.¹² In this case, the school district denied a request by a parent to view the videotape on the basis that it was exempt from disclosure under Washington's Public Disclosure Act according to a student file exemption. Similar to FERPA, the student file exemption protects the confidentiality of student records in Washington by exempting from disclosure "[p]ersonal information in any files maintained for students in public schools..."¹³

In reaching its decision, the court limited the student file exemption to only cover information that is both "personal" and "maintained for students;" it then adopted the same line of reasoning as the New York court by emphasizing that a surveillance camera primarily serves as a means of maintaining security and safety on school buses. Consequently, videotapes produced by a surveillance camera are, in the court's opinion, significantly different from the types of records schools traditionally maintain in students' personal files, such as a student's grades, standardized test results, assessments or class schedules.

Waiting for Clarification from the FPCO

School officials and school attorneys are anxiously waiting for the FPCO to provide formal, written guidance on the status of school video footage under FERPA. The National School Boards Association (NSBA) has continued to press the FPCO to clarify its current position on how FERPA's definition of education records applies to surveillance videotapes while considering state public records laws and the above court cases. The fact that the FPCO has acknowledged that it is currently working on formal guidance is, hopefully, a sign that school districts will soon be able to rely on an official position from the FPCO in handling public records requests for surveillance videotapes.



In the interim, some of the confusion over releasing and withholding surveillance videotapes could be eliminated if the videos are created and maintained in such a manner that they qualify as a recognized exception to FERPA's definition of education records. The exceptions neither require nor prohibit the release of such exempted documents, but allow schools to follow their own policies or applicable state law in regards to their disclosure. Of the five exceptions, the one that could apply to student images captured on videotape is the exception for the records of law enforcement units.¹⁴

The Law Enforcement Unit Exception

FERPA excludes from the definition of education records – and thereby from the restrictions of FERPA – records that a law enforcement unit of a school or school district creates and maintains for a law enforcement purpose.¹⁵ A “law enforcement unit” is an individual, office, department, division or other component of a school district – such as a unit of commissioned officers or noncommissioned security guards – that is officially authorized or designated by the school district to: (1) enforce any federal, state or local law, or (2) maintain the physical security and safety of the school.¹⁶

FERPA narrowly defines a “law enforcement record” as a record that is (1) created by the law enforcement unit, (2) for a law enforcement purpose and (3) maintained by the law enforcement unit.¹⁷ Thus, while a school district can disclose, without consent, student education records to school law enforcement units under FERPA's exception for school officials with legitimate educational interests,¹⁸ these records are not thereby converted into law enforcement unit records because the records were not created by the law enforcement unit.

Maintaining Videotapes as Law Enforcement Records

If a school district wishes to exclude security videotapes from the restrictions of FERPA, it should consider designating a department or an individual to serve as the district's law enforcement unit responsible for controlling the surveillance cameras and maintaining the resulting videotapes. As long as the videotapes are created for a law enforcement purpose (i.e., maintaining the physical security and safety of a school)¹⁹ and they remain in the possession of the law enforcement unit, the videotapes constitute law enforcement, rather than education, records.

The law enforcement unit's responsibilities relating to law enforcement records do not, however, prevent the designated individual or department from also performing non-law enforcement unit functions for the school district, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student.²⁰ In the preamble to the FERPA regulations published in the *Federal Register*, on Jan. 17, 1995, the U.S. Department of Education clarified further the status of records created by an individual or a department responsible for performing law enforcement and school related functions:

[W]here a law enforcement unit also performs non-law enforcement functions, the records created and maintained by that unit are considered law enforcement unit records, even where those records were created for dual purposes (e.g. for both law enforcement and disciplinary purposes). Only records that were created and maintained by the unit *exclusively* for a non-law enforcement purpose will not be considered records of a law enforcement unit.²¹

Additionally, a law enforcement official may permit a school official responsible for discipline to view a surveillance videotape without risking the videotape's status as a “law enforcement unit record.” However, if a school official who is not a law enforcement official receives a copy of the surveillance videotape, that videotape becomes an education record subject to FERPA as a result of the copy being maintained by a component of the school district that is not the law enforcement unit.

A school district creating a law enforcement unit must have its school board take action to establish the unit. Parents and students should also be notified of which office or school official will serve as the school's law enforcement unit. This can be accomplished by including the designation in a board policy, student handbook, or in the school district's annual notification to parents of their rights under FERPA. Law enforcement unit officials who are employed by the school district should also be designated as “school officials” with a “legitimate educational interest” in the FERPA notification in order for them to receive personally identifiable information from students' education records.²²

Disclosing Law Enforcement Unit Records

Because law enforcement unit records are excluded from the definition of education records, schools may disclose information from them to anyone without parental consent. The issue of whether a school district *must* disclose records of a law enforcement unit is regulated by section 13(1)(b) of Michigan's Freedom of Information Act (FOIA).²³ Under this provision, a public body may exempt from disclosure investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:



“(i) interfere with law enforcement proceedings, (ii) deprive a person of the right to a fair trial or impartial administrative adjudication, or (iii) constitute an unwarranted invasion of personal privacy.”²⁴

Further, the grounds for preventing the disclosure of records in connection with an ongoing investigation include “fears of revealing evidence, witnesses, prospective testimony, the transactions being investigated, the direction of the investigation, governmental strategy, prospective new defendants, and the scope and limits of the government’s investigation.”²⁵

Conclusion

The hypothetical scenario at the beginning of the article provides an example of the multiple issues involved in disclosing or withholding surveillance video footage. The issues, however, are not quite as complicated if the videotape is not an education record under FERPA. If the video was created and maintained by the school’s designated law enforcement unit, then it could be disclosed to all the requesting parties without worrying about consent from the parents of any of the students directly involved in the altercation.²⁶ If the school district wanted to keep the disk confidential, it would have to establish “particularized justification”²⁷ for withholding the disk pursuant to section 13(1)(b) of FOIA. Thus, the disk would have to qualify as an investigatory record, and then the district would have the burden of proof to show that its disclosure would interfere with law enforcement proceedings, deprive a person of the right to a fair trial, or constitute an unwarranted invasion of privacy for the students who are shown on the video.

If the disk does not qualify as a record of a law enforcement unit, then the district must determine if the disk

amounts to an education record for the students whose images are captured on the video. Clearly, under guidance formally issued by the FPCO, the disk would be a record for the quarterback, the injured student, and the football players involved in the altercation. However, under a strict interpretation of the Berkeley Letter, the parents of these students could only view the tape if all of the parents consented to the disclosure. In this case, redacting portions of the tape is not an option because the school’s video system was rendered intentionally un-editable, but it could be an expensive and time consuming option for a school district that uses an editable video system.

The district could seek additional clarification from the FPCO in regards to disclosing the disk without consent to the parents of the students directly involved in the altercation.²⁸ As mentioned above, the FPCO has provided “informal advice” to school officials that goes beyond the Berkeley Letter in relation to two issues: (1) a videotape that shows students in the background of an altercation or any other event is not an education record for those students, and (2) if multiple students are the focal point of an event captured on video, a school would not need to obtain consent of the parents of the students to *show* all the parents the video because the involved students are directly related to each other as a result of the event. However, under the unwritten guidance, the school may not give a *copy* of the video to any of the parents without consent from the involved students’ parents.²⁹ Thus, in the scenario, the parents of all the students involved in the altercation could view the disk in the absence of consent from the students’ parents, but the lack of consent would prohibit the district from copying and releasing the disk to any

of the parents. This result would prohibit the parents of the injured student from receiving a copy of the disk for evidence in pursuing a civil lawsuit against the quarterback.

In regards to the media’s request for a copy of the disk, the FPCO’s position appears to be that the parents of the quarterback, the injured student, and the other football players have to provide unanimous consent before a copy of the disk can be released.

The local police department in the scenario would likely have to issue a subpoena in order to receive a copy of the disk for commencing a criminal proceeding.³⁰ This would then require the district to make reasonable efforts to notify the students’ parents of the subpoena in advance of complying with it.³¹

This article probably raises more questions than answers. Hopefully, answers to these questions may be coming in the form of written guidance from the FPCO. NSBA and MASB will continue to monitor the FPCO’s formally issued policy guidance and will inform Michigan school officials when that guidance provides additional clarification on the status of school video footage under FERPA.

¹ “Directory information” is FERPA’s term for basic identification data about a student, which would not generally be considered harmful or an invasion of privacy if disclosed. This information may be released without first obtaining the student’s parental consent if a school district has properly given notice of its intention to release specified directory information. The theory that videotape evidence may constitute directory information will not be discussed in this article. This theory has yet to be recognized by any administrative body or court.

² “Eligible student” means a student who has reached 18 years of age or is attending an institution of post-secondary education. 34 CFR § 99.3.

³ 34 CFR § 99.3

⁴ *Id.*

⁵ *Id.*

⁶ The Family Policy Compliance Office (FPCO) in the U.S. Department of Education administers FERPA. The Office provides technical assistance on FERPA to education agencies and institutions, state and local officials, and parents. The Office also investigates alleged violations of the law.

⁷ 7 FERPA Answer Book 40, 104 LRP Publication 44490 (Feb. 10, 2004).

⁸ OR2006-07701 and OR2006-00484.

⁹ *Id.*

¹⁰ See 20 USC § 1232g(a)(1)(A) (“If any material or document in the education record of a student includes information on more than one student, the parents of one such student shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material.”).

Case Updates

By: Robert B. Ebersole, Michigan Association of School Boards

In the Fall, 2007, edition of the *Council News*, Marshall Grate summarized and analyzed two cases, *Lewis v Bridgman Public Schools*, 275 Mich App 435, (2007), and an unpublished decision, *Michigan Federation of Teachers and School Related Personnel, AFT, AFL-CIO v University of Michigan*, COA #25866, 3/22/07. Each case has now been the subject of a Michigan Supreme Court order.

In *Lewis*, the Teacher Tenure Commission ordered the reinstatement of a teacher who had presented, during class time, an air gun to a student, in violation of school district policy. The Commission ruled that an unpaid suspension was appropriate, rather than the dismissal that the Administrative Law Judge (ALJ) had suggested.

The Michigan Court of Appeals, rejecting the *de novo* standard of review, ruled that a clear error standard should have been applied to this case by the Commission. The majority opinion narrowed the discretion of the Commission and had the effect of emphasizing and granting more deference to the findings of the ALJ.

On Dec. 27, 2007, the Michigan Supreme Court, in lieu of granting leave to appeal, reversed the *Lewis* decision in a summary order. See Supreme Court Docket #134631. The Supreme Court ordered the case remanded to the Court of Appeals for "... consideration of whether the Commission's decision was arbitrary, capricious or

an abuse of discretion; or unsupported by competent, material and substantial evidence on the whole record." The *de novo* standard of review found in the Administrative Procedures Act, which was explained and argued for by the dissenting judge in the Court of Appeals, was apparently deemed the appropriate standard for the Commission to use when reviewing the ALJ recommendation. The Court of Appeals must now review the case again, and decide if the Commission correctly applied the *de novo* standard of review.

In the unpublished case, *Michigan Federation of Teachers*, the Court of Appeals panel found that the names, addresses and telephone numbers of public employees must be disclosed when requested pursuant to the Michigan Freedom of Information Act. On Oct. 5, 2007, the Michigan Supreme Court granted leave to appeal. See Supreme Court Docket #133819.

The interesting and lengthy order granting leave directed that the parties brief three questions, including whether the 1997 case, *Bradley v Saranac Board of Education*, 455 Mich 285, (1997), should be reconsidered; whether the statutory privacy exemption could be properly asserted on the facts of this case; and whether the establishment of the do-not-call list pursuant to federal law may have an impact on the evaluation of the privacy exemption.

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¹¹ *Rome City School District v. Grifasi*, NY slip op 25525 (N.Y. Sup. Ct. Oct. 28, 2005).

¹² *Lindeman v. Kelso School District No. 458*, No. 7725303 (Nov. 15, 2007).

¹³ For the purposes of using this case for guidance to interpret FERPA, the student file exemption should be construed as providing more protection to student records than FERPA, which sets a privacy "floor" in guarding the confidentiality of student records.

¹⁴ The other exceptions, not discussed here, are (1) records that are kept in the sole possession of the maker as a personal memory aid and are not shared with anyone but a substitute for the maker of the record, (2) records of students who are also employees of the school system, (3) certain medical or psychiatric records of students over 18 years old, (4) and information about the activities of alumni following graduation. 34 CFR § 99.3; 20 USC § 1232g(a)(4).

¹⁵ 20 USC § 1232g(a)(4)(A) and (B).

¹⁶ 34 CFR § 99.8(a)(1).

¹⁷ 34 CFR § 99.8(b).

¹⁸ 20 USC § 1232g(b)(1)(A).

¹⁹ The law enforcement records exception does not apply to records that are created for a purpose other than law enforcement, such as enforcement of school rules or use in a school disciplinary proceeding.

²⁰ 34 CFR § 99.8(a)(2).

²¹ 60 FR 3476.

²² 34 CFR § 99.7(a)(3)(iii).

²³ MCL 15.243(1)(b).

²⁴ *Id.* Other reasons for withholding investigatory records under this exception, but not discussed here, are (1) disclosing the identity of a confidential source, or if the record is compiled by a law enforcement agency in the course of a criminal investigation, disclosing confidential information furnished only by a confidential source, (2) disclosing law enforcement investigative techniques or procedures, (3) or endangering the life or physical safety of law enforcement personnel.

²⁵ *State News v. Michigan State University*, 274 Mich App 558, 735 NW2d 649 (2007).

²⁶ This would also be the case if a school risked adopting the analysis of the courts from New York and Washington and concluded that surveillance tapes fall outside the definition of an education record under FERPA regardless of whether the district has designated a law enforcement unit responsible for maintaining the security cameras and videos.

²⁷ *Id.*

²⁸ Family Policy Compliance Office, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, D.C. 20202-5929.

²⁹ See note 10.

³⁰ 34 CFR § 99.31(9)(i) (Education records may be disclosed without prior consent to comply with a judicial order or lawfully issued subpoena.).

³¹ 34 CFR § 99.31(9)(ii).



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