



COUNCIL NEWS

MICHIGAN COUNCIL OF SCHOOL ATTORNEYS



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President's Letter

As my term draws to an end, I find myself reflecting on the purposes of school law and how well the MCSA and its members serve those purposes. We are all familiar with, but sometimes too busy to think about, the two overarching objectives of American school law: first, to provide citizens with the knowledge and skills necessary to govern themselves in a democratic society; and second, to develop the human capital necessary to successfully compete in an increasingly global economy. Judged by these standards, this year has been a mixed bag.

Our school clients have struggled to comply with and meet No Child Left Behind's annual yearly progress (AYP) goals. The good news is that the NCLB has all eyes focused on improving student achievement. The bad news is the NCLB's goal of universal proficiency is unrealistic and, by most lights, our school clients do not have the resources necessary to increase student achievement as contemplated by that law. In Michigan, available resources are increasingly limited by Proposal A and diverted to meeting rapidly escalating health care and retirement costs.

We watch with interest the Pontiac school district's NCLB challenge, recently filed in the United States District Court for the Eastern District of Michigan. We trust the focus of that lawsuit will be to secure the resources necessary to improve student achievement and not to provide excuses for failing to meet NCLB's laudable purposes; at least to the extent those purposes can be achieved. We wish MCSA member Dennis Pollard the best of luck with this case. At the same time, we realize the true answer to our fiscal problems does not rest with the courts; it never has. The real responsibility rests in Lansing.

The Michigan legislature is responsible for funding public education. The legislature has a concomitant duty to ensure that legislative funding is sufficient to improve student

achievement to world class levels and to ensure the funding provided is not consumed by health care and retirement costs. These responsibilities cannot be fobbed off to local districts. Unfortunately, we see no aggressive legislative movement on either the revenue or expense side of the school funding equation.

This year, toward that end, the MCSA has formed an ad hoc advisory group to support MASB's legislative efforts. We hope to have meaningful consultation and input on MASB's school related legislative initiative, including those addressing the fiscal issues that continue to bedevil our public school clients. Your input and support are more than welcomed.

This year, MCSA has also continued its mission of educating Board members and administrators in developing legal issues. Our fall and spring legal issues conferences were both successful. In fact, most attendees described the spring conference as one of the best ever. Accordingly, many thanks to the MCSA members who contributed their pro bono efforts and expertise. Thanks also to Brad Banasik who, as always, brought the conference together. On a related note, you may have seen MCSA board member Laura Katers Reilly's article, "Are Early Retirement Payments to Tenured Teachers Subject to FICA?" from our fall newsletter, republished in the NSBA's April 2005 issue of Inquiry & Analysis. This reflects well on Laura and the MCSA, and reaffirms the quality of the services MCSA attorneys provide their school clients.

In conclusion, I am pleased to turn over the helm to incoming President Suzanne Bartos to continue the MCSA's good work. I am confident she will continue MCSA's educational mission, and advance our fledgling legislative efforts on behalf of our clients and, more importantly, the students and communities they serve. Sue, good luck and best wishes.

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President Signs the IDEA – 2004

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Reauthorization of the IDEA had been pending for years, with both the House and Senate introducing different bills. In the fall it looked as though we would not see the IDEA completed this school year, but a compromise bill was finally reached in conference during the “lame duck” session after the elections. The bill, HR 1350, passed the House and Senate on November 19, 2004, and was signed into law by President George W. Bush on December 3, 2004.¹

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

Funding

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

Some additional funding provisions include:

- States are granted the ability to reserve 10 percent of their state level funds to establish a risk pool for “high need” students.
- Local Education Agencies (LEAs) are still required to maintain their fiscal efforts from the prior years. However, IDEA-2004 allows LEAs to reduce their expenditure of federal funds by 50 percent of the increase received from the prior year so long as the 50 percent reduction is used for NCLB activities.
- LEAs may reserve 15 percent of their federal funds to provide “early intervening services” to K-12 students, with an emphasis on K-3 students. If an LEA does so, this amount is calculated as part of the 50 percent deduction discussed above.

Alignment with NCLB

The alignment with NCLB is evident. The IDEA adopts many definitions from NCLB, including the definition of “core academic subjects” and “highly qualified” in regard to special education teachers. Under IDEA-2004, “highly qualified” has the same meaning as the term is defined in NCLB, except that the term also requires special education teachers to have full state certification as a special education teacher, without waiving requirements on an emergency, temporary, or provisional basis. Further, IDEA-2004 provides that special education teachers may meet the NCLB “highly qualified” definition by meeting the requirements of subparagraph (C) or (D).²

Subparagraph (C) provides that special education teachers teaching exclusively to alternate achievement standards must meet the requirements of NCLB for an elementary, middle, or secondary school teacher who is new or not new to the profession, *or* meet the requirements of NCLB relating to competency established by test or High Objective Uniform State Standard of Evaluation (HOUSSE) standards for teachers new or not new to the profession, *or* “...in the case of instruction above the elementary level, [the teacher must have the] subject matter knowledge appropriate to the level of instruction being provided, as determined by the state, needed to effectively teach to those standards.”

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

Evaluations and Re-evaluations

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

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

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

Eligibility Determinations

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

IEPT Meetings and IEP Content

With IDEA-2004, LEAs will have some flexibility in Individualized Educational Program Team (IEPT) meeting attendance. While the list of IEPT participants is essentially unchanged, a provision was added that requires that a member of the Individualized Family Service Plan (IFSP) team be invited to the IEPT, at parent request, for a 2½ - 3 year old student transitioning from Part C to Part B. IDEA-2004 also provides that some participants need not attend or may be excused. Attendance at an IEP meeting is not necessary if the parent and the district agree that the attendance of a particular participant is not necessary because the area of curriculum and/or related service is not being modified or discussed. Any agreement must be in writing. Attendance may be excused if the parent consents in writing to excuse the person and the member being excused submits written input to the parent and the IEPT prior to the IEPT meeting regarding the area of curriculum or related service being considered in the meeting.

IEPs may now be modified or amended in two ways: by convening an IEP team meeting, or by the parent and LEA agreeing to not convene an IEP meeting and amending the IEP



by a separate written document. An LEA must provide a revised copy of the entire IEP on parent request.

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

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

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

Discipline

IDEA-2004 made some significant changes to the discipline procedures. A district may now unilaterally change placement for specific offenses to an Interim Alternative Educational Setting (IAES) for up to 45 school days (rather than calendar days), and the statute adds "serious bodily injury" to the list of offenses (weapons and drugs).

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

As for Manifestation Determination Reviews (MDR), IDEA-2004 still requires an MDR to be convened within ten school days of the decision to impose a change in placement. However, the review is now conducted by the parent, the LEA, and "relevant members" of the IEP team (as determined by

the parent and the LEA). The team then determines (a) whether the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability, and (b) whether the conduct in question was the direct result of the LEA's failure to implement the IEP. If the answers to these questions are "no," the behavior is not a manifestation of the student's disability, and the student may be disciplined just as any other non-disabled student. If, on the other hand, the team determines that the conduct is a manifestation, then the student cannot be disciplined, and the district is required to complete a Functional Behavioral Assessment (FBA), and implement a Behavior Intervention Plan (BIP).

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

Part C – Infants and Toddlers with Disabilities

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

IDEA-2004 also allows the statewide system to include a policy to permit the parent of an eligible student under Part B (Section-619 special education preschool programs) who has previously received services under Part C to elect to continue to receive services under Part C. To do so, a state must adopt a policy, and the parent must make an informed choice; then, the child may continue to receive services under Part C until he or she reaches kindergarten age. A district is relieved of the obligation to provide Part B FAPE to these children; rather, the Part C obligations continue. If the state adopts a policy, the statewide system must assure that parents are provided annual notice which sets forth the rights and responsibilities of parents in determining whether their child will continue under Part C or participate in Part B preschool programs, an explanation of the differences between

the services, including the types of services and the location the service is provided, the applicable procedural safeguards, and any costs or fees to parents. The services to be provided to students continuing under Part C must include an educational component to the program which promotes school readiness, and incorporates pre-literacy, language, and numeracy skills.

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

Procedural Safeguards

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

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

Dispute Resolution

IDEA-2004 establishes a two-year statute of limitations for the filing of a due process complaint (unless the state establishes a different time period) from the date when the parent (or agency) knew or should have known about the alleged action that forms the basis of the complaint.

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



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

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

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

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

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

Attorney Fees

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

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

to harass, cause unnecessary delay, or needlessly increase the cost of litigation).

Summary

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

¹ Individuals with Disabilities Education Improvement Act of 2004, Pub. L. 108-446, Title I, § 101, Dec. 3, 2004, 118 Stat. 2647, classified to 20 U.S.C. §1400 et seq.

² Subparagraphs “(C)” and “(D)” refer to § 602(10)(C), (D) of Title VI of the Individuals with Disabilities Education Act, Pub. L. 91-230, as revised by the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. 108-446, Title I, § 101, Dec. 3, 2004, 118 Stat. 2647, 2654, classified to 20 U.S.C. §1401(10)(C), (D).

Public Deed or Private Greed? Conflict of Interest Issues

Affecting Public School Board Members and Administrators

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To be effective leaders, school board members and administrators must live up to the expectations of their community. Preservation of public trust is essential. While most school officials seek to uphold the integrity of their respective school districts and communities, recent scrutiny of intermediate school district (ISD) officials and subsequent “ISD reform legislation” has heightened concerns among school officials about conflict of interest issues. Accordingly, this article will provide a summary of the conflict of interest provisions contained in the ISD reform legislation, as well as various other laws relating to conflicts of interest applicable to Michigan school districts.

Summary of ISD Reform Legislation Relating to Conflicts of Interest

Adoption of Conflict of Interest Policies

Not later than July 1, 2005, each ISD board is

required to adopt and implement: (1) a conflict of interest policy designed to avoid conflicts of interest by intermediate school district officials and employees; and (2) a conflict of interest policy to prohibit use of ISD funds or other public funds for purchasing alcoholic beverages, jewelry, gifts, fees for golf, or “any item the purchase or possession of which is illegal.”¹ To assist ISDs in the development of these policies, the Michigan Department of Education (MDE) is required to develop and distribute model policies that satisfy the requirements of the new law.²

Acceptance of Gifts

Pursuant to the reform legislation, ISD board members and administrators are restricted from accepting gifts from “a person who does business or seeks to do business of any kind” with the ISD.³ Specifically, board members and administrators may not accept “any money, goods, or services with a value in excess of \$44.00 if the board member or administrator does not provide goods or services of equal value in exchange.”⁴ The \$44.00 threshold will be adjusted annually based on upon the average consumer price index.

Contracts

If an ISD board member or administrator has a “substantial conflict of interest in a proposed contract,”⁵ the ISD board is prohibited from entering into that contract. “Substantial conflict of interest” means a conflict of interest on the part of an ISD board member or administrator that “is of such substance as to induce action on his or her part to promote the contract for his or her own personal benefit.”⁶ This provision does not, however, apply to contracts between ISDs and:

- a corporation in which the ISD board member or administrator is a stockholder or a beneficiary of a trust owning 1 percent or less of the total stock outstanding in any class if the stock is not listed on a stock exchange; or owns stock, or is a beneficiary of a trust that owns stock, that has a present market value of \$25,000 or less if the stock is listed on a stock exchange.
- a professional limited liability company organized under the laws of the state of Michigan, if the ISD board member or administrator is an employee but not a member of the company.
- corporations in which the ISD board member or administrator is not a partner, member, or employee.
- a firm, partnership, or other unincorporated association in which the ISD board member or administrator is not a partner, member, or employee.



- a corporation or firm that has an indebtedness owed to an ISD board member or administrator.
- the constituent school districts.⁷

The ISD reform legislation also seeks to avoid conflicts of interest by requiring any board member, administrator, or employee with authority to recommend, negotiate, or authorize the signing of a contract on behalf of an ISD to disclose whether he or she, or one of his or her family members, is either employed by, or under contract with, a business enterprise with which the ISD is considering entering into a contract.⁸

Conflict of Interest Laws Affecting All Michigan Public Schools

Competitive Bidding

One section of the ISD reform legislation applies both to ISDs and general powers school districts. Public Act 417 makes it a felony to “knowingly or intentionally” violate the competitive bidding requirements contained in Section 1267 of the Revised School Code. School officials should be made aware of Section 1267, which provides, in part, that “before commencing construction of a new school building, or addition to or repair or renovation of an existing school building, except repair in emergency situations,” the board of a school district or ISD or board of directors of a public school academy “shall obtain competitive bids on all the material and labor required for the complete construction of a proposed new building or addition to or repair or renovation of an existing school building.”⁹

Section 1267 additionally requires “a sworn and notarized statement disclosing any familial relationship that exists between the owner or any employee of the bidder and any member of the school board, board of directors, or superintendent.”¹⁰ Bids that do not include this sworn and notarized disclosure statement may not be accepted.¹¹

Contracts of Public Servants with Public Entities

The Michigan Contracts of Public Servants with Public Entities Act (Contracts of Public Servants Act) regulates the circumstances under which a public servant may enter into a contract with a private entity in which the public servant has a direct or indirect financial interest.¹² The Act prohibits a “public servant” from being a party, directly or indirectly, to a contract between himself or herself and the governmental entity of which he or she is an officer or employee.¹³

The Contracts of Public Servants Act contains an exception, however, for public servants paid for working an average of 25 hours per week

or less for a public entity.¹⁴ Board of education members generally fall within this exception and may avoid the Act’s otherwise absolute prohibition upon contracting with the public entity for which that individual serves as an officer or employee, if certain actions are taken.

For the exemption to apply, a public servant paid for working 25 hours a week or less must promptly disclose his or her financial interest in a contract, in writing, to the board’s presiding officer. Such disclosure must be made at least seven days before the public meeting at which the contract will be voted upon, or at a public meeting.¹⁵ If the initial disclosure takes place at a public meeting, however, a vote upon the contract by the board must be delayed by at least one week.¹⁶ Ultimately, the contract must be voted upon by the board, and must pass by at least a $\frac{2}{3}$ vote, with the involved board member abstaining.¹⁷

The official minutes of a public meeting at which a contract is voted on pursuant to the Contracts of Public Servants Act must reflect the terms of the contract, including party names, duration, financial consideration between the parties, facilities or services of the school district included in the contract, and the “degree of assignment” of public employees regarding fulfillment of the contract. All of a board member’s pecuniary interests in a contract must be disclosed.¹⁹

Incompatible Offices

Section 1 of the Michigan Incompatible Public Offices Act (IPOA), which prohibits the holding of incompatible offices, defines incompatible offices as “public offices held by a public official which, when the official has performed the duties of any of the public offices held by the official,” results in

- (1) the subordination of one public office to another;
- (2) the supervision of one public office by another; or
- (3) a breach of duty of public office.¹⁹

The IPOA seeks to prevent “any suggestion that a public official is acting out of self-interest or for hidden motives because of a conflict between the two offices of the public official.”²⁰ To determine whether a conflict exists, “the salient question is not whether the public official will be affected, but whether there exists the possibility that actions in one office will be influenced by the other position held by the public official.”²¹ Merely abstaining from official actions to avoid an incompatibility does not remedy a breach of duty under the statute. Rather, vacating one of the offices is the only solution to the problem.²²

Michigan case law and attorney general opinions provide extensive legal authority about incompat-

ible offices. When asked to provide a legal opinion about whether two specific offices are incompatible, a review of these authorities should be conducted. As the statutory authority of public officers may change from time to time, legal research must be updated frequently. For example, the Attorney General recently opined that the offices of township clerk and member of a board of education of a local school district, which were previously compatible, became incompatible on Jan. 1, 2005, which was the effective date of amendments to the Michigan Election Law.²³

Conclusion

Conflict of interest issues weigh heavily on the minds of all Michigan school officials in the wake of last year’s controversy surrounding ISDs. As ISDs grapple with new legislation, officials at local school districts question whether the ISD reforms will have any impact on them. Therefore, effectively counseling school officials about conflict of interest issues requires an understanding of the new legislation affecting ISDs, as well as competitive bidding, contracts of public servants, and incompatibility of offices.

¹ MCL §380.634 (1) and (2). See also MCL §380.1814 (1) and (2).

² *Id.* at subsection (3).

³ *Id.* at subsection (4).

⁴ *Id.* Note that this subsection does not affect MCL §380.1805, which prohibits a school official from acting as an agent “for an author, publisher, or seller of schoolbooks or school apparatus” or receiving “a gift or reward for his or her influence in recommending the purchase or use of a schoolbook, apparatus, or furniture in this state.”

⁵ MCL §380.634(5).

⁶ *Id.*

⁷ *Id.*

⁸ MCL §380.634(6).

⁹ MCL §380.1815. See also MCL §380.1267.

¹⁰ *Id.*

¹¹ *Id.*

¹² MCL §15.321, et seq.

¹³ MCL §15.322.

¹⁴ MCL §15.323.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ MCL §15.323(c).

¹⁹ MCL §15.181(b)(i)-(ii).

²⁰ *Oakland Co. Prosecutor v. Scott*, 237 Mich.App. 419, 423 (1999).

²¹ *Id.* at 423-24.

²² *Oakland Co. Prosecutor*, supra, *Wayne Co. Prosecutor v. Kinney*, 184 Mich.App. 681 (1990).

²³ OAG, 2004, No 7156 (June 1, 2004).



Subcontracting Non-Instructional Support Services

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In times of financial difficulty, school districts are rediscovering Public Act 112. Enacted in 1994, Public Act 112 amended the Public Employment Relations Act (PERA).¹ Among other changes, this Act removed a number of issues from collective bargaining involving public school districts. One of these issues is the subcontracting of non-instructional support services.

There are several obvious advantages to subcontracting non-instructional support services such as transportation, custodians and food service. The cost savings can be substantial. For example, a subcontractor does not have to pay next year's 16.34 percent payroll cost associated with the Michigan Public School Employees Retirement System. This savings, coupled with insurance savings, especially employees who enjoy MESSA health insurance benefits, has made these employee groups vulnerable to subcontracting. This article reviews the legal issues that can arise from a school district exercising this option under Public Act 112.

Section 15 of PERA, MCL §423.215, provides in relevant part:

(3) Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:

....

(f) The decision of whether or not to contract with a third party for one or more non-instructional support services; or the procedures for obtaining the contract; or the identity of the third party; or the impact of the contract on individual employees of the bargaining unit.

....

(4) The matters described in subsection (3) are prohibited subjects of bargaining between a public school employer and a bargaining representative of its employees, and, for the purposes of this act, are within the sole authority of the public school employer to decide.

In *Michigan State AFL-CIO v. MERC*, 453 Mich. 362; 551 N.W.2d 165 (1996), the Michigan Supreme Court upheld the constitutionality of Public Act 112 and Section 15's list of prohibited subjects of bargaining. The Michigan Supreme Court characterized the subjects within Section 15 (3) as illegal subjects of bargaining:

In these subjects, the legislature simply has removed the statutory requirement that public school employers listen to their employees and instructed that the employer is not to collectively bargain with regard to these subjects. In effect, the Legislature simply classified the disputed subjects as illegal subjects of bargaining.²

The Michigan Supreme Court explained the importance of classifying a subject for bargaining as illegal:

An illegal subject of bargaining is a provision, such as a closed shop, that is unlawful under the collective bargaining statute or other applicable statutes. The parties are not explicitly forbidden from discussing matters which are illegal subjects of bargaining, but a contract provision embodying an illegal subject is [unenforceable].³

Decisions interpreting Public Act 112 have consistently ruled that the subcontracting of non-instructional support services is an illegal subject.⁴ In *Parchment School District*, 13 MPER, P 31037 (2000), the Michigan Employment Relation Commission (MERC), adopted the Michigan Supreme Court's *AFL-CIO* analysis. While parties can discuss illegal subjects, MERC stated that a school district can never be found to have committed an unfair labor practice by refusing to bargain over them, and these matters can never become part of a collective bargaining agreement. In another case, *Coldwater Community Schools*, MERC again confirmed that while parties may discuss an illegal subject of bargaining, a contract provision that embodies an illegal subject of bargaining is unenforceable.⁵

Public Act 112, and in particular Section 15, has not always been warmly embraced by MERC. For example, in *St. Clair Intermediate School District*, 14 MPER, P 32055 (2001), the St. Clair County Intermediate School District transferred certain vocational education programs from its technical education center to two public school academies which the St. Clair ISD had authorized. The union filed unfair labor practice charges alleging that the transfer of bargaining unit work violated PERA. The ISD contended that the transfer of programs was tantamount to subcontracting and thus, it had no duty to bargain over this issue in Section 15. MERC remanded the case to the administrative law judge for the purpose of determining whether the ISD decision to transfer bargaining unit work to a public school academy constituted subcontracting under Section 15. With the *St. Clair* decision, MERC seemed to carve out an exception to the prohibited subjects of bargaining in Section 15 (3) as to the transfer of programs and services.

A more alarming decision restricting the scope of Section 15 of Public Act 112 is *Parchment School District*, 13 MPER, P 31037 (2000). In this case, a school district decided to subcontract its food services department in order to save money. The record established that the district's decision to subcontract was motivated in part because the food service employees filed numerous grievances. Based on this record, MERC ruled that a decision to subcontract non-instructional support services cannot be based on an improper reason under PERA, such as a desire to get rid of the union or because employees exercise their collective bargaining rights, such as filing grievances. In *Parchment*, MERC found that a school district violated PERA when its predominant reason for subcontracting its food service department was to eliminate the burden of dealing with the many grievances the food service employees had filed.

Another troubling unpublished decision is the *Wyoming Public Schools and Kent County Education Association/Wyoming Support Staff Association*, MERC Case No. CU01L-062 (October 15, 2002). This case involved a dispute over whether a public school district had the right to unilaterally remove restrictions against subcontracting support services from a collective bargaining agreement. After the parties ratified a tentative agreement, a dispute arose over whether the tentative agreement eliminated restrictions on subcontracting. Both the district and the union filed unfair labor practice charges. The employer filed a motion for summary disposition contending that the employer had a right as a matter of law to remove unenforceable language from a contract that placed restrictions on the district's ability to exercise its rights under Section 15(3) of PERA.

The Administrative Law Judge (ALJ) denied the motion for summary disposition, finding that there were facts in dispute. The ALJ did find that some of the language at issue was unenforceable, especially in connection with restrictions on subcontracting work performed by custodians and maintenance employees. However, the ALJ found that neither party violated PERA by agreeing to include the language in the subsequent contract. Despite the fact that contractual language restricting subcontracting was legally unenforceable, the ALJ ruled that an employer would have to bargain to impasse before it could remove such language. At the same time, the ALJ ruled that the union could not have lawfully conditioned its agreement to a subsequent contract on the inclusion of such language. These two conclusions are irreconcilable. The parties settled their dispute, but had the *Wyoming* case been appealed, it is uncertain whether it would have withstood judicial scrutiny.



Parchment did make clear that an economic motivation is a legitimate reason for exercising subcontracting rights under Public Act 112. Indeed, MERC has rejected legal challenges to subcontracting when the decision is based on economic motivations. In *Coldwater Community Schools*, 13 MPER, P 31062 (2000), MERC dismissed an unfair labor practice charge against the school district, which subcontracted its food service department to save money. MERC rejected the union's contention that the decision to subcontract was in retaliation against the union, especially where the evidence indicated the district had been considering privatization for some time before the union filed its charge. MERC reached a similar result in *Benton Harbor Area Schools*, 15 MPER, P 33073 (2002). It dismissed an unfair labor charge that was filed to challenge the board's decision to subcontract its food service operation. Among other allegations asserted in *Benton Harbor*, the union accused the school board of being motivated by animus toward the union and by a desire to retaliate against union members. The board contended that it was motivated to save money in its decision to subcontract. The Administrative Law Judge denied the unfair labor practice charge, finding that the charging party failed to meet its burden of showing that the subcontracting decision was motivated, at least in part, by union animus.

Most recently, MERC upheld a decision to subcontract in *Detroit Public Schools*, 17 MPER, 14 (2004). The Detroit Public Schools laid off an entire nine-member bargaining unit of machinists as part of an ongoing reduction in force because of the district's financial problems. The district planned to subcontract the work that had previously been performed by this unit. Among the allegations, the union accused Detroit Public Schools of failing to provide it information concerning the layoff and the decision to subcontract the work with a third party. MERC dismissed this unfair labor practice charge. MERC held that the school district had no duty to bargain about its decision to lay off employees. In addition, the district had no duty to provide the union with information concerning the third-party subcontractor since Public Act 112 prohibits bargaining on the decision of whether to contract with a third party for one or more non-instructional services.

There is at least one very important lesson that can be derived from these cases. A school district must avoid any reference to a motivation based on union animus or a desire to reduce administrative costs associated with handling grievances or collective bargaining administration. It is vitally important for the board of education and the school district's administration to base all of their decisions relating to sub-

contracting on an economic motivation. Given the financial circumstances confronting many districts, this should be a fairly easy task.

¹ MCL §423.201.

² *Id.* at 380.

³ *Id.* at 380 n9 (citing *Detroit Police Officers Association v. Detroit*, 391 Mich. 44, 54-55 n6; 214 N.W.2d 803 (1974)).

⁴ See, e.g., *Mt. Clemens Public Schools*, 13 MPER, P 31000 A (1999).

⁵ *Coldwater Community Schools*, 13 MPER, P 31062 (2000) (citing *Michigan State AFL-CIO v. MERC*, 453 Mich. at 380 n9).

Sixth Circuit Revisits Student Dress Code Violations as "Speech"

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The First Amendment can protect a student's right to wear a black armband or a Confederate-flag t-shirt. But what about a student's right to sweatpants, flip-flops, and low-cut tank tops?

The Sixth Circuit recently took up this question in *Blau v. Fort Thomas Public School District*, 2005 WL 291514 (6th Cir. (Ky.) Feb. 8, 2005). The Court considered whether the First Amendment covers a free-speech claim by a student who does not proclaim "any particular message" through her clothing, but merely opposes a school dress code because it prohibits her from wearing clothes that she likes.

The fact pattern of *Blau* was a departure from prior cases taken up by the Court, which concerned student clothing that depicted a particular endorsement or message. In *Boroff v. Van Wert Board of Education*, 220 F.3d 465 (6th Cir. 2000), a student violated his high school dress code against clothing with "offensive illustrations, drug, alcohol, or tobacco slogans" when he wore t-shirts promoting the band Marilyn Manson, one of which depicted a three-headed Jesus. In *Castorina v. Madison County School Board*, 246 F.3d 536 (6th Cir. 2001), students wore Hank Williams, Jr. t-shirts that displayed the Confederate flag and the phrase "Southern Thunder" in violation of their high school dress code prohibiting clothing with "illegal, immoral, or racist implication."

Blau arose out of sixth-grader Amanda Blau's general opposition to the dress code at her public middle school. In 2001, Highlands Middle School in Fort Thomas, Kentucky adopted a school dress code that contained a long list of prohibited clothing. In addition to typical restrictions such as "clothing that promotes drugs, alcohol, tobacco, sex, or is offensive or degrading," the dress code also prohibited a variety of items commonly found in pre-teen and teen wardrobes, including jeans; "clothing that is too long, flip-flop sandals, or high platform shoes;"

shirts that are sleeveless, "form-fitting", or not in a "solid color;" and "bottoms made with stretch knits, flannel, or fleece such as sweatpants, jogging pants, or any type of athletic clothing." The dress code was adopted by the school's Site Based Decision Making Council on the recommendation of a Council committee that consisted of Council members, teachers, parents, and students (including Amanda Blau). The stated objective of the dress code was to "create unity, strengthen school spirit and pride, and focus[] attention upon learning and away from distractions."

In response, Amanda Blau and her father, Robert Blau, filed a lawsuit against the school under 42 U.S.C. §1983, principally alleging that the dress code violated Amanda's First Amendment right to freedom of expression. The Blaus did not argue that the dress code infringed on their religious beliefs or hindered the expression of any particular message conveyed by Amanda's clothing. Rather, Amanda argued that she had a right to wear clothes that "look nice on her" and that she "feels good in," and through which she could express her individuality. Her father Robert similarly argued that the dress code inhibited Amanda's "ability to wear clothing that she likes." The Blaus also alleged that the dress code was invalid on its face for being overbroad in violation of the First Amendment.

The central question for the Sixth Circuit was not whether Blau's claim could succeed; it could not, the Court determined. If under *Boroff* a school district could enforce a dress code banning the "offensive illustrations" of a Marilyn Manson t-shirt, the Court reasoned, then clearly a school district could regulate the clothing of a student who had no "message" but simply wanted to "look nice." Rather, the Court tackled the question of whether the First Amendment covers an expressive-conduct claim at all when the claimant conveys no message with her conduct.

The Court rejected Amanda Blau's individual claim, holding that in order to sustain an expressive-conduct claim under the First Amendment, a claimant must show that the conduct "conveys a particularized message and the likelihood is great that the message will be understood by those who view it." The Court held that Amanda Blau's mere desire to wear clothes that "look nice on her" and that she "feels good in" bore no resemblance to other expressive-conduct cases such as *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (students wearing armbands to protest Vietnam War), *United States v. O'Brien*, 391 U.S. 367 (1968) (burning draft card to protest Vietnam War), *Spence v. Washington*, 418 U.S. 405 (1974) (student hanging flag with peace sign upside down to protest Cambodian incursion and Kent State), and *Texas v. Johnson*, 491 U.S. 397 (1989) (burning American flag to protest renomination of Ronald Reagan). To meet the threshold requirements of an expressive-conduct claim, a

claimant must show that the conduct (in this case, the clothing) “can be fairly described as imbued with elements of communication,” which “conveys a particularized message” that will be “understood by those who view it.”² The Court determined Blau did not make this showing with her generalized desire to wear clothes of her choice, and therefore she could not claim First Amendment protection.

In addition to Blau’s expressive-conduct claim, Blau also challenged the validity of the dress code on its face as applied to all students at Highlands Middle School. The Sixth Circuit rejected this claim as well. Regulation of protected conduct will be upheld if “(1) it is unrelated to the suppression of expression, (2) it furthers an important or substantial government interest, and (3) it does not burden substantially more speech than necessary to further the interest.”³ The Sixth Circuit found that the dress code was viewpoint- and content-neutral, and there was no evidence it was being used to suppress student expression. The Court rejected the notion that everything related to dress is expressive speech. The Court also found that the dress code served a number of important governmental interests, including focusing attention on school and increasing students’ self-respect, evidenced by affidavits from teachers at the middle school. As to the last prong of the analysis, the Court determined that students had other ways of expressing themselves at school other than through clothing, and thus the dress code did not suppress speech more than necessary. Finally, the Court emphasized the Supreme Court’s long tradition of giving middle and high schools more latitude in evaluating constitutional claims against school policies. As with Amanda Blau’s individual claim, the Sixth Circuit held there was no basis under the First Amendment to invalidate the dress code on its face.

The holding of *Blau* is not surprising in light of the Sixth Circuit’s recent holdings in First Amendment cases challenging school dress codes. In both *Boroff* and *Castorina*, the decision of the Court turned on whether the student’s clothing was “perceived to express any particular political or religious viewpoint.”⁴ The *Boroff* Court found the student’s Marilyn Manson t-shirts did not express any “viewpoint” but merely promoted the band’s values, and consequently the school was permitted to ban the shirts for being inconsistent with the school’s educational mission. In *Castorina* the Court sided with the students, whose t-shirts sporting the Confederate flag were found by the Court to be an expression of Southern pride; the Court concluded under a *Tinker* analysis that the school impermissibly suppressed this viewpoint. The Sixth Circuit’s holding in *Blau* similarly focused on whether Amanda Blau claimed to express a message or viewpoint. In this case, however, Blau’s entire case was premised on *not* having a message or viewpoint, and for this reason the Court declined to place it in the same realm as flag-burning and black armbands: “To rule otherwise not only would erase the requirement that expressive conduct have an identifiable message but also would risk depreciating the First Amendment in cases in which a ‘particularized message’ does exist.”⁵

The Sixth Circuit’s decision in *Blau* also aligns with holdings of other federal courts where, as in *Blau*, students raised a generalized challenge to school dress codes. The Fifth Circuit in *Cannady v. Bossier Parish School Board*, 240 F.3d 437 (2001) upheld a school board’s mandatory school uniform policy under an *O’Brien-style* analysis, holding the policy furthered an important governmental interest by increasing test scores and reducing discipline problems; did not suppress student expression because children could express

themselves other ways at school; and did not restrict speech any more than necessary.⁶ The federal district court of New Mexico, under the individualized expressive-conduct analysis used in *Blau*, rejected a student’s claim that his sagging pants, allegedly expressing his ties to African-American culture, were a “message” that would be understood by observers.⁷ The court upheld the school district’s dress code, which banned sagging pants for their association with gang activity.⁸

Blau’s lesson is that school districts are on more stable ground with a dress code that is focused on student clothing generally rather than clothing with a particular viewpoint or message. A shirt banned for showing cleavage under a neutrally written and enforced dress code does not spark the tricky analysis of whether a viewpoint is being suppressed, or whether the shirt “substantially and materially interferes” with appropriate discipline in the operation of the school. Students can leave their flip-flops and stretch pants at home: In the Sixth Circuit, there is no First Amendment expressive-conduct claim for the student who objects to a school dress code out of a simple desire to “look nice.”

¹ *Blau* at *4 (citing *Spence v. Washington*, 418 U.S. 405, 411 (1974), and *Texas v. Johnson*, 491 U.S. 397, 404 (1989)).

² *Blau* at *6 (citing *Spence* at 411 and *Johnson* at 406).

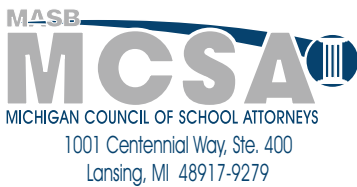
³ *Blau* at *7 (citing *O’Brien*, 391 U.S. at 377, and *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997)).

⁴ *Boroff* at 470; see also Brad Banasik, *Shedding T-Shirts at the Schoolhouse Gate: Why can Students Wear Castorina’s T-Shirt, but not Boroff’s?*, *Council News* (Michigan Council of School Attorneys) Fall 2001.

⁵ *Blau* at *6.

⁶ It should be noted, however, that the *Casady* Court did not decide the issue of whether the First Amendment applied to the students’ choice of clothing; application of the First Amendment was assumed for purposes of the analysis in the opinion. In fact, the Court noted it did not agree with the lower court’s blanket assertion that a student’s choice of clothing was never “communicative” enough to be protected speech. *Casady* at 441. In this respect *Casady* differs from *Blau*, in which the Sixth Circuit rejected the idea that everything related to dress is expressive speech. *Blau* at *7.

⁷ *Bivens v. Albuquerque Public Schools*, 899 F.Supp. 556 (1995).



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