

THE Extra Mile

GOING THE EXTRA MILE SO YOU DON'T HAVE TO

EDUCATION EDITION

September 2010

HLEK Attorneys Named as "Leading Lawyers"--We are pleased to announce that four of our founding partners have been recognized for excellence by their peers. Once again, **Terry Hodges, Mike Loizzi, Stan Eisenhammer and Bennett Rodick** have been named

Illinois *Leading Lawyers* by their peers in *Leading Lawyers Magazine* while our partner **Nancy Krent** has been recognized by her peers as an Illinois *"Super Lawyer."* **HLEK is celebrating its 20 year anniversary of excellence in legal service for the school districts of Illinois.**

Amendatory Veto of FOIA Performance Evaluation Bill--The Governor has issued an amendatory veto of [HB 5154](#), which would amend the *Personnel Records Review Act* to prohibit the FOIA disclosure of performance evaluations of all public employees. In his veto message, the Governor expresses concern that approval of this bill

would effectively depart from progress toward openness in government attained in the recent overhaul of the FOIA statute. The Governor's amendatory veto recommends that the prohibition on FOIA disclosure instead be limited to performance evaluations of law enforcement officers. The legislature will consider

Continued on Page 2

Medical Opinions Not Determinative of Special Education Eligibility, Seventh Circuit Determines--In *Marshall Joint School Dist. No. 2 v. C.D.*, 2010 WL 2990839 (7th Cir. 2010), the Seventh Circuit Court of Appeals held that an administrative law judge applied the wrong standard in determining whether a child with Ehlers-Danlos Syndrome was eligible for special education services under the *Individuals with Disabilities Education Act*. In making her decision, the ALJ relied on the testimony of the child's physician that the illness could adversely affect the child's educational performance.

The case involved C.D., a student who was diagnosed with Ehlers-Danlos Syndrome, a genetic disease that caused the student to have poor upper body strength along with chronic and intermittent pain.

Upon the conclusion of C.D.'s second-grade year, the District's IEP team determined after a re-evaluation that C.D. was performing at grade level in his classes, had met many of the goals included in his IEP for gym, and that C.D.'s EDS no longer adversely affected his educational performance.

Continued on Page 2

Consumer Price Index

Percent change for the month of **July 2010**, for the urban wage earners & clerical indices as reported by the Bureau of Labor Statistics.

	All Urban (CPI-U)	Workers (CPI-W)
Chicago-Mthly	0.2	0.2
12 Mth	0.8	1.4
St. Louis-6 Mth	1.1	1.2
12 Mth	2.3	2.8
U.S. Mthly	0.0	0.0
12 Mth	1.2	1.6

August CPI figures will be released September 18, 2010. For the most recent CPI, visit our website at: www.hlerk.com

The Extra Mile is intended solely to provide information to the school community. It is neither legal advice nor a substitute for legal counsel. The Extra Mile is intended as advertising but not as a solicitation of an attorney/client relationship.

Reminders & Notes

- Join us at our reception at the Illinois Alliance of Administrators of Special Education fall conference on September 23rd in Tinley Park where **Bennett Rodick** is a featured speaker. Visit www.iaase.org for information and registration.
- Prepare your district's administrator salary compensation report and submit to your board at its regular September meeting. Post on your district's website by October 1st.
- Require student health exam and immunization by October 15th, unless you have set an earlier date and provided parent notice of the earlier date, or the student is an out-of-state transfer student (See [August 2010 Extra Mile](#)).

Offices:

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HB 5154 Cont. this issue in the fall veto session. Earlier this year, the Governor signed SB 315 (P.A. 96-0861), which contained Illinois Race to the Top compliance provisions as well as an amendment to the

School Code prohibiting the disclosure of performance evaluations of public school teachers, principals and superintendents. **Contact Rob Swain or Heather Brickman with your FOIA inquiries.**

IDEA Cont. The IEP team further found that C.D. was no longer in need of special education services, because his needs could be met in a regular education setting. The team instead decided to implement a health plan drafted by his physicians and the school nurse, which included restrictions and modifications for participation in gym class.

C.D.'s parents thereafter sought and obtained administrative review of the team's decision. The parents contended that he was entitled to special education because he could not perform all of the activities in gym class.

The ALJ found for the parents, relying on the opinion of one of C.D.'s physicians that the EDS causes him to experience pain and fatigue, which "can affect his educational performance." Based on the physician's testimony, the ALJ found that C.D.'s ability to safely and fully perform and participate in certain activities at school, including regular P.E. class and recess, was adversely affected by his EDS. The federal district court affirmed.

The Seventh Circuit reversed, finding that the ALJ applied the wrong standard in determining whether C.D. was eligible for special education services. For a child to qualify as a student with a disability under the IDEA, he must have an ailment listed in the statute. Although EDS was not specifically listed under the statute, it would qualify as an "other health impairment" where it manifests itself in a variety of ways and adversely affects the child's educational performance. 34 C.F.R. 300.8(c)(9)(ii).

The court then noted that the ALJ applied the incorrect standard. It noted that the standard "[was] not whether something, when considered in the abstract, *can* ad-

versely affect a student's educational performance, but whether in reality it *does*." The court also noted there was no substantial evidence that supported the ALJ's finding that C.D.'s EDS adversely affected his educational performance.

Even if the ALJ did not err in finding that the EDS adversely affected C.D.'s educational performance, the IEP team needs to make a second determination as to whether the student requires special education. The team determined that such services were not needed and that all of C.D.'s safety needs could be addressed through his health plan implemented through his regular gym class.

The ALJ rejected the team's finding and dismissed the opinion of C.D.'s adaptive P.E. teacher as "unreliable." Instead, she credited the opinion of C.D.'s physician that C.D. needed special education because of safety concerns in gym class.

The court found the ALJ's reliance on the physician's opinion on this point was improper, noting that "physicians cannot simply prescribe special education for a student." Rather, this determination rests within the team's discretion, because the IDEA dictates full review by an IEP team composed of parent, regular education teachers, special education teachers, and the representative of the local agency.

Finally, the court noted that C.D. would benefit from continued physical and occupational therapy. However, physical and occupational therapy are both related services and do not stand alone as services the school must provide apart from special education.

Contact Jay Kraning or Bennett Rodick with your special education eligibility inquiries.