

Inquiry & ANALYSIS

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CHARTER SCHOOLS AND STUDENTS WITH DISABILITIES

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Charter schools are public schools that operate under a specific "charter" or contract. They operate under a premise of flexibility and autonomy. That said, most states require charter schools to meet more rigorous school content standards "in exchange" for a waiver from particular state requirements. Despite the increased independence, charter schools do not escape oversight. State laws define the relationship between the charter school and the local education agency (LEA) or local school district and the extent to which the charter school is free from particular state statutes, regulations, and policies imposed on traditional public schools.²

Charter schools are also subject to federal law. Unlike some state laws, charter schools are not released from federal laws, including accountability mandates and civil rights laws like Section 504 of the Rehabilitation Act³ and the Individuals with Disabilities Education Act.⁴

These federally imposed obligations, especially a charter school's duty to students with disabilities, cause many challenges for charter schools. This article discusses the three-layered legal structure imposed on charter schools, how that structure affects a charter school's responsibility to students with disabilities, and ways in which charter schools can improve their delivery of services to students with disabilities.

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This article also discusses the recent initiative of charter schools designed specifically to serve students with disabilities and the unique issues such schools encounter.

Background

The charter school movement began in 1991 when Minnesota passed the first state law allowing charter schools as part of the public education system. In the following two decades, approximately 40 states and Washington D.C. have passed laws permitting charter schools. In most cases, charter schools are initiated as a vehicle to provide an alternative to typical public schools.

Often the impetus behind the introduction of a charter school is to create educational options for one of two reasons (or both): (1) to respond to dissatisfaction with the delivery of educational services by the local school district; and/or (2) to offer a school with a particular focus. For example, some charter schools in Virginia and Illinois maintain a curriculum with an emphasis on environmental awareness and social responsibility. Another charter school in Virginia was established to create experiential learning opportunities for students who are at risk to leave school or graduate below their potential.⁵

Reports on the need for charter schools, their success, and their impact on the local school districts vary greatly. Proponents of charter schools tout their ability to provide superior educational services or meet a community's specific needs. Opponents of charter schools complain that they use up precious resources and are counter productive to the essence of a public system.

Regardless of one's perspective, it is clear from the research that the number of charter schools is on the rise and their education of students with special needs requires attention and improvement. The difficulties a charter school faces often are attributed to its small size, a too narrowly-focused mission, and misunderstandings with respect to the school's obligation to students with disabilities. The first two factors are usually inevitable and are likely considered fundamental to a charter school. On the other hand, the third is not. If charter school educators and those who support the educators gain a concrete understanding of the specific responsibilities that fall directly to the charter school in the education of students with disabilities, and plan accordingly, service delivery can be improved.

Federal Law

The Individuals with Disabilities Education Act (IDEA) provides that public schools must identify students with disabilities, identify their needs, and provide such students with a free and appropriate public education (FAPE). That right is "guaranteed" by procedural safeguards and complaint procedures.⁶ The IDEA's implementing regulations specifically include charter schools and clearly provide that children with disabilities who attend public charter schools and their parents retain all rights as outlined above.⁷ Additionally, Section 504 of the Rehabilitation Act of 1974 (Section 504) protects students with disabilities from discrimination by public educational institutions. Section 504's protection applies to all programs that receive federal funding.⁸ Accordingly, students with disabilities in public charter schools are protected equally to students with disabilities in traditional public schools.

While federal law makes it unequivocal that students with disabilities are afforded the same rights in a charter school as they would be in a traditional public school exactly which party is responsible is less clear. The scope of a charter school's responsibility to students with disabilities is dictated by the often unclear and complicated legal status of the charter school. Federal law supplies a broad outline. It provides that if the charter school is an LEA then the charter school retains the responsibility; if the charter school is *part* of an LEA then the LEA retains responsibility. State laws furnish significantly more meaning to this distinction.

State Laws

Most states maintain a three-tiered public educational system. The first tier is the state educational agency (SEA), then the LEAs, and finally the individual schools that fall under the LEAs.⁹ States are ultimately responsible for the education of their students. In most cases, that responsibility is delegated down and in practice, LEAs are typically responsible for the education of all students that reside within their specific boundaries. Likewise, LEAs retain the accountability for providing a FAPE to their students with disabilities.

State law dictates a charter school's status and that status determines the duty owed to students with special needs by a charter school. A charter school's status is best explained by its relationship to the LEA. Some states classify charter schools

as within a particular LEA and others as their own LEA. Still other states leave the status up to the particular charter school as dictated by the charter.

That association or lack thereof to the LEA is fundamental to determining the charter school's programmatic and financial responsibility to students with special needs. If the charter school retains no connection to the LEA then it acts as its own school district and retains all liability and responsibility for educating students with special needs. On the opposite end of the spectrum, if the charter school falls directly under the LEA then it acts like a school within the LEA. That clear line is muddy for the many charter schools that fall somewhere in the middle. In those situations, state law and the authorization process dictate the extent of autonomy enjoyed by the charter school. The two institutions' operational and financial responsibilities are usually outlined in the charter.

Illinois provides a prime example of the varied legal statuses of charter schools and the impact of the status. In Illinois, an LEA can be the authorizing body for a charter school. In those cases, a potential charter school submits its proposed contract to the LEA and the LEA authorizes the governing body of the charter school to operate the charter school on the terms specified in the contract. However, the proposed charter also must be submitted to the state board of education for certification. If the state board recommends modifications, those modifications, must be made prior to certification.¹⁰

A charter in Illinois can also be granted via a referendum.¹¹ In those situations, multiple requirements must be met. First, the group of citizens hoping to establish a charter school submits a proposed charter to the state board for certification. The charter is between the proposed charter school and the state board of education. Additionally, the group of citizens must acquire a petition containing signatures from at least five percent of the voters of the school district(s) where the proposed charter would be located in support of the proposed charter. Assuming the signatures are collected and the state board approves the charter, then the LEA must submit the question of whether the proposed new charter school will be established to the general voting population at the next regularly scheduled election. If a majority of the votes are in favor of the proposed

charter school then the state board will approve the charter.

Consequently, some Illinois charter schools fall mostly under the LEA and are governed by the terms of the charter while the state retains some oversight. Others only are connected to the state board as their chartering entity and act more like an independent school district.



Charters

A particular charter school's charter is the third governing structure imposed on charter schools. The charter's founders usually draft the document and establish in it how the school will function. It is often the document reviewed by the authorizing body to determine whether the charter should be granted.

While most charters are very detailed and cover a wide range of topics from the school's mission to the hours in a school day, the specific content varies greatly due to the vast differences among charter schools. For example, some charter schools teach from a particular viewpoint while others focus on a particular group such as at-risk students. Still other charter schools are founded on the basis of delivery of services, for example, independent study versus virtual study. It is impossible to speak generally about the affects of charters on charter schools because each charter is specific to the particular charter school. Therefore, charter schools must understand their own charter and how it provides for the provision of special education services.

Practical Tips / Avoiding Common Pitfalls

Given the complex structure under which charter schools operate, many are unclear about their duties to students with special needs. Additionally, by virtue of

their potential separation from the LEA and the individual schools within a school district, charter schools may lose access to the larger pool of special education resources including trained personnel. As a result, students with special needs may fall through the cracks. Through good planning and creative thinking, charter schools can uphold their duty to students with disabilities.

To do so, first, charter schools need to understand what they are responsible for with respect to students with disabilities. While the charter grant process is lengthy and detailed, how a charter school will deliver special education services is often a small part of the charter approval process or absent totally. Accordingly, a charter school must take the initiative to determine its connection to the LEA and what responsibilities fall within its purview.

Given that charters are voluminous, it is easy to allow them to collect dust on a shelf. However, it is important that those that carry out the day to day operations of the charter school remain familiar with the obligations of the charter school as defined by the charter. This is especially true for charter schools that are not completely separate from or are included in the LEA as the charter may further define the charter school's responsibility to students with disabilities.

Second, ensuring a non-discriminatory admissions process is essential. Charter schools have been criticized for encouraging applicants with special needs to not apply or placing those that do apply on waiting lists.¹² Such actions are in violation of federal civil rights laws, as students with disabilities cannot be denied admissions to a charter school because of their disability.¹³

Third, charter schools need to employ or be connected to a special education expert. That person can assist the charter school with understanding its responsibilities and how best to navigate the complicated mandates. Professional development can assist in training current staff on how best to serve students with special needs.

Fourth, charter schools also must obtain newly enrolled students' individual education plans (IEPs). Parents not providing them because of their dissatisfaction with previous special education services often complicate access to IEPs. Once a child is enrolled, IEPs must be reviewed at least annually. Charter schools cannot

limit their delivery of services to students who have been identified as eligible for special education and related services at the time of enrollment. If a “regular” education student demonstrates signs of a disability, which has an impact on his or her ability to learn, the charter school must evaluate that child and plan accordingly, if the child is eligible. When planning for a student with special needs, it is important to remember that special education is not a particular placement, teacher, or curriculum. Rather, it is instruction designed to meet a student’s needs and encourage progress.

Finally, with respect to the provision of related services and transportation, charter schools need to review their resource needs and plan accordingly. A school either can employ its own staff or pair with other agencies to provide the services. Some charter schools have begun cooperatives to pool their resources. Building access also provides often-unexpected hurdles for charter schools. Charter schools need to be cognizant of building design when choosing a location in order that the school is accessible to disabled students.

Charter Schools Founded to Serve Students With Disabilities

Any discussion on charter schools and special education would be lacking if it did not address the small subset of charter schools designed specifically to serve students with special needs.¹⁴ They start from the premise of segregation. For the most part the schools are founded by teachers who want to teach using a particular methodology,¹⁵ parents hoping to expand their choices, or organizations already serving special needs populations. For example, the New York Center for Autism Charter School utilizes the applied behavior analysis (ABA) method of teaching. Around 70 such schools exist today.¹⁶ Most of these charter schools are in Florida and Ohio. More than half serve students with autism.

States vary on their allowance of such schools. Some states outright prohibit or explicitly limit them.¹⁷ Only one state, Ohio, explicitly allows charter schools to be created to separately serve students with special needs.¹⁸ Many states remain neutral or specifically provide that a charter school must admit all students who want to attend.

What is most problematic about these schools is that they are counter to the es-

sence of educational planning for students with disabilities. The cornerstone of educational planning for students with disabilities is the IEP. The IDEA demands that a multidisciplinary team draft a roadmap for the provision of services for students with disabilities. That roadmap is based on the child’s specific needs and strengths. The amount of support required in order to carry out the goals and objectives of the IEP determines the student’s placement. For students in these schools, however, their placement is determined first and their IEP, if any exists, is drafted to comply with the placement.

Such charter schools also appear to directly conflict with the generally accepted and legally mandated mission to educate students in the least restrictive environment (LRE) and, to the extent possible, provide students with disabilities access to their non-disabled peers. Rather than encouraging access to the general education curriculum, these schools siphon out students based on their status as a student with a disability.

Furthermore, the provision of related services and participation in extracurricular activities is complicated. By attending these schools, students may lose access to related services. For example, in *J.N. v. New York City Department of Education, Region 9*,¹⁹ a student’s IEP team met and determined that the child required a specialized class on a twelve-month basis with related services including occupational and physical therapy and speech and language services. Rather than attend his local school, the child was enrolled in a charter school for students with autism. The charter school used the ABA method and provided no related services. The parents attempted to hold the local school district responsible for providing the related services. The court found that the charter school curriculum alone is likely to produce progress and therefore the child was not entitled to the related services. With respect to extracurricular activities, the schools themselves usually do not have sports teams or clubs and access is often limited to joint agreements for participation in community clubs.

Conclusion

Charter schools are a fast growing segment of the public school system. Their impact on children, including children with disabilities, increases as their numbers grow.

Children with special needs are guaranteed a FAPE and a charter school does not escape that responsibility. The multifaceted structure under which charter schools operate often leads to confusion regarding the specific duties to students with special needs. The set of responsibilities differs greatly by state and even within a state. The new influx of charter schools dedicated to specifically serving students with special needs implicates its own challenges regarding LRE and access to non-disabled peers. Regardless of a charter school’s focus, it is essential that charter schools understand their responsibilities and plan accordingly to ensure students with special needs receive a FAPE. **I&A**

End Notes

1. Thanks to Vanessa V. Clohessy of Hodges Loizzi for editing this article.
2. Many states exempt charter schools from length of school day or year requirements, curriculum expectations, staff hiring and firing policies, and staff certification requirements.
3. 29 U.S.C. § 794.
4. 20 U.S.C. § 1400 *et seq.*
5. A mandate to serve at-risk youth is a common requirement. Yet, despite the focus on at-risk youth, many critics fault charter schools for not serving enough at-risk and minority youth.
6. 20 U.S.C. § 1400 *et seq.*
7. 34 C.F.R. § 300.209.
8. 29 U.S.C. § 794.
9. There are some exceptions to this general rule. States sometimes take over financial oversight of schools with pervasive financial problems and/or failures to meet state standards.
10. 105 ILL. COMP. STAT. 5/27A-6.
11. 105 ILL. COMP. STAT. 5/27A-6.5.
12. The State University of New York Charter Schools Institute, an organization granted the power to authorize and monitor charter schools in New York, recommended Albany Preparatory Charter School be put on probation for wait listing students with learning disabilities in an effort to increase test scores. See CHARTER SCHOOLS INSTITUTE, STATE UNIVERSITY OF NEW YORK, SUMMARY OF FINDINGS AND RECOMMENDATIONS: ALLEGED DISCRIMINATION IN ADMISSIONS AND OTHER ALLEGATIONS AT THE ALBANY CHARTER SCHOOL (Feb. 2010).
13. 34 C.F.R. § 300.209.
14. Two percent of the total charter schools are designed as special education charter schools. See JULIE MEAD, CHARTER SCHOOLS DESIGNED FOR CHILDREN WITH DISABILITIES: AN INITIAL EXAMINATION OF ISSUES AND QUESTIONS RAISED (Jan. 2008).
15. For example, a school that uses only ABA to teach children with autism.
16. See Mead, *supra* note 14.
17. See, e.g., MO. REV. STAT. § 160.410(3).
18. OHIO REV. CODE ANN. § 3314.06.
19. 700 F. Supp. 2d 356 (S.D.N.Y. 2010).

THE ATTORNEY AS A WITNESS: ETHICAL CONSIDERATIONS FOR IN-HOUSE COUNSEL

By: *Donna Sessions Waters, Escambia County School Board, Pensacola, Florida*

Separation of church and state. Cyberbullying. Standardized tests. Health insurance. Sexual harassment. In addition to the hot button topics that fill the media, school districts must still deal with the day-to-day operation of entities that are essentially multi-million dollar corporations, including human resource issues, real estate transactions, and other matters that may not appear in the news—unless something goes wrong.¹ As members of a school district's senior management team, in-house school district attorneys are increasingly called upon to wear many hats in the course of a "normal" day.²

In addition, an ever-more litigious society has forced school administrators to be wary of actions which may result in a lawsuit, and in-house school attorneys are increasingly called upon to practice "preventive law."³ By becoming aware of and involved in potential problems early on, attorneys may be able to provide advice and guidance that will help administrators avoid lawsuits or at least mitigate damages.

However, there can be a serious negative aspect to such a proactive approach. Giving advice and creating work product on non-legal matters may not entitle in-house attorneys to the "privileges" they typically enjoy and may instead make them vulnerable as a witness in litigation. In short, by participating in the decisions that lead to a legal issue or by investigating an alleged problem, the attorney runs the risk of becoming a witness in the very matters he or she is called upon to handle.

In assessing whether to become involved in an investigation or decision-making process, attorneys for school districts should keep three separate but related considerations in mind: the attorney-client privilege, the work-product privilege, and the attorney-witness rule. Because of government attorneys' "special duty to uphold the public trust and the nature of the government as a corporate or organizational entity,"⁴ the privileges available to them can be quite limited. As courts determine the applicability of these three rules based on

the policy considerations in a situation, it will often be difficult for counsel to predict how they apply. In order to avoid receiving information or creating material where the privileges do not apply and then being called as a witness, an in-house attorney may need to avoid being involved in situations that fall into a grey area.⁵

Attorney-Client Privilege

The attorney-client privilege is the oldest evidentiary privilege, with roots in the English common law of the sixteenth century.⁶ It is based upon the principle that attorneys cannot perform their professional responsibility to their clients unless they are given full, frank communication about the matter at hand.⁷

In general, there are two parts to the attorney-client privilege in most jurisdictions: the rule of evidence which protects confidential information from being disclosed in a proceeding, and the rule of professional responsibility which prohibits the attorney from disclosing confidential communications.⁸ In other words, there is a rule about the courts' ability to seek attorney-client material and a rule about the attorney's responsibility to safeguard the information. As the precise wording of federal and state rules of evidence and of professional responsibility vary, in-house counsel should be thoroughly familiar with their rules and the scope of the attorney-client privilege applicable to their situation.

It is well-settled that the privilege applies to corporations and other organizations.⁹ However, the tests to determine whether the privilege applies to a given communication becomes complicated when the client is an organization rather than a natural person, as the privilege attaches to the corporation, not necessarily the natural person through whom the corporation acts.¹⁰ Typically, several elements must be present for the attorney-client privilege to apply, including that counsel was providing legal advice, the communication was and remained confidential, and the communication was made by the client.¹¹

Many in-house attorneys perform duties which go beyond the traditional practice of law.¹² Membership in the bar does not automatically give all communications received by an attorney the cloak of attorney-client privilege. As one author puts it, "A non-legal business meeting is still a non-legal business meeting" even if an attorney attends.¹³ Before counsel can assert the attorney-client privilege, it must be clear that the communication was received in the course of providing legal advice. If the advice sought could have come from any other upper-level member of the organization, the communication is not privileged.

The attorney-client privilege is a fragile construct, and may be waived if the communication is revealed to a third party. If the communication is made in the presence of persons who are not necessary for the consultation and advice, or if the client chooses to reveal the communication to others, the communication is not confidential.

A problematic requirement for government attorneys is that the privilege applies to communications from the "client." In that employees and officers who communicate with the attorney are individuals rather than the corporate client, the applicability of the privilege can be quite murky. Different jurisdictions have developed different ways of applying the privilege in such circumstances, including the "control group"¹⁴ and "subject matter"¹⁵ tests. In-house counsel should familiarize themselves with the test which courts in their jurisdiction would apply to communications with school board members, administrators, and employees of the school district.

A tangential issue to be aware of in attorney-client privilege questions is the effect of any open meetings or open records laws on communications with in-house counsel. Some state courts have gone so far as to say that these laws have completely done away with the attorney-client privilege in agencies to which they apply.¹⁶ Other courts have ruled that strong public policy considerations call for the continuation of the attorney-client privilege for governmental agencies.¹⁷ While most government lawyers may be familiar with their state's open meetings and records laws, the effect of these laws on confidential communications should be determined.

Attorney Work-Product Privilege

In contrast with the time-honored attorney-client privilege, the work-product privilege is a relatively new rule, having been judicially created in the federal court system by the United States Supreme Court in 1947.¹⁸ Since then, most state courts have adopted rules codifying this privilege.¹⁹

As defined by the Federal Rules of Civil Procedure, work product includes "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative."²⁰ Clearly, then, if the material was not prepared in anticipation of litigation, the work-product privilege will not apply. Items prepared as part of ordinary business are not privileged, even when they are vital to the issues in the case. Further, attorneys should be clear on the way in which their jurisdiction interprets the rule's language. For example, will items prepared, not for formal litigation, but in regard to an administrative proceeding be considered work product? Must the adverse proceeding be foreseeable, imminent, or actually filed when the material is prepared? If the material was prepared for previous litigation, does the privilege extend to current proceedings?

Attorneys must also consider the distinction between "fact work product" and "opinion work product." Factual material which is gathered in preparation for litigation, such as internal audits and reports, may be discoverable by the opponent upon a showing of substantial need and an inability to obtain equivalent material without undue hardship.²¹ In contrast, "to the extent that work product reveals the opinions, judgments, and thought processes of counsel, it receives some higher level of protection, and a party seeking discovery must show extraordinary justification."²²

Again, the applicable open records laws should be consulted. An unforeseen and unfortunate result of open record laws has been hesitation by government attorneys to commit their thoughts to paper if the document may be subject to disclosure to the other side.²³

Advocate-Witness Rule

If neither of the privileges discussed above applies to information received or created by an attorney, he or she may be required to produce documents or even testify at trial. In such a situation, in-house counsel

should be conversant with the applicable advocate-witness (or lawyer-witness) rule.

The American Bar Association Model Rule of Professional Conduct 3.7, adopted in 1983, states that an attorney shall not act as an advocate at a trial in which he or she is likely to be a necessary witness. Exceptions to this rule are permitted when the testimony is about an uncontested issue or the nature and value of legal services in the case. A more nebulous exception is allowed when the "disqualification of the lawyer would work substantial hardship on the client."²⁴ Most jurisdictions have adopted some version of the ABA Model Rules.²⁵

This rule is based upon the different functions of a witness and an advocate at trial, and the prejudice that could result from a lawyer appearing in both roles.²⁶ Therefore, in a jurisdiction following the model rule, the prohibition extends only to appearance as the client's trial counsel. In a 1989 opinion, the ABA Committee on Ethics and Professional Responsibility found several factors justifying the lawyer-witness's involvement in pre-trial proceedings, including the possibility that settlement or other evidence will preclude the attorney's testimony.²⁷

Of course, the advocate-witness rule must be applied with an eye to common sense. While a strict reading of Model Rule 3.7 allows an attorney-witness to represent the client at a pretrial deposition, for obvious reasons the attorney should be reluctant to depose himself or herself. The better practice would be to have another lawyer conduct the deposition or a pretrial hearing in which the attorney-witness will testify.²⁸

Conclusion

Policy considerations, public information laws, and overlapping responsibilities present exceptional challenges to in-house school district counsel. As attorneys are increasingly called upon to participate in fact-finding and decision-making, they must be aware of the various rules of evidence and ethics applicable to these situations. Special attention should be paid to the local jurisdiction's law regarding the attorney-client and work-product privileges, as well as the rule of professional conduct governing appearance as both an advocate and a witness at trial. While the creative thinking nurtured by legal training and work in the field may lead school administrators to seek the advice of in-house attorneys on a variety of non-legal matters,

school attorneys must counsel their clients that privileges may not apply to such advice and if the matter is ultimately litigated the in-house attorney cannot represent the district and instead may be a witness. **I&A**

End Notes

1. Chris Mahon, *Education Lawyers in Demand*, LAW CROSSING, <http://www.lawcrossing.com/article/pdf/435.pdf>.
2. National School Board Association, *Careers in School Law*, <http://www.nsba.org/MainMenu/SchoolLaw/Careers.aspx> (last visited Sept. 9, 2010).
3. SELECTING AND WORKING WITH A SCHOOL ATTORNEY: A GUIDE FOR SCHOOL BOARDS (NSBA Council of School Attorneys 1997).
4. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 920-21 (8th Cir. 1997).
5. Uncertainty means that "[g]overnment attorneys cannot represent with certainty that information received from their clients will remain confidential and cannot prepare cases for trial adequately and in the best interest of the government, because their documents may be compelled to be disclosed." Marion J. Radson & Elizabeth A. Waratuke, *The Attorney-Client and Work Product Privileges of Government Entities*, 30 STETSON L. REV. 799, 836 (2001).
6. JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, Vol. 8 § 2290, 542-43 (John T. McNaughton, ed., Little, Brown & Co. 1961); *Swidler & Berlin v. U.S.*, 524 U.S. 399, 403 (1998); *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981).
7. *Trammel v. U.S.*, 445 U.S. 40, 51 (1980).
8. RADSON & WARATUKE, *supra* note 5, at 802.
9. See, e.g., *U.S. v. Louisville & Nashville R.R.*, 236 U.S. 318, 337 (1915).
10. *Upjohn*, 449 U.S. at 389-90.
11. WIGMORE, *supra* note 6, at § 2292, 554.
12. Michael A. Lambert, *In House Counsel and the Attorney Client Privilege* (2000), <http://library.findlaw.com/2000/Oct/1/128767.html>.
13. *Id.*
14. *Philadelphia v. Westinghouse Electrical Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962).
15. *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977).
16. RADSON & WARATUKE, *supra* note 5, at 800.
17. *Id.* at 800, 813-16.
18. *Hickman v. Taylor*, 329 U.S. 495 (1947).
19. RADSON & WARATUKE, *supra* note 5, at 825.
20. Fed. R. Civ. P. 26(b)(3).
21. Fed. R. Civ. P. 26(b)(3).
22. *In re Sealed Case*, 676 F.2d 793, 809-10 (D.C. Cir. 1982).
23. RADSON & WARATUKE, *supra* note 5, at 833.
24. MODEL RULE OF PROF'L CONDUCT R. 3.7.
25. American Bar Association, *ABA Model Rules of Professional Conduct*, State Adoption of Model Rules, http://www.abanet.org/cpr/mrpc/model_rules.html (last visited Sept. 9, 2010).
26. MODEL RULE OF PROF'L CONDUCT R. 3.7 cmt.
27. ABA Comm. On Ethics and Prof'l Responsibility, *Informal Op.* 1529 (1989).
28. Ethics Opinion, D.C. Bar Ethics 228 (May 19, 1992).

LETTERS OF RECOMMENDATION AND FERPA

By: Mark Blom, Howard County Public School System, Ellicott City, Maryland



The college application process can be stressful for students and parents. The right college can be the earned reward for past years of hard work, and the bridge that leads to a future of enriching opportunities, life-long learning, and rewarding friendships. Admission is a competitive process, of course, causing students to want to optimize all their qualifications: G.P.A., SAT scores, course selection, essays, extra-curricular activities, and letters of recommendations from school staff.

Letters of recommendation can be important in the selection process. In a survey by the National Association for College Admission Counseling in 2007, slightly more than 60% of colleges and universities rated teacher/counselor recommendations as "considerably" or "moderately" important in their admission decision.¹ In addition to helping a student gain admission, recommendations also can be very important in

the highly competitive pursuit of scholarships. With so much riding on the student's application package, it is not surprising that some parents want to see how strong the letters of recommendations are.

As Dave Berry, Senior Advisor at College Confidential, stated, "It does take some brass to request a pre-mailing review of a teacher letter of recommendation."² However, the Family Educational Rights and Privacy Act (FERPA) gives parents and eligible students that right. Specifically, a letter of recommendation written by a school staff member is an "education record" as it directly relates to a student and is maintained by the school district.³ Parents may inspect and review education records until a student turns 18 or starts college, whichever comes first; after that the student may inspect and review educational records.⁴

While parental inspection is permissible under FERPA, does it affect the reference writing process? How do teachers feel about it? Does it have a potential impact on the student's admission? The College

Admissions Partners reports that teachers and guidance counselors are more comfortable writing a recommendation if the parents and students have waived their right of access to the letter.⁵

The Howard County Public School System began using a FERPA waiver for letters of recommendation approximately 10 years ago. It has been extremely rare for a parent or student *not* to sign the waiver. School districts benefit from waivers in a number of ways. Specifically, teachers and guidance counselors say that when the waiver is signed, they feel freer to write more realistic letters of recommendation. In addition, with the waiver, guidance counselors no longer have parents asking for advance copies of the letter and then asking that it be strengthened.

A waiver also benefits the student. Universities place greater weight on "waived" letters of recommendation. This means the waiver enhances that portion of the student's application, thereby increasing his or her chances of acceptance.

Section 99.12(b)(3)(i) of the FERPA regulations explicitly allows *postsecondary institutions* to disallow students to review letters of recommendation if the student has waived in writing his or her rights to inspect them. The Family Policy Compliance Office (FPCO) has stated in a guidance letter that K-12 school districts also may ask students to sign a waiver of their FERPA right to access letters of recommendation. Specifically, FPCO stated:

While the regulations [34 C.F.R. § 99.12] indicate that this section applies at the postsecondary level, this Office has previously determined that a secondary school may refuse a student or the student's parent access to any copies of letters of recommendation to which a student has waived his or her right of access which are maintained at the secondary school. However, if a student has not signed a waiver of his or her right to access a particular confidential letter or statement, a school would be required by FERPA to provide that student access to that record.⁶

School districts should ask both parents and students to waive their FERPA rights of access to letters of recommendation. The parents should be asked to sign the waiver because they usually have the FERPA inspection rights during the letter writing

Bargaining in Difficult Economic Times: Audio Conference Series

COSA is pleased to partner with the National Association of Education Negotiators (NAEN) to offer a series of audio conferences to assist labor attorneys with a number of common problems which arise during bargaining in difficult economic times.

- Creative Compensation – October 5 at 1:00 p.m. Eastern time
- Health Insurance – November 2 at 1:00 p.m. Eastern Time
- Communication Strategies and Union Tactics – December 7 at 1:00 p.m. Eastern time

Registration is per "site" and the one low fee covers all three audio conferences! More information on the topics to be covered and a registration form can be found on the Council's website at: <http://www.nsba.org/SecondaryMenu/COSA/Seminars/2010-Webinar-Series.aspx>.

2010 School Law Practice Seminar

We look forward to seeing you October 14-16 at the Renaissance Providence Hotel. This 2.5 day seminar (<http://www.nsba.org/cosa2/practice/2010/program.html>) provides an opportunity to earn up to 10.5 hours of CLE customized to meet the needs of the school law practitioner. If you have not already registered, click [here](#) for registration information.

KASB/NSBA Patricia E. Baker Scholarship

The scholarship will be awarded annually and will allow a COSA member, who would not normally participate due to financial hardship, to attend the Annual School Law Seminar. Send your nominations in right away to landrews@nsba.org. The application deadline is November 1, 2010.

Nominate a Colleague for a COSA Award

The deadline for us to receive your nominations for the Distinguished Service and Lifetime Achievement Awards is October 29, 2010. The Distinguished Service Award may be given annually and recognizes a COSA member who has provided exemplary leadership and distinguished service in support of COSA's mission. The Lifetime Achievement Award is given periodically to recognize an individual who has provided exemplary leadership and distinguished service in support of COSA's mission over an extended period of time. Click [here](#) for more information and a nomination form. Award recipients will be recognized at the 2011 Annual School Law Seminar, April 7-9, 2011 in San Francisco.

COSA School Law Seminar, April 7-9, 2011 Offering up to 11 hours of CLE!

Registration is now open for this premier education event to be held April 7-9, 2011, at the Hilton San Francisco Union Square. Register now, receive your confirmation of registration number, and book a room through the Housing Bureau when it opens on October 12!

Topics include labor relations and special education early bird sessions; First Amendment and student behavior; health care reform; ethical "lawyering" in the digital age; raising money for public education; going "green" in school facilities and construction; strategies for addressing bullying and hazing; and much more.

Full program information can be found at <http://www.nsba.org/cosa2/law/2011/>.

Extend your stay to include NSBA's 71st Annual Conference and Exposition, April 9-11. COSA members paying to attend NSBA's Annual Conference may attend the School Law Seminar for no additional fee!

Visit NSBA's conference website at <http://www.nsba.org/conference> for more information.

New Resource!

Sign up now for *School Board News Today*, NSBA's new weblog that captures the most interesting news about school boards each weekday. Significant legal content can be found on this service. Know what your board member clients are reading. Visit the *School Board News Today* website at <http://schoolboardnews.nsba.org/>.

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Ned Julian of Seminole County Schools Receives C. Graham Carothers Award of Excellence

Our congratulations go to Ned Julian, legal counsel to Seminole County Public Schools and former NSBA Council of School Attorneys board member, who has been awarded the C. Graham Carothers Award of Excellence. This award is given annually to honor a Florida school board attorney who has demonstrated excellence in the profession. Full details on the award can be found at <http://www.flaschattys.org/award.htm>.