NEW JERSEY LAWYER

October 2024

No. 350

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WILLIAM H. MERGNER JR.

It's fall—stay busy with the NJSBA

The fall season is upon us.

After what I hope was a relaxing and reinvigorating summer, the New Jersey State Bar Association's calendar is in full swing. The Association's sections and committees are busy, social and networking events are happening around the state and the educational programing is loaded with talented speakers and compelling topics.

In August, I had the privilege of visiting the law school campuses at Seton Hall and Rutgers-Camden to welcome first-year students for orientation. Watching the student groups raise their right hands to recite the Lawyers Pledge, I remembered the first-day jitters, the anxious and excited feelings at the start of my law school journey. At times the work may seem overwhelming, I reminded them. But the reward that awaits will far outweigh the hardships when they emerge from school as a member of the greatest profession in the world.

I made two recent trips to Trenton for networking events at the Office of the Public Defender and Office of Attorney General. It was a pleasure to address members of these vital institutions in the law. Public Defender Jennifer N. Sellitti and Attorney General Matthew J. Platkin have been steadfast supporters of the NJSBA and helped further the cooperative relationship between their offices and the Association. In the last year, more than 300 professionals in the Public Defender's Office joined the NJSBA, a testament to the strength of the partnership and the vibrancy they bring to the Association.

Recently, the New Jersey State Bar Foundation hosted its biggest night, honoring retired Assignment Judge Peter F. Bariso Jr. and former NJSBA President Karol Corbin Walker with the 2024 Medal of Honor for their service to the state's legal community. They are two individuals whose integrity, professionalism and legal skills are unmatched. I had the opportunity to thank them for their outstanding contributions to the legal profession and to the advancement and improvement of the justice system in New Jersey.

October promises to be just as lively. The month kicked off with the 21st Annual Chancery Judges Reception at the New Jersey Law Center in New Brunswick, where the judges celebrated the start of a new term and introduced their clerks for the coming year.

In the last year, more than 300 professionals in the Public Defender's Office joined the NJSBA, a testament to the strength of the partnership and the vibrancy they bring to the Association.

From Oct. 7–11, the NJSBA will host its annual Member Celebration Days as a tribute to the thousands of members and volunteers who work hard in the profession every day. The week will feature a series of free programs and events that demonstrate the value of an NJSBA membership, including a free seminar to help attorneys with e-filing and an open house networking reception at the New Jersey Law Center. There, attendees can delve into the value of belonging to one of our 80 sections, committees and divisions and explore opportunities in their practice areas.

At the end of the month, I hope you'll join me in celebrating this year's recipients of the annual Pro Bono Awards. The awards will honor six outstanding individuals, firms and corporate legal departments for their commitment to providing legal services to the state's underserved residents. This year's awardees are an impressive group, who have dedicated countless pro bono hours toward helping unaccompanied minors in immigration proceedings, criminal expungements, housing

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New Jersey Lawyer (ISSN-0195-0983) is published six times per year. Permit number 380-680. • Subscription is included in dues to members of the New Jersey State Bar Association ($10.50); those ineligible for NJSBA membership may subscribe at $60 per year. There is a charge of $2.50 per copy for providing copies of individual articles • Published by the New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520. • Periodicals postage paid at New Brunswick, New Jersey 08901 and at additional mailing offices. POSTMASTER: Send address changes to New Jersey Lawyer, New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520. • Printed in U.S.A. • Official Headquarters: New Jersey Lawyer, New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520. 732-249-5000 • Advertising Display 732-565-7560.

FROM THE SPECIAL EDITOR

Education Laws and Their Impact on Parents, School Staff, and Counsel

By Brian R. Lehrer

There can be little doubt that school influences everyone from childhood to adulthood. As a child, it is your primary daily activity. For an adult with a family that includes children, it influences decisions about where to live, where to work, how to allocate family responsibilities and gives rise to endless debates about levels of taxation.

It's no exaggeration that school comprises a major component of one's life from childhood to parent/taxpayer. This issue of the *New Jersey Lawyer* addresses some of the legal issues that arise from the governing aspect of most families' lives.

Michael Kaelber opens the issues with a discussion of the laws governing gifted and talented programs in New Jersey. Stacey Cherry and Vittorio LaPira discuss different concerns regarding the Individuals with Disabilities Education Act requirements public school districts face under this statute.

Parents of disabled children obviously face numerous challenges regarding the education of their children. Joan Thomas discusses a parent's right to place a recording device in their child's belongings to gather evidence at Court hearings. Court hearings and representation of school districts present challenges for attorneys themselves. David Rubin offers an article discussing the ethical obligations of school board attorneys.

Parents and school board attorneys are not the only people facing challenges with regard to education. Arsen Zartarian discusses what is described as the most formidable challenge for today's school district—staffing. Finally, a particularly topical issue fresh off a state Supreme Court decision, Katherine A. Gilfillan discusses the unique issue of what constitutes a "diploma."

While no issue can address all impacts of school and education law, the present issue of *New Jersey Lawyer* attempts to give an overview of significant concerns which affect parents, educators and counsel. ■

BRIAN R. LEHRER *is with the law firm of Brandon J. Broderick, LLC.*

President's Perspective

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and tenancy issues and much more. All are welcome to attend an award reception on Oct. 29, where the NJSBA will recognize their work to ensure fair representation under the law.

In other news, the Association will hold its annual series of regional bar dinners this month in North, South and Central Jersey, where NJSBA leaders will share the latest Association updates on membership, advocacy and issues facing the profession with the state's county and affinity bars. To prevent a backslide in judicial vacancies across the state, the NJSBA's Judicial and Prosecutorial Appointments Committee has met frequently to review judicial nominations to the Superior Court. As always, the Association has maintained vigorous advocacy practice for the benefit of New Jersey attorneys and the profession. The NJSBA has weighed in on issues related to child sexual abuse cases, purchasing attorney names for online searches, transparency in certain DUI matters, the banning of referral fees to out-of-state attorneys and other important topics. Notably, the Association submitted an *amicus* brief before the U.S. Supreme Court on affirming prevailing party standards in preliminary injunctions.

These events represent a fraction of what the NJSBA will offer this season. Check out the NJICLE lineup for all the definitive sessions in every practice area, including programs on hot-button issues like artificial intelligence and how to keep your firm safe from cyber hacks.

Enjoy this active stretch in the NJSBA. I hope to see you around a seminar, reception or at the Annual Mid-Year Meeting in Dublin this November. ■

ETHICS AND PROFESSIONAL RESPONSIBILITY

Can My Personal Behavior Land Me in Ethical Trouble?

By Bonnie C. Frost
Einhorn, Barbarito, Frost & Botwinick, PC

Lawyers might be surprised to find that they may get into ethical trouble because of their behavior outside of their day-to-day employment as a lawyer. The New Jersey Supreme Court has stated, "An attorney's conduct [that] did not involve the practice of law or arise from a client relationship will not excuse the ethics transgression or lessen the degree of sanction."[1] "The obligation of an attorney to maintain the high standard of conduct required of a member of the bar applies even to activities that may not directly involve the practice of law or affect the attorney's clients."[2]

Behavior which can result in discipline could have arisen from criminal activity, behavior which relates to clients, or third parties.

For example, road rage can trigger a violation of the Rules of Professional Conduct. In the Matters of *Martin Milita* and *John Collins*, both attorneys' actions resulted in criminal charges and attorney discipline.

Martin Milita was driving through a small town, below the speed limit, when a car with two men began to tail him. This upset him and when the speed limit increased to 40 miles per hour, he continued to drive 20 miles per hour. He gave the men "the finger" and they responded in kind. Then, Milita slammed on his brakes, opened his door, and flashed a knife at the other drivers while they passed him. Milita then began to tailgate the men for nine to 10 miles, still gesturing at them with the knife. He received a one-year term of probation and was censured.[3]

John Collins, angered by another driver, exited his car and took a baseball bat from his trunk and proceeded to smash the other driver's vehicle, breaking the windshield and side mirror while the driver and passenger were seated inside. He received three concurrent one-year terms of probation and a three-month suspension.[4]

In an extremely troubling scenario, Neil Cohen, a New Jersey Assemblyman, viewed 19 images of girls, 16 years old and younger, on the receptionist's computer in his legislative office. Cohen served one year and two months of a five-year prison sentence and received an indeterminate suspension for his conduct.[5]

Inappropriate behavior using social media has also resulted in discipline. A recent case is one of first impression and is only the third case where an attorney has been disciplined for the crime of the invasion of privacy.[6]

John Toczydlowski was a Pennsylvania attorney who had been admitted *pro hac vice*. He engaged in a prolonged course of conduct where he sexually exploited his own wife. For three years he surreptitiously photographed her while naked and disseminated those photographs with graphic comments on social media, inviting others to live out their sexual fantasies with her. His website postings included information which viewers could use to find his wife just by using the internet. In its opinion, the Disciplinary Review Board noted that the photographs would "remain in cyberspace in perpetuity subjecting his wife to a lifetime of revictimization, each time the photographs are viewed by others."[7] The court imposed a permanent bar to Toczydlowski's plenary or *pro hac vice* admission in New Jersey.

In another case of first impression, Annmarie Smits, while in the process of moving to a new home, accidentally shot a minor in the thigh and buttock while packing her gun for moving. Police took the minor to the hospital two and a half hours after being wounded by Smits, after the minor's friend called police to tell them he had been shot. Smits was charged with endangering the welfare of a child and abuse and neglect for failing to obtain medical attention for the minor. She was censured.[8]

Douglas Long was the managing partner of his law firm. Not only did he use the firm's business account to pay his personal bills and expenses, he had the bookkeeper falsely classify his personal

expenses as legitimate law firm expenses, and he failed to report to the IRS more than $800,000 of these "business" expenses as additional income. Long pleaded guilty to income tax evasion and spent 14 months in prison. He was subsequently disbarred.[9]

In an interesting factual scenario, Francis Bock, in a desire to live with his paramour, faked his death by drowning and concealed his whereabouts for five weeks despite knowing that an investigation was ongoing as to his disappearance. He left "contrived" evidence on Long Beach Island to give the impression that he had drowned. He left his judicial post as a municipal court judge unattended and left 60-70 files for his partners to address. He received a six-month suspension for abandoning his clients and his court responsibilities.

There is no doubt that the practice of law can be stressful and can lead to attorneys making mistakes, but as can be seen from these various scenarios, the attorney's behavior in private life affected their license. Hopefully these examples demonstrate that the personal behavior of a lawyer is not outside the reach of the ethics system.

Endnotes

1. *In re: Musto*, 152 N.J. 167, 173 (1997).
2. *In re: Schaeffer*, 140 N.J. 148, 156 (1995).
3. *In re: Milita*, 217 N.J. 19 (2014).
4. *In re: Collins*, 228 N.J. 23 (2016).
5. *In re: Cohen*, 220 N.J. 7 (2014).
6. N.J.S.A. 2C:14-9.
7. *In re Toczydlowski*, 256 N.J. 508 (2024).
8. *In re Smits*, 248 N.J. 222 (2021).
9. *In re Long*, 255 N.J. 436 (2023).

WHAT I WISH I KNEW

Be an Advocate, Not a Jerk, and be Thoughtful Enough to Know the Difference

By Megan S. Murray
The Family Law Offices of Megan S. Murray

The practice of family law should be about crafting the best legal arguments for our clients based on the facts of their case. Unfortunately, many attorneys believe it is their job to argue as aggressively as possible for their client, even if that means taking baseless positions, prolonging litigation or entirely ignoring fair viewpoints of the adversary.

Attorneys practice in a very stressful field with high emotions. Under the circumstances, practitioners must be vigilant about not allowing the emotion of a case to manifest itself in impetuous case-handling decisions, which may reflect poorly upon the attorney—not only in the case at hand but regarding the attorney's reputation going forward.

Integral to being a successful family law attorney is the ability to act in a professional manner regardless of the difficulty or emotional intensity of the case. When attorneys forsake their professionalism by taking unreasonable positions, writing gratuitously nasty letters to the adversary, or being disrespectful to a judge or their staff, they are not only hurting themselves, they are hurting their clients. In most cases, unprofessionalism and overly aggressive practices lead to a needless increase in counsel fees to the client and often result in the divorce process exacting a far greater emotional toll on the clients involved.

The following suggestions are made for maintaining civility with colleagues, adversaries and judges alike.

Pick up the phone and personalize your adversary

If my client's spouse has already retained an attorney, I make it a priority to make a telephone call to the adversary—especially in a case where I have not worked with or do not know opposing counsel. When attorneys communicate with each other only via letters and writings, they tend to depersonalize each other. Lashing out at an adversary or writing an inflammatory response to a letter is easier to do when the recipient is just a name on letterhead.

Calling an adversary allows you to build a rapport with them. Oftentimes, I find that when I reach out personally to an attorney who may be known for being abrasive, that attorney is far more pleasant to deal with than reputation would suggest if lines of communication are opened early and person-to-person. Find common ground with your adversary on common interests; share a humorous story about the practice or bring up a (non-inflammatory) current event.

It's often true that you get more flies with honey

When dealing with abrasive adversaries or judges, reciprocating with gratuitous hostility has almost never yielded good returns. I find that many attorneys may act aggressively from the

outset of a case as a matter of course because they expect their adversaries to act in-kind. They do not want to appear to be weak. However, if you approach your adversary cooperatively and amicably from the start, the initial aggression often decreases. When the adversary does not feel that they are in battle with you but rather working toward a common goal— albeit for different clients—of reaching a fair resolution to the matter, they may be relieved of the need to constantly be on the defensive. No one wants to feel under attack. While an attack from an adversary may instinctively make one want to attack back, trying to first diffuse the situation by convincing the adversary that you do not view them as the enemy and will not treat them as such can work wonders for expediting resolution to the case.

A friendly tone in raising disagreement with a judge also helps to convince a judge that you are not attempting to attack them. If a judge has taken the time to prepare a Tentative Decision, a full-out attack against the judge in connection with any portion of the decision is not only rude, but it will almost certainly result in the judge being less receptive to changes in the decision. Thank the judge for their decision and point out specific areas where the decision could be improved and provide explicit reasons why in a way that is constructive rather than combative.

Don't add fuel to a non-substantive fire

Nasty-gram letters could be one of the worst ways to move a case forward. I have yet to experience or hear of a nasty-gram letter that resulted in the recipient conceding to the contentions therein. Letters containing non-substantive vitriol and often overflowing with he/said-she/said accusations only inspire equally vitriolic letters in return, resulting in a vicious cycle of avoidable contentiousness. Fees continue to accrue while attorneys argue non-substantive issues, and the case does not progress. My policy is not to respond to such letters unless they contain accusations that demand a response to protect a substantive interest on behalf of my client. Even in those cases, I most often provide a blanket denial on behalf of my client without attempting to editorialize in a way that will keep the letter-writing campaign going at full strength.

Make the life of the judge easier

Judges have too many cases. Do what you can to free up time for the judge. When you receive a Case Management Conference notice, immediately complete a proposed Case Management Order for the adversary's review and approval, with the goal of resolving scheduling by consent and avoiding judicial intervention with scheduling issues. Regarding motions, ensure that your application complies with the Rules of Court. Use individual, labeled tabs to separate exhibits; bind the motion properly; clearly reference exhibits within the body of the certification. Prior to trial, meet with your adversary to stipulate on all issues in agreement so that the judge does not have to hear testimony on issues that are not in dispute. Prepare trial binders for your adversary and the judge, so that everyone has copies of exhibits being presented at trial. Pre-mark exhibits so that time is not spent individually marking every exhibit.

Quit while you're ahead

When arguing a case, attorneys must ensure that they do not become so caught up in their own argument that they fail to recognize when they have already won. As soon as a judge has acknowledged that an attorney's position is sound and that the judge is accepting the position, the attorney should stop arguing. I have watched in horror as attorneys have argued themselves out of winning positions, including an award of counsel fees, by failing to end their argument at the time that it is initially won. Over-speaking does not endear attorneys to judges with very limited time.

It is extremely easy to get caught up in the hostility and animosity which are inherent in many family law cases. Constantly remind yourself to take a step back and reflect upon your own practices. Treat adversaries, their clients, judges and colleagues in a manner that would not offend you if you were treated the same way. Let your civility toward others garner the same civility in return.

A longer version of this article originally appeared in the June 2024 edition of the New Jersey State Bar Association Family Law Section's New Jersey Family Lawyer *and is reprinted here with permission.*

WORKING WELL

Keys to Overcoming Procrastination

From the NJSBA Member Assistance Program

It's 5 p.m. and everyone's leaving work—except you, because you still have to do the weekly sales report. You knew the deadline but waited too long to get started. Why do you put off doing things until the last minute?

"Many people don't realize procrastination is an automatic habit pattern they use to avoid tension," says Dr. William Knaus, a psychologist and author of *The Procrastination Workbook.* "It's kicked off by discomfort, such as uncertainty or insecurity. These

habit patterns are the barriers to overcoming procrastination." Knaus divides these patterns into the following three diversions.

Mental Diversions

If you think, "I can't do it right now because I'm too tired. I'm not alert enough. I won't be able to concentrate well enough. I'll get to it later when I'm better prepared to think more clearly," then you've fallen into a procrastination trap known as the Manana Diversion. You've fooled yourself into thinking that later is different from now and will be better.

Action Diversions

With this barrier, you procrastinate by going to the water cooler, doodling, calling someone on the phone, or doing something else on your computer.

Emotional Diversions

Some office tasks aren't inspiring or motivating—they're drudgery. If you wait to be inspired to do something you consider a drag, you'll be waiting a long time. To overcome these barriers, Knaus recommends the following steps:

Five-minute System

Commit to the task for five minutes. For example, tell yourself, "I'll work for the next five minutes on gathering the information for developing this report."

Decide whether you'll commit for another five minutes at the end of that five minutes. Continue this pattern until you complete the task, run out of time, or have a good reason to stop.

"By doing the task for at least five minutes, you're already living through the frustrations that are a part of the activity, and you're making a series of forward-moving decisions," says Knaus.

Plan in Reverse

Many people set goals but don't have a plan. To create a clear, directed, and purposeful plan:

First, visualize your goal as a target and imagine shooting an arrow into the target's center. Imagine the arrow's trajectory as you pull it back, release it, and hit the center.

In other words, visualize your outcome first, then work from there. Where do you want to end up? What do you do just before that and before that? By doing this, you're automatically creating a plan, and at the same time, you're reminding yourself the plan is a series of small parts.

Building Frustration Tolerance

If you develop a high frustration tolerance, you'll achieve more because fewer things burden your mind. You build frustration tolerance by persistently tackling challenging tasks until you complete them.

"Even if you don't overcome the discomfort, you've lived through the frustration, which creates this powerful message: You can organize and direct your activities for a productive result, and you have control over yourself," says Dr. Knaus. "It's better to recognize that doing reasonable things, reasonably, within a reasonable time, gets things done—and you end up doing rather than stewing."

This article is from New Jersey State Bar Association Member Assistance Program provider Charles Nechtem Associates. The Member Assistance Program connects NJSBA members—and anyone else in their household—to trained, experienced mental health professionals and resources. Learn more at njsba.com/member-assistance-program.

WRITER'S CORNER

A View From Both Sides

By Emily Wood and Veronica J. Finkelstein
Paralegal, U.S. Attorneys Office–EDPA and Litigative Consultant, U.S. Attorneys Office–EDPA

Paralegals can play a pivotal role in the success of law firms, and their written work can be vital to a case's success. Both paralegals and attorneys can learn to better communicate with each other to ensure the best brief or motion is produced. Considering the following will help make the writing process smoother and faster, even for attorneys and paralegals who regularly collaborate.

Communication Tips for Attorneys

For attorneys, communicating clearly about a writing assignment will help your paralegal provide you with a draft document that meets your needs. Every assignment is a little different, but there are a few categories of information you can provide that will help your paralegal. These categories are content, format, style, and expectations.

Content is the most important category to cover when asking your paralegal for a draft document. Set clear parameters for the

assignment. If you are expecting a complete draft and the paralegal presents you with an outline and some relevant case citations, you will both be unhappy. Explain the level of detail or completeness you need in the draft. Let your paralegal know if there are specific cases or passages you want them to include. This portion of the assignment is the most vital and should be the easiest to explain.

Formatting considerations might seem like a nicety, but they are essential. Consider how much more efficient drafting is when you don't have to spend time adjusting the basic layout of your document. Font style and citation format are relatively minor variables that can have an outsized affect on document length. Switching from Times New Roman to Century Schoolbook can increase your page count substantially. Changing from footnotes to in-line citations or vice versa is not technically difficult, but it takes time that can be better spent making sure your arguments are as strong as possible.

Ideally, your paralegal will approximate your writing style in their draft. Imitating another writer's style takes finesse, and this is arguably the most difficult category to cover with your paralegal. It can be challenging to articulate stylistic preferences, so the easiest way to help your paralegal do this is to provide a few writing samples. The paralegal can use these to get a sense for how your sentences flow and whether you believe in the Oxford comma.

Sometimes, you aren't sure quite what you need for a specific assignment, but you know what you don't want. Communicating what you do and don't want fits the expectations category, and this is important to articulate. Explaining what you aren't looking for can be as helpful to your paralegal as a list of your preferences. For example, tell your paralegal if you know that you don't like any format that has more than two levels of sub-headings. Let your paralegal know if the judge who will be reading a brief has a well-known disdain for dictionary definitions as introductions or expressed a dislike for sports metaphors.

Communication Tips for Paralegals

Communication is a two-way street, and it can be improved when paralegals communicate well about the writing process. Consider discussing workload, tools, and timeline with your attorney. Communicating about these three issues will ensure sufficient time is allocated for the writing process.

First, discuss workload. Prior to meeting with the attorney, check the docket or file to determine what written work will need to be produced. Make an objective assessment of how long you think the work will take. Then review your other assignments, again objectively assessing how much time you need to devote to each. Where a critical product must be filed by a deadline, it is much easier to work around workload issues or conflicts when they are spotted early. If you are too busy to handle the assignment, say so. The attorney may be able to help you prioritize and balance assignments. Or, the writing might be better deferred to another paralegal. If you don't speak up, you may be preventing the assigning attorney from better planning.

Second, communicate about writing aids. Steps in the writing process can be improved using technological tools. But before you use a tool, make sure you understand it, have access to it, and that the assigning attorney approves its use. As one example, generative artificial intelligence tools can vastly accelerate the initial drafting process. But these tools may generate incorrect citations or points of law, and the attorney whose name is on the brief has an ethical obligation to ensure the final brief is free from these sorts of errors. Before you use a tool—ask. Ensure you are using the tool effectively and properly.

Third, clarify the timeline. Unless the document must be filed almost immediately, it can be helpful to set internal deadlines. Schedule when you will submit drafts of the brief and when the attorney will provide edits and feedback to you. The more internal dates on the calendar and the more communication prior to the eleventh hour, the more coordination there can be with the assigning attorney. The work product will be better as a result.

Paralegals and attorneys are on the same team. When each party communicates needs and expectations, the finished work product shines.

The views expressed herein are the authors' own.

TECHNOLOGY

The Oops of AI [or the Banality of AI]

By Jeffrey R. Schoenberger

For Practice HQ

No matter where you turn today, you read about the opportunities and perils of artificial intelligence tools like ChatGPT. The opportunities need no additional cheerleaders on their squad. And the Cassandras don't need another armchair prophet of doom. Instead of highlighting extremes, let's focus on the banalities that legal professionals need to know when approaching AI.

A Writing Aid, But Not (Yet) a Writer

One productive use of AI is to overcome writer's block. Because ChatGPT works like a conversation, it's possible to ask

questions to help start your own ideas flowing. For example, if I were preparing a webinar on Microsoft Outlook, I could ask, "What are the most popular Outlook 365 features?" ChatGPT instantly returned a list of nine items, with a sentence describing each.

The list may spur inspiration or break a mental logjam, but even this simple request exposes gaps. First, its top four items are, in order, "email management," "calendar integration," "contacts and address book," and "task management." True enough, but it hardly makes for an illuminating webinar to say, "Outlook does email." Someone new to the topic finds a starting point or learns the "greatest hits," but a would-be presenter or trainer still confronts a fair amount of research and customization ahead. Anyone "in the know" on a topic finds ChatGPT's responses as illuminating as the portrayal of attorneys on TV shows is accurate.

Second, AI tools like ChatGPT are known as large language models (LLM). Companies train these LLMs with an initial data set. ChatGPT and other AIs have cutoffs, after which they add no new data; September 2021 in ChatGPT's case. So, were I to ask, "What new features of Outlook 365 should lawyers know about?" ChatGPT would be ignorant of features added after September 2021, such as the forthcoming AI-based Microsoft Copilot.

Third, ChatGPT is verbose. I prompted it: "Write a 500-word blog about the best use of Outlook by lawyers." It supplied an article of 600 words and concluded, "Embracing Outlook as a comprehensive tool can empower legal professionals to optimize their time, increase efficiency, and ultimately provide excellent legal services to their clients while maintaining the highest standards of professionalism and confidentiality." It's impressively grammatically correct, but would benefit from editing. My armchair rewrite uses half the words: "Legal professionals' skillful use of Outlook saves time and assists them in efficiently providing excellent service to clients." In fairness to ChatGPT, I presumed "excellent service" from an attorney includes professionalism and confidentiality.

AI Tries Too Hard to Please

On June 22, 2023, Judge Kevin Castel of New York's Southern District fined attorneys Steven Schwartz and Pete LoDuca $5,000 for filing a brief written by ChatGPT. Unfortunately for the attorneys involved, ChatGPT didn't merely engage in the above-mentioned foibles. Instead, it invented cases and holdings to fit the attorneys' propositions. Furthermore, ChatGPT's manufactured cases included properly formatted, but entirely fake, citations, and it attributed the holdings to real judges. As part of his sanctions ruling, Judge Castel ordered the attorneys to send letters to "the judges whose names were wrongfully invoked," notifying them of the sanctions.

While this sanctions case uniquely exposed AI's "creativity," ChatGPT's inventiveness is not limited to court cases. We've seen similar ChatGPT flights of fancy in our internal testing. Without attempting to trick it, a colloquy asking ChatGPT to describe the differences between horses and unicorns resulted in ChatGPT declaring horses to be mythical creatures. We also witnessed ChatGPT assert a seven-year statutory closed file retention period for a state with no statutory retention period at all.

We sometimes feel rushed to get work out the door, meet a filing deadline, or check off a drafting task before vacation. And while ChatGPT and other generative-AI tools may help overcome writer's block, legal professionals must review everything AI supplies, particularly for pleadings and attorney work product.

If you want to experiment with legal industry-targeted AI tools, try Casetext's CoCounsel, Lexis + AI, and Westlaw Edge.

Two Worlds of AI

Stephen Rose, Chief Technology Strategist at Petri IT, was interviewed on the First Ring Daily podcast about Microsoft's AI announcements at its 2023 Build Conference. He offered a sobering statistic from Microsoft's Work Trend Index: 70% of employees would hand off as much work as possible to AI. Similarly, a recent study from Fishbowl found 43% of responding professionals had used AI for work-related tasks. 70% of those users had not told their bosses they were doing so.

Additional numbers Rose cites are even more alarming: 70% of respondents are experimenting with ChatGPT. 40% of those experimenting are putting confidential information into it. Only 5% are telling the boss they're using AI. ChatGPT and most public-facing AI tools store the questions they're asked. If you or someone in your firm is entering confidential information into an AI tool, stop until you know what the vendor does with the questions asked of the AI.

Rose's suggested solution for confidentiality is to rely on a "sandboxed" AI rather than a "general public" tool. For businesses, and perhaps larger firms at present, that entails using AI tools available through Microsoft, Amazon, or others, running in a cloud environment that the business controls. For example, a firm on Microsoft 365 could connect to AI resources available on Microsoft Azure. Then the firm could train or "seed" its AI sandbox with the documents it stores in SharePoint while having user permissions controlled through Active Directory. The firm maintains information security while teaching an AI to "think and write" like the firm. Any summer associate could ask the firm's AI a question and receive in reply an answer as knowledgeable as that from the senior partner.

Although "private AI clouds" aren't approachable and affordable for small firms yet, it's only a matter of time. We're on the way to where a "best of breed" AI can combine reference material and case law with your past work product to create a quality draft in record time. But you should still proof it before filing.

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Gifted and Talented Education and State Law

What Attorneys and School Administrators Need to Know

By Michael Kaelber

MICHAEL KAELBER *is the Coordinator of Continuing Legal Education and Research for LEGAL ONE at the New Jersey Principals and Supervisors Association/Foundation for Educational Administration since retiring in 2017 from his position of Director of Legal and Labor Relations Services of the New Jersey School Boards Association.*

Recent data from the New Jersey Department of Education revealed that 8.3% of New Jersey's almost 1.4 million students have been identified by their school districts as being gifted and talented students.[1] That's over 108,000 students that are receiving specialized services to address their gifted needs. In order to best serve these students, who are present in every school district and every school building, school board attorneys, school administrators and, in fact, all educators and parents need to understand the legal requirements of gifted and talented education in New Jersey and what school districts are required to provide. A full understanding of the G&T legal requirements can place the school board attorney in the best position possible to advise the school district client.

The Law

There are two New Jersey legislative/regulatory pieces that address the legal requirements for gifted and talented education in New Jersey: the Strengthening Gifted and Talented Education Act (SGTEA), P.L. 2019, c.338, and the Gifted and Talented regulations found in the New Jersey Standards and Assessment Regulations, N.J.A.C. 6A:8-3.1 et. seq. These two legislative/regulatory pieces establish the standards for New Jersey G&T programming.

The Definition

New Jersey Statute and Code define what constitutes a gifted and talented student in New Jersey. A gifted and talented student means:

> Students who possess or demonstrate high levels of ability, in one or more content areas, **when compared with their chronological peers in the local school district** and who require modifications of their educational program if they are to achieve in accordance with their capabilities.[2]

The key phrase is "when compared with their chronological peers in the local school district." It is a locally determined norm, not a state or federal norm. If someone states that everyone in the school district is gifted or that there are no gifted students in the school district, they are absolutely wrong. It cannot be "all students" and it cannot be "none" of the students. How many? It depends on the school district. As a guidepost, the NJDOE Fall 2022 NJSMART data collection revealed G&T students make up 8.3% of the New Jersey student population. Many G&T advocates believe that is an underreported number. Entities such as the National Association for Gifted Children and professional educators in the field have suggested that between 6% and 12% of the student population could be identified as gifted students. How a school district determines which of its students are gifted varies from school district to school district. It must vary, because the comparison is to "chronological peers in the local school district" and every school district is different.

The Identification Process

While the identification process varies from school district to school district and there is no state-mandated way to identify gifted and talented students, there are certain parameters set forth in the law by which every board of education must abide. They include ensuring:

> An ongoing kindergarten through grade 12 identification process for gifted and talented students that includes multiple measures in order to identify student strengths in intellectual ability, creativity, or a specific academic area.[3]

The identification process is ongoing K-12. When a school district says it does not start gifted and talented education until third grade, as some do, it is not in compliance with the law. Identification begins at the kindergarten level and does not stop at the end of the elementary school level or the middle school level; it continues all the way through 12th grade. A student could be identified as gifted in 12th grade while having never being identified before; ongoing K–12.

How a board of education handles the question of continuation of a student in the G&T program once admitted, varies from school district to school district. Some districts have an automatic review every year, some districts have a once you're in, you're in forever philosophy. Some address the issue by need, reevaluating students who are not doing well in the program to see if the student is benefiting from G&T services to see how the school district can better serve that student and match services with needs. There is no absolutely correct or incorrect method. School districts have the flexibility to do what is best for the students in their school district.

The identification process must include multiple measures; no single test score or recommendation is sufficient to comply with the law. Boards of education use a variety of measures including certain test scores, parent recommendations, teacher recommendations, portfolio assessments and more. There is no one correct path, other than to have more than one measurement. The state does not mandate a particular test or measure; school districts are free to choose what works best in their district to identify gifted students. Keep in mind that the purpose of the process is to identify student strengths in intellectual ability, creativity, or a specific academic area. Each of these potential strengths can require a different measuring stick to identify effectively; hence the need for multiple measures.

Keeping that in mind, the law provides some assistance to boards of education and school administrators as they work through the process. A school district must specifically

> Take into consideration the Gifted Programming Standards, Position Statements, and White Papers of the National Association for Gifted Children in identifying and serving gifted and talented students.[4]

How a school district determines which of its students are gifted varies from school district to school district. It must vary, because the comparison is to "chronological peers in the local school district" and every school district is different.

As with other parts of the law, the state does not prescribe any specific content or curriculum standard; it is all a matter of locally developed school district policy and curriculum.

While the 2005 New Jersey Commission Gifted Students recommended that the state require that every school district adopt the PreK–Grade 12 National Association for Gifted Children (NAGC) Gifted Programming Standards, the administrative code and later the statute only require consideration by the school district. Nonetheless, the NAGC Standards, Position Statements and White Papers can be a very useful tool in G&T identification and programming and should be reviewed and considered by the appropriate school district personnel.

Equity in identification is an important component as well, as the law requires that:

> School districts shall ensure equal access to a continuum of gifted and talented education services. The identification process shall include consideration of all students, including those who are English language learners and those with Individualized Education Plans or 504 plans;[5]

Programs and Services

Boards of education shall ensure that appropriate instructional adaptations and educational services are provided to gifted and talented students in kindergarten through grade 12 to enable them to participate in, benefit from, and demonstrate knowledge and application of the New Jersey Student Learning Standards at the instructional level of the student.[6]

The law defines what is meant by an instructional adaptation. It means:

> an adjustment or modification to instruction enabling a student who is gifted and talented to participate in, benefit from, and demonstrate knowledge and application of the New Jersey Student Learning Standards in one or more content areas at the instructional level of the student, not just the student's grade level.[7]

The law specifically requires that boards of education ensure that appropriate instructional adaptations are designed for students who are gifted and talented. Boards of education should

> develop and document appropriate curricular and instructional modifications used for gifted and talented students indicating content, process, products, and learning environment, and including, but not limited to, additional education activities such as academic competitions, guest speakers, and lessons with a specialist.[8]

As with other parts of the law, the state does not prescribe any specific content or curriculum standard; it is all a matter of locally developed school district policy and curriculum. Almost every Commissioner of Education decision regarding challenges to school district gifted and talented programing, includes the following sentence: "There is no New Jersey law or regulation which prescribes the substantive content of a G&T program." Local control is alive and well. Each school district can develop the G&T program it believes is best for its students as long as it addresses the parameters in the law; K-12 identification and programming using multiple measures and instructional adaptations.

The law requires that boards of education shall affirmatively assist staff in program development. Boards of education shall provide the time and resources to develop, review, and enhance instructional tools with modifications for helping gifted and talented students acquire and demonstrate mastery of the required knowledge and skills specified by the standards at the instructional level of the student.[9] How that is done, where that is done and at what time that is done is locally determined through managerial prerogative where appropriate and through collective negotiations with the local union when necessary.

Transparency of Process

To increase transparency of the G&T process, a school district is required to make detailed information available on its website regarding the policies and procedures used to identify students as gifted and talented and the continuum of services offered to gifted and talented students. The information shall include the criteria used for consideration for eligibility for the gifted and talented services, including the multiple measures used in the identification process to match a student's needs with services, and any applicable timelines in the identification process.[10]

An individual who believes that a school district has not complied with the SGTEA provisions may file a complaint with the board of education. The right to file a complaint shall be set forth in the board's policy on gifted and talented education. The policy shall be linked to the homepage of the board's website. When a complaint is filed, the board of education shall issue a decision, in writing, to affirm, reject, or modify the

school district's action in the matter. A petition of appeal to the board of education decision may be filed with the Commissioner of Education within 90 days of the board's final decision.[11]

Challenges to Board of Education Gifted Identification and Programming

When a board of education is challenged as to its decision regarding gifted and talented identification and/or programming, the board's action is reviewed by the Commissioner of Education under an arbitrary and capricious standard. Traditionally the board of education will prevail in litigation before the commissioner, provided that its policies and procedures are clear and consistent with the DOE policy on identification, the selection process is clearly set forth, there is a rational basis for the process and it is correctly and consistently applied.

This is particularly important for attorneys to know, whether they represent school districts or parents of gifted and talented students, as the standard of review on an appeal of a board of education decision is critical to developing a litigation strategy or a response to filed litigation.

Professional Development

The law requires that boards of education actively assist and support professional development for teachers, educational services staff, and school leaders in the area of gifted and talented instruction.[12]

The need for G&T professional development for school administrators and teachers cannot be overstated. Most professional educators entering the Gifted and Talented field have no background or experience in gifted education; they simply don't know what they don't know. That is not surprising as very little in teacher or school administrator training programs address gifted and talented programming and gifted student needs. There are no requirements in teacher pre-service training for gifted and talented education. Some have argued that part of the six required credits in special education for the instructional teaching certificate could address the needs of twice exceptional students; students with a disability who are also gifted.[13] But that is the only area of pre-service education that even touches on gifted and talented students. That's why professional development is so critical. Some examples of available Gifted and Talented professional development programs include:

- Gifted and Talented Certificate Programs (9-12 credits) at Rutgers University and Montclair State University.
- Graduate School Programs at Rider University and University of Connecticut
- New Jersey Association for Gifted Students (NJAGC) annual conference
- NJPSA FEA LEGAL ONE Gifted Institute (four day, three hours per day program).

Many school districts use staff who have attended these programs to turnkey the programs to school district administrators and teachers.

It should be noted that while, as with any teaching assignment, an instructional certificate is required to teach gifted and talented education, no specific endorsement is needed. Any teacher can teach gifted and talented education without any additional training or certification. That's another reason why ongoing professional development becomes so important.

Department of Education Oversight and Board of Education Reporting Requirements

The Strengthening Gifted and Talented Act requires the Commissioner of Education to appoint a coordinator for gifted and talented services. The coordinator shall have teaching experience and specialized knowledge in gifted and talented education. The coordinator shall be responsible for providing support by identifying and sharing research and resources to school districts as they develop, implement, and review their local gifted and talented services and shall be responsible for reviewing the information about gifted and talented services provided by each school district to support implementation of the provisions of the SGTEA.[14]

Crystal Siniari is the current coordinator for gifted and talented services. Her office is located in the Office of Standards within the Division of Teaching and Learning Services.

Each school district files, with the coordinator, consistent with the school district's QSAC reporting schedule (every three years), a report that includes:

- the gifted and talented continuum of services, policies, and procedures implemented in the school district;
- the total number of students receiving gifted and talented services in each grade level kindergarten through grade 12 disaggregated by race, gender, special education designation, and English language learner designation;
- the professional development opportunities provided for teachers, educational services staff, and school leaders about gifted and talented students, their needs, and educational development; and
- the number of staff employed by the school district whose job responsibilities include identification of and providing services to gifted and talented students.[15]

While not contained in the SGTEA or the G&T administrative code, the DOE website contains another G&T reporting requirement for school districts. Annually, student (SID) and staff (SMID) data

must be submitted by school districts to NJSMART no later than Oct. 15 for the fall collection, and June 30 for the end-of-year collection. This data collection fulfils the SGTEA's mandate to report:

- "the total number of students receiving gifted and talented services in each grade level kindergarten through grade 12 disaggregated by race, gender, special education designation, and English language learner designation;" and
- "the number of staff employed by the school district whose job responsibilities include identification of and providing services to gifted and talented students."[16]

The new reporting requirement under SGTEA may be the most significant provision in the recent legislation as nothing makes a school district take a closer look at its programming than the need to report aspects of the program to the Department of Education.

Equity Concerns in Gifted and Talented Programming

An analysis of the Fall 2022 NJSMART data was presented to the State Board of Education in August 2023. The data revealed that certain demographic groups were underrepresented in gifted and talented programs.

- Black students represent 14.4% of the overall New Jersey student population but make up only 8.7% of the total New Jersey gifted and talented population.
- Hispanic students represent 32.5% of the overall New Jersey student population but make up only 23% of the total New Jersey gifted and talented population.
- Asian students represent 10.5% of the overall New Jersey student population but make up 18.4% of the total New Jersey gifted and talented population.
- White students represent 39.2% of the overall New Jersey student population but make up 46.7% of the total New Jersey gifted and talented population.
- Economically disadvantaged students represent 35.8% of the overall New Jersey student population but make up only 24.7% of the total New Jersey gifted and talented population.
- Students with disabilities represent 16.7% of the overall New Jersey student population but make up only 4% of the total New Jersey gifted and talented population.
- Multilingual learners represent 8.9% of the overall New Jersey student population but make up only 1.7% of the total New Jersey gifted and talented population.

The DOE, recognizing the equity concerns with the data, has pledged to

- Continue to encourage LEAs to remove barriers to G&T programs, enrichment opportunities and advanced coursework.
- Continue to co-design resources with key stakeholders and partners.
- Update and disseminate guidance and resources that focus on highlighting promising practices for increasing representation across student groups.
- Redesign data collection measures for ease of reporting and quicker interpretation of the findings.[17]

Multilingual Students in Gifted and Talented Programs

Boards of education have traditionally been required, pursuant to the Equity in Classroom Practices administrative code, to reduce or prevent the underrepresentation of minority, female, and male students in all classes and programs, including gifted and talented, accelerated and advanced classes. The Managing for Equity in Education code was revised in August 2023 to now require that boards of education to increase and promote equitable representation of all students in all classes and programs.[18]

The recently readopted Bilingual Education code, N.J.A.C. 6A:15, contains several new and revised provisions relative to multilingual learners (MLs) and gifted and talented programs. They include:

- Each district board of education shall design additional programs and services to meet the special needs of eligible MLs and include, but not be limited to, among others, gifted and talented education services.[19]
- School district staff shall engage in ongoing and continuous language instruction education program (LIEP) evaluations that shall include regular reviews of student performance data (for example, graduation rates and assessment results) and other measures (for example, absenteeism, disciplinary records, and course enrollment) to evaluate whether MLs in the school district have equitable access to educational opportunities, including, but not limited to, gifted and talented programs, advanced coursework and dual enrollment.[20]
- Each district board of education shall provide for the maximum practicable engagement of the parent of MLs in the development and review of program objectives and dissemination of information to and from the district boards of education and communities served by the LIEP, including ensuring all information regarding an ML's educational experience is available in the language in which the parent possesses a primary speaking ability, and in English; specifically including gifted and talented programs.[21]

P.L. 2017 c. 171, codified at N.J.S.A. 18A:35-26.1, requires the Commissioner of Education to develop guidance on identifying English language learners (ELL) for gifted and talented programs.

The guidance is intended to assist school districts in identifying ELL students K-12 who are gifted and talented and match them with programs that will help them achieve in accordance with their full capabilities. The commissioner was directed to provide guidelines on appropriate identification methods that may help reduce the underrepresentation of ELL students in G&T programs. The DOE issued guidance on Nov. 7, 2018, which, until recently was posted on the DOE website on the Gifted and Talented webpage. The guidance has been temporarily taken down from the DOE website and is being revised to reflect changes in the law, including the readoption of the bilingual code in August 2023. It is expected to be revised and reposted in the fall or early winter of the 2024–2025 school year.

Accountability for G&T Identification and Programming

Boards of education are held accountable for G&T identification and programming through the New Jersey Quality Single Accountability Continuum (NJQSAC) process.[22]

- The QSAC Instruction and Program District Performance Review (DPR) indicator for each academic area contains a reference to modifications for gifted students. English and Language Arts, Mathematics, Science, Social Studies, World Languages, Health and Physical Education, Visual and Performing Arts each contain a four-point indicator that the school has provided "Integrated accommodations and modifications for students with IEPs, 504s, ELLs, and gifted and talented students." That's four QSAC points in each of the seven academic areas or 28 QSAC points total.
- The QSAC Operations section contains a three-point indicator whereby the board of education confirms that it has submitted its required Gifted and Talented report; the G&T complaint policy is on the homepage of the board's website and detailed information is available regarding the policies and procedures used to identify students as gifted and talented and the continuum of services offered to gifted and talented students.

Conclusion

Gifted and Talented education is part of the constitutionally guaranteed thorough and efficient education for New Jersey's 1.4 million students. While over 108,000 students are currently receiving G&T services, it is believed by most education professionals that the number should be significantly higher. Good enough should not be good enough when it comes to New Jersey's students. Those who can benefit from instructional services in gifted and talented education should receive them, regardless of the school district in which they are located. The Strengthening Gifted and Talented Education Act and the New Jersey Administrative Code provide a legal structure for school districts to follow for the identification of and programming for gifted and talented students. While every school district is different and can design G&T identification processes and programming that can best serve its students, there are certain legal requirements that must be followed. These areas include identification, programs and services, transparency of process, professional development, oversight and reporting, equity, multilingual students and accountability under NJQSAC.

In order to best serve New Jersey's students, it is important that every school board attorney and school administrator fully understand the legal requirements of gifted and talented education and the legal requirements of what school districts must provide. A full understanding of the G&T legal requirements can place the school board attorney in the best position possible to advise the school district client. ■

Endnotes

1. New Jersey Department of Education Gifted and Talented Program nj.gov/education/sboe/meetings/agenda/2023/August/public4_gifted_and_talented_presentation.pdf
2. N.J.S.A. 18A:35-35, N.J.A.C. 6A:8-1.3
3. N.J.S.A. 18A:35-36 b 2, N.J.A.C. 6A:8-3.1a 5 i, ii
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5. N.J.S.A. 18A:35-36 b 2, N.J.A.C. 6A:8 -3.1c 3 iv
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20. N.J.A.C. 6A:15-1.5 b 4
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Out of the Classroom

Informal Removals and the IDEA's Discipline Procedures

By Stacey Cherry and Vittorio LaPira

The Individuals with Disabilities Education Act (IDEA) requires public school districts to provide a free appropriate public education to eligible children with disabilities ("classified students") and ensures that they receive special education and related services. School personnel may face challenging situations with classified students concerning student or staff safety, such as when school personnel are concerned that a student may be a danger to themselves or others. In those circumstances, school officials are tasked with balancing the needs of the student body with the needs of an individual classified student. Often, schools provide a student with alternatives to their typical day that are intended to improve the students' functioning academically, socially, or emotionally, which could include removing a student from a classroom when their behavior is inappropriate, or having the parent pick the student up so they can self-regulate and return the following day. When those responses are rare and the student quickly returns to their placement, this typically does not become a legal issue. However, when these measures extend beyond 10 consecutive school days (or 10 days cumulatively as part of a pattern of conduct), they can constitute a change in placement similar to a formal long-term suspension, and school administrators need to ensure that they follow the IDEA's discipline procedures for these "informal removals."

Removals: Disciplinary vs. Informal

Long-term suspensions occur when a student is excluded from school for more than 10 consecutive school days,[1] while short-term suspensions are those lasting 10 days or less.[2] For classified students, removal (including a suspension or informal removal) is considered a "change in placement" when it is for 10 or more consecutive

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school days *or* when cumulative removals that constitute a pattern exceed 10 days.[3] A pattern occurs when (i) the removals exceed 10 school days; (ii) the behavior "is substantially similar to the child's behavior in previous incidents that results in the series of removals;" and (iii) other factors such as the length of each removal, the total removal time, and the proximity of the removals are considered.[4] Some removals (such as an in-school suspension) *do not* invoke the IDEA's discipline procedures when the student is able to continue to participate in the general education program, receives the services in their IEP, and participates with non-disabled peers to the extent they would have in their current placement.[5]

In contrast to formal disciplinary actions like suspensions, informal removals occur when school personnel remove a student for all or part of their school day without invoking the IDEA's discipline procedures.[6] School staff must be careful not to overlook actions that *should* trigger the discipline procedures, but often do not in practice because the school personnel do not consider these actions to be disciplinary. Each of the following actions, however, constitute informal removals that require school personnel to follow the IDEA's discipline procedures: being picked up early by a parent at the school's request; walking around outside to "cool off" instead of participating in class; being sent for a school clearance (and not being allowed to return until cleared); putting the student on a partial or shortened day outside of the IEP process; denying access to attend electives or certain activities due to behavior; in-school suspensions (that do not meet the exception requirements); and bus suspensions (where busing is a related service).[7] In each case, school personnel must be mindful that these informal removals can constitute a change in placement that requires the school to follow the IDEA's procedural protections for disciplinary removals.

IDEA's procedural requirements

When school officials institute informal removals that last for more than 10 consecutive days, or 10 cumulative days for a pattern of behavior, the school must conduct a manifestation determination within 10 school days of the decision to change the placement.[8] The manifestation determination is made by relevant members of the Individualized Education Program (IEP) team, including the parent, who determine if the behavior was caused by, or had a "direct and substantial relation" to, the student's disability or the school's failure to implement the IEP.[9] If the team determines that the behavior was not a manifestation, and that the school implemented the IEP, the classified student is subject to the same treatment as general education students.[10] However, the school must ensure that the classified student continues to receive educational services (which can be in another setting) and, if appropriate, receive a functional behavioral assessment (FBA) and behavioral interventions so that the behavior does not recur.[11] In contrast, if the IEP team determines that the behavior constitutes a manifestation of the student's disability, the school must immediately return the student to their placement—unless the behavior meets one of the exceptions for an interim alternative educational setting (IAES)—and receive an FBA or, if the school already conducted an FBA, modifications to the student's behavioral intervention plan.[12] If the school failed to implement the IEP, it must similarly return the student to their placement immediately, and the school must take immediate steps to correct the deficiencies.[13]

Even where a student's behavior is a manifestation of their disability, if it involves conduct occurring at school, on school premises, or at a school function that involves having a weapon, possessing or using drugs, or causing serious bodily injury upon another, the school can remove the student to an IAES for 45 calendar days.[14] When the behavior does not meet those standards and is a manifestation of the student's disability, but the school believes that returning the student to their placement is "substantially likely to result in injury to the child or others." the school may request removal of the student to an IAES through an expedited due process hearing.[15] At an expedited hearing, the hearing officer can, after considering the testimony and evidence, either return the child to their placement or move the child to an IAES for 45 calendar days if the hearing officer finds that "maintaining the current placement of the child is substantially likely to result in injury to the child or to others."[16] This procedure can be repeated, as necessary, to continue the student's removal.[17]

While these laws protect all students in the Pre-K through 12th grade setting, students in pre-school through second grade enjoy additional special protections afforded to them by state law. Schools cannot suspend or expel pre-school students with disabilities.[18] They also cannot suspend or expel general education preschool students, except as provided under the Zero Tolerance for Guns Act.[19] Finally, schools may not issue out-of-school suspensions to kindergarten through second grade students unless the suspension is based on conduct that is "of a violent or sexual nature that endangers others"[20]; they also cannot expel such students except as provided under the Zero Tolerance for Guns Act.[21]

Responding Before Informal Removals Become a Change in Placement

Even before the informal removals reach the point of being a change in placement, the IEP team must consider positive behavior support and other

strategies to address the student's behavior.[22] But even putting aside the legal requirements (and protecting the district from a finding that it has not provided a FAPE), the district's proactive measures to assist the student will likely also increase the likelihood of a collaborative relationship with parents so that the IEP team can agree on the appropriate next steps without needing to initiate adversarial proceedings. Therefore, when school personnel find that they are implementing informal removals, even if they do not exceed 10 days, schools should consider convening the IEP team to determine if behavioral supports, related services, and supplementary aids and supports need to be added or changed.[23] They should, of course, consider any parental concerns about the student's behavior and how to support the student, and whether the IEP is calculated to provide a meaningful educational benefit.[24] Working together, the district and parent may be able to address the student's needs before the informal removals require invoking the IDEA's discipline procedures.

Psychiatric Clearances

On a related note, when school officials are so concerned that they believe the student is a danger to themselves or others, they often seek to have the student examined by a psychiatrist or other mental health professional to either confirm or assuage their fears, and to "clear" the student to resume attendance in school. That approach, which reflects sound judgment, common-sense, and putting student safety first, can unfortunately conflict with the IDEA's requirements when the parents do not voluntarily agree to have their child examined and to keep their child at home (often on home instruction) pending receipt of a written report clearing their child to resume in-school attendance. And that is because keeping a student home pending psychiatric clearance without parental consent constitutes an "informal removal" and a change in placement if it exceeds 10 consecutive school days.

Before making such a determination, school personnel must assess whether the student's behavior may pose a threat to the safety of the school community. In the case of a student with an IEP, the threat assessment team must consult with the IEP team to determine whether the aberrant or concerning behavior is a threat to school safety and is being properly addressed in a manner as required by all applicable federal and state special education laws. Working with the IEP team, the law requires the threat assessment team to determine if the behavior is part of known baseline behavior, or is already being managed under the student's IEP or FBA plan. If the behavior is not consistent with baseline behaviors or is not able to be effectively managed through current programming, then a threat assessment would need to be conducted. A special education representative must be part of the team and shall engage throughout the process.[25]

If the IEP team, including the parents, agree that a change in placement is appropriate for the student, the school district can revise the IEP through an IEP meeting or an IEP amendment.[26] The change in placement can include a shortened day or modified schedule (although the team should also consider appropriate supports that will lead to a full day), home instruction pending location of a new placement or completion of an evaluation such as a school clearance or psychiatric assessment, or a behavior intervention plan that includes leaving the classroom for breaks. If the school and the parents agree to these changes, then implementing them will not constitute an informal removal.[27] In the absence of agreement, however, schools are required to take a different approach.

The United States Department of Education view removals pending a psychiatric clearance as triggering the IDEA's procedures applicable to discipline and changes in placement.[28] School districts, therefore, are often faced with the task of making the "sales pitch" to parents to keep their children home pending the results of a psychiatric examination that should give the parents more insight into their child's mental state, thought processes, and disabilities (if any). By and large, schools are often successful in obtaining parental consent to address legitimate concerns about a student's behavior.

When parents refuse to provide such consent, however, a question arises as to whether the school needs to seek judicial intervention not only to compel the parent to have their child remain at home pending clearance from a psychiatrist or other mental health professional, but even to have the child examined and cleared in the first place. In those cases, school districts *may* face an uphill battle, depending upon the circumstances giving rise to the school officials' concerns. If it relates to a violation of school rules that would give rise to discipline, schools can impose disciplinary consequences that could include a long-term suspension (greater than 10 days), *provided* that the conduct was not a manifestation of the child's disability, and impliedly can condition that student's return on a psychiatric clearance.[29] But if the conduct does constitute a manifestation of the child's disability, or if it was not a violation of the student code of conduct, school officials must generally resort to asking courts to modify the placement of a potentially dangerous child by seeking an injunction.[30] The United States Department of Education has explained that the IDEA and its regulations' procedure for removal by a hearing officer, where there is a likelihood of injury, are *an additional means* to remove a student, and do not deprive schools of their long-settled discretion to apply for a *Honig* injunction.[31]

Conclusion

As school personnel address the various needs of their students, including those that implicate school and student safety, they must also consider whether the IDEA's discipline procedures are applicable. In most instances, the school personnel and parents will be able to reach a collaborative decision on how to best support the classified student. From time to time, however, even the most well-intentioned parents will create roadblocks to getting students the help that school officials believe they need, be it a change in their placement or further evaluation to determine the child's needs and how to address them. In those circumstances, schools have options to ensure the safety of both the student in question as well as the other children in the district. Furthermore, addressing student behavior before it constitutes a change in placement, as well as following the IDEA's discipline procedures when school officials have a legitimate reason to remove the classified child for more than 10 days, will ensure that school districts do not have procedural hurdles that prevent them from meeting a classified child's needs and ensuring that their districts remain safe for all students and staff. ■

Endnotes

1. N.J.A.C. 6A:16-1.3.
2. N.J.A.C. 6A:16-1.3.
3. 24 C.F.R. § 300.536(a); N.J.A.C. 6A:14-2.8(c).
4. 34 C.F.R. § 300.536(a)2; N.J.A.C. 6A:14-2.8(c)2.
5. 34 C.F.R. § 300.530; 71 Fed. Reg. 46715 (Aug. 14, 2006); U.S. Department of Education, "Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions," pp. 11-12 (July 19, 2022)("U.S. DOE Q&A"), *available at:* sites.ed.gov/idea/files/qa-addressing-the-needs-of-children-with-disabilities-and-idea-discipline-provisions.pdf.
6. U.S. DOE Q&A, p. 52 (July 19, 2022).
7. N.J.A.C. 6A:14-2.8; N.J. DOE Broadcast Memo, "U.S. Department of Education Guidance Regarding Discipline of Students with Disabilities" (January 11, 2023)("U.S. DOE Guidance"), *available at:* nj.gov/education/broadcasts/2023/jan/11/USDepartmentofEducationDisciplineGuidanceforStudentswithDisabilities.pdf; N.J. DOE Broadcast Memo, "Guidance Regarding the Use of Psychiatric Clearances for Students with Disabilities" (February 8, 2023)("N.J. DOE Psychiatric Clearance Guidance"), *available at:* nj.gov/education/broadcasts/2023/feb/8/GuidanceRegardingtheUseofPsychiatricClearancesforStudentswithDisabilities.pdf; U.S. DOE Q&A, pp. 11, 14-16, 52 (July 19, 2022); Dear Colleague Letter, 116 LRP 33108, 68 IDELR 76 (OSERS August 1, 2016).
8. 34 C.F.R. § 300.530(e)(1).
9. 34 C.F.R. § 300.530(e)(1) and (2).
10. 34 C.F.R. § 300.530(c).
11. 34 C.F.R. § 300.530(d)(1).
12. 34 C.F.R. § 300.530(f).
13. 34 C.F.R. § 300.530(e)(3).
14. N.J.A.C. 6A:14-2.8(d) and (f); 34 C.F.R. § 530(g).
15. N.J.A.C. 6A:14-2.7(n) and (o); 34 C.F.R. § 532(a).
16. N.J.A.C. 6A:14-2.7(n)(N.J. allows for removal for 45 calendar days, not school days); 34 C.F.R. 300.532(b)(2)(ii); see *Wayne Township Bd. of Educ.*, EDS 01492-23 (N.J. OAL May 3, 2023)(ordering IAES where student attempted to start a fire in the bathroom and previously threatened to "shoot up the school with everyone in it); *Franklin Township Bd. of Educ.*, EDS 00268-2022 (N.J. OAL Jan. 19, 2022)(ordering IAES after punching another student, posting video of himself holding a gun, policy determining that he has access to fire arms, and posting in a class assignment that his wishes include getting away with killing people and being known for killing).
17. N.J.A.C. 6A:14-2.7(n)1.
18. N.J.A.C. 6A:14-2.8(a)1.
19. N.J.S.A. 18A:37-2a.1.c
20. N.J.S.A. 18A:37-2a.1.b.
21. N.J.S.A. 18A:37-2a.1.a
22. 34 C.F.R. § 200.324(a)(2)(i); Dear Colleague Letter, 116 LRP 33108, 68 IDELR 76 (OSERS August 1, 2016).
23. 34 C.F.R. § 300.324(b); Dear Colleague Letter, 116 LRP 33108, 68 IDELR 76 (OSERS August 1, 2016); U.S. DOE Q&A, pp. 8, 13 (July 19, 2022).
24. 34 C.F.R. § 300.324(b); Dear Colleague Letter, 116 LRP 33108, 68 IDELR 76 (OSERS August 1, 2016); U.S. DOE Q&A, pp. 8, 13 (July 19, 2022).
25. N.J. DOE," Guidance on the Establishment of Behavioral Threat Assessment Management Teams," p. 12 (2023), *available at:* nj.gov/education/security/NewJersey_ThreatAssessmentGuidance.pdf.
26. N.J.A.C. 6A:14-3.7a(d); U.S. DOE Q&A, pp. 14, 52 (July 19, 2022).
27. U.S. DOE Q&A pp. 14, 52 (July 19, 2022).
28. U.S. DOE Q&A, pp. 22-23 (July 19, 2022); N.J. DOE Psychiatric Clearance Guidance (February 8, 2023).
29. 34 C.F.R. § 300.530(c).
30. *Honig v. Doe*, 484 U.S. 305 (1988).
31. 43 Fed. Reg. 12,621 (1999).

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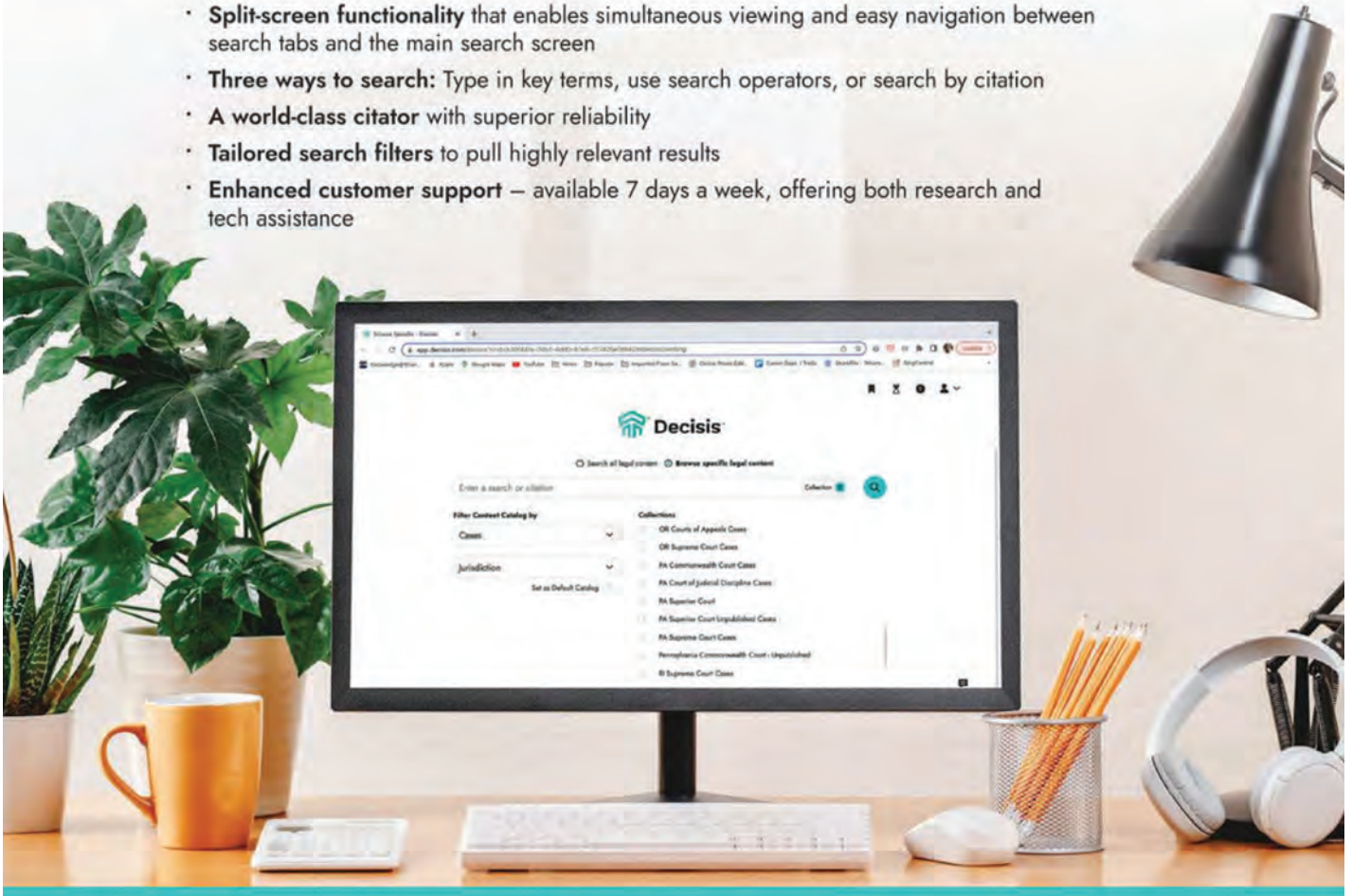

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"HOW WAS SCHOOL TODAY?"

If Your Disabled, Non-Verbal Child is Having Meltdowns in School, is Markedly Upset When They Return, and is Now Refusing to Go to School, Can You Legally Place a Recording Device in Their Belongings? And Can That Audio Recording Be Used as Evidence in Court Hearings in New Jersey?

By Joan Thomas

JOAN THOMAS *is an attorney with Sussan Greenwald & Wesler. She devotes her practice primarily to representing children with special needs.*

It's the question parents ask their children every day: How was school? Most parents get little more than "good," "fine" or maybe a few details to be treasured up. But what if your young child **cannot** tell you because they are non-verbal? What if they are clearly upset, suddenly showing school refusal for days on end, and your inquiries to teachers get only vague responses giving you little information? A secretly placed recording device may seem like the only answer, particularly in a world where everyone seems to be recording almost all the time.

Does Secretly Recording a Classroom Violate any New Jersey Laws?

The New Jersey Wiretap Law allows a recording of a conversation to be made without the consent or knowledge of all parties to the conversation as long as one party to the conversation consents to the recording.[1] The statute states in relevant part:

It shall not be unlawful under this act for:

> "d. A person not acting under color of law to intercept a wire, electronic or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception unless such communication is intercepted or used for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this State or for the purpose of committing any other injurious act."

Thus, it is not unlawful in NJ for a student to use a device to record teaching staff in a public school classroom as long as the purpose is not to commit any criminal or tortious act.

The Vicarious Consent Doctrine

Since the consent of one party is required in New Jersey, for younger or significantly disabled children (where the parent has placed a recording device in the child's clothing or backpack), the doctrine of "vicarious consent" should come into play. In *State v. Diaz*,[2] the Court held that parents could vicariously consent on behalf of their 5-month-old infant to recording a nanny abusing the child on videotape. The Court in *Diaz* noted that the New Jersey statute was modelled on the federal statute and held that the state statute incorporates the theory of vicarious consent.[3] Similarly, in *Cacciarelli v. Boniface*,[4] the Court held that a father, as the parent of primary responsibility, could vicariously consent to recording post-divorce telephone conversations between mother and children; it was objectively reasonable to believe that taping is necessary and in the best interest of the child.[5] Similarly, the Sixth Circuit held in *Pollock v. Pollock*[6] that as long as the parent (or guardian) has a good faith belief that it is in the best interest of the child, the parent can consent to recording.[7]

The same logic should apply with a disabled child where a parent has evidence that their child is unusually and consistently upset or dysregulated when returning from school. Such evidence supplies an objectively reasonable, good faith basis to be concerned about their child's wellbeing in school, entitling them to provide "vicarious consent" for those secret recordings. Such inquiries as to whether a parent has a good faith basis are necessarily fact specific. So if you place a recording device in your child's belongings, you are not violating the law in New Jersey, providing vicarious consent in our one-party consent state can be established.

School Policies Prohibiting Recording

Nevertheless, many New Jersey public school districts have adopted a policy broadly prohibiting students from recording, secretly or otherwise, in the classroom. The school policy against such recordings, known as Policy 5516 in many districts, may be seen as an attempt to "contract around" the one-party consent right and endow staff with broad privacy rights that are not otherwise recognized. School districts of course are entitled to proclaim policies regarding student behavior and much else on school property. They can also prescribe remedies for violations of those policies, such as temporarily confiscating recording devices and phones. However, over 12 years ago, even the New Jersey Principals and Supervisors Association recognized the impact of the one-party consent rule and cautioned that "a student secretly recording a classroom discussion, a disciplinary meeting with an administrator or a discussion with a counselor is not violating the law in New Jersey. ...According to NASSP research twenty-five states and the District of Columbia have laws which permit the recording of conversations where at least one of the parties to the conversation has consented to the recording. New Jersey is one of those states.... In the Cherry Hill School District a special education student recorded a classroom discussion where he was allegedly berated. Almost certainly the teacher and the paraprofessional have a diminished expectation of privacy."[8]

Similarly, the National School Board Association Council of School Board Attorneys publication also acknowledged that expectations of privacy are very limited in a public classroom: "In the case of a student making a recording of something going on across the room in a classroom full of students, it is highly unlikely that the subject being recorded has any reasonable expectation of privacy, due to the fact that their actions are taking place in a very public setting."[9] Gilsbach concludes: "Schools should...not rely exclusively on the wiretap law for prohibiting conduct where those laws may not even apply, such as in a circumstance where there is no expectation of privacy."[10] "Because some states are 'one-party consent' states, a student may not always need to ask permission to record."[11]

Recordings in the Context of Special Education

On the subject of privacy, it has long been recognized that public school classrooms do not provide teachers with an expectation of privacy in most cases, and especially in cases involving special education students. For those unfamiliar with the federal statute setting forth requirements for special education, the Individuals with Disabilities and Education Act broadly defines the rights of a

disabled child to a Free Appropriate Public Education, known as FAPE and an individualized educational plan known as the IEP. The IEP is, among other things, a blueprint that sets forth goals and objectives so that a disabled child's educational progress can be measured. Some 25 years ago, the Third Circuit Court of Appeals indicated that the appropriate standard for what progress means is whether the IEP offers the disabled child the opportunity for "significant learning" and "meaningful educational benefit."[12] And, more recently, the Supreme Court made clear that a disabled child is entitled to an IEP that is "appropriately ambitious" in light of that child's circumstances.[13] Where FAPE may have been denied, a parent may file a Petition for Due Process in the Office of Administrative Law against a school district. If not settled, a bench trial is then conducted. The school district has the burden of proof and the burden of production to establish that it provided a FAPE to the student.[14] It is assumed that all relevant evidence is admissible.

It is now clear that the content of a secret recording device that reveals what a non-verbal disabled child's school day is like (where parents are deemed to have provided vicarious consent) is admissible. In a very recent case on appeal to the U.S. District Court from the Office of Administrative Law, a federal judge found that the ALJ erred when he excluded recordings from a trial to determine whether FAPE was provided to a 5-year-old child with autism who struggled to communicate. Accepting the doctrine of vicarious consent, the Court held that the parents had a good faith basis to secretly place the device in their child's belongings, based on testimonial evidence they provided at the trial, and therefore they could provide the vicarious consent for the audio recordings. The Court held that the recordings were admissible and remanded the case with instructions to the ALJ to determine the recordings' authenticity if needed.[15]

Other courts have held that "[a]ny expectations of privacy concerning communications taking place in special education classrooms such as those subject to the proposed audio monitoring in this case are inherently unreasonable and beyond the protection of the Fourth Amendment."[16]

Even if recording is not illegal and there is little expectation of privacy in the public school classroom, can a school district successfully argue that they have a policy against such recordings to exclude the content of the relevant recording as evidence in a trial to determine if a disabled child is receiving FAPE? The U.S. District Court in the *Verona Boro Board of Education* case cited above decisively rejected this argument as well and held that the remedy for violating a school policy is simply school discipline; it is not exclusion of evidence in a trial to determine if FAPE was provided to a disabled child.

In conclusion, the New Jersey wiretap law provides some protection for recording in the classroom since New Jersey is a one-party consent state and the doctrine of vicarious consent may apply where there is a good faith basis to believe that such recording is necessary. You may run afoul of a school policy, but it's not illegal to record in New Jersey and the audio recordings may well be admissible in a trial to determine if your disabled child is receiving a free appropriate public education. ■

Plaintiffs in the Verona Boro *case were represented by Sussan Greenwald & Wesler.*

Endnotes

1. N.J.S.A. 2A:156A-4.
2. 308 N.J. Super. 504, 706 A.2d 264 (1998).
3. *Diaz*, at 514–15, 706 A.2d 264.
4. 325 N.J. Super. 133, 737 A.2d 1170 (1999).
5. *D'Onofrio v. D'Onofrio*, 344 N.J. Super. 147, 780 A.2d 593 (A.D.2001).
6. 154 F.3d 601, 607–09 (6th Cir. 1998).
7. *Pollack*, at 610.
8. Higgins, "The Walls Have Ears: Recording Conversations in School," *NJPSA* May 9, 2012. http://njpsa.org/walls-have-ears-recording-conversations-school. *See also Roberts v. Houston ISD*, 788 S.W. 2d 107 (Tex. App.–Houston 1990).
9. Erin D. Gilsbach, Esq. *50 Years of School Technology: Lessons Learned from the Past and Legally Defensible Practices of the Future* (2017) at 47-48.
10. *Id.* at 48.
11. Christina Henagen Peer and Peter Zawadski, "What the Courts Say About Recording in the Classroom," Best Lawyers Posting, May 22, 2022.
12. *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238 (3d. Cir., 1999).
13. *Endrew F. v. Douglas County School Dist. RE-1*, 580 U.S. 386 (2017).
14. N.J.S.A. 18A:46-1.1.
15. *G.L. and C.L. v. Verona Boro Bd. of Educ,* 124 LRP 28443 (D.N.J. July 26, 2024) (not for publication)
16. *See Plock v. Bd. of Educ. of Freeport Sch. Dist.* No. 145, 545 F. Supp. 2d 755, 758 (N.D. Ill. 2007) ("What is said and done in a public classroom is not merely liable to being overheard and repeated but is likely to be overheard and repeated."). *State v. McClellan*, 144 N.J. 602 (1999). More broadly, other courts have ruled that teachers have no general expectation of privacy in a public-school classroom. *See Peters v. Mundelein Consolidated High School District No., 120*, Slip Op. 2022 WL 393572 (N.D. Ill. Feb. 22, 2022.)

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Representing School Districts: Who is the Client?

By David B. Rubin

DAVID RUBIN *is of Counsel at Busch Law Group LLC. He has achieved national prominence in the field of education law through his representation of numerous public school districts and private schools throughout New Jersey, his leadership role in the National School Boards Association's Council of School Attorneys (COSA), and his reputation as a frequent author on school law and legal ethics issues.*

Representing public school districts is professionally challenging on many levels. Board attorneys must be conversant in the legal complexities any corporate entity faces in providing an important public service in a highly regulated environment.[1] Then there are the hundreds of state and federal statutes and regulations specific to public education, and the constitutional obligations government agencies must honor when interacting with private citizens. There is also much closer public scrutiny of board attorneys' legal advice these days, now that school districts have become battlefields in culture wars.

One of the most vexing challenges is complying with the ethical obligations the Rules of Professional Conduct impose on counsel for organizational clients in general, and public bodies in particular—first and foremost, knowing who the client is and, as importantly, who it isn't. A mutual understanding of this between lawyer and client, from the outset of the engagement, is critical for staking out the zone of confidentiality at the heart of the relationship, and for detecting any conflicts of interest.

RPC 1.13(a) seems to provide a straightforward answer: "A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents...."[2]

The duty of confidentiality is owed to a "client,"[3] but school board members, superintendents and others who may be the attorney's only contact person with the district sometimes assume, wrongly, that they are entitled to individual privacy in their dealings with counsel. It is the attorney's obligation to dispel any confusion about this by "explain[ing] the identity of the client when the lawyer believes that such an explanation is necessary to avoid misunderstanding on their part."[4] These individuals must understand that board attorneys deal with them only in their representative capacity as agents of the client—the district—not as clients in their own right.

A 1976 opinion of the Advisory Committee on Professional Ethics (ACPE) provides a textbook example of a school board attorney who lost sight of this.[5] A board member asked the attorney to draft a resolution censuring a fellow board member, but to keep it confidential between them since he was not sure he was going to introduce it. The rest of the board got wind of it and demanded that the attorney produce the draft. The attorney, believing he was on the horns of an ethical dilemma, sought guidance from the ACPE on whether he was obliged to honor the board member's confidentiality request. Although the opinion predated the adoption of the RPCs, the committee's response holds true today:

> The inquirer makes clear that the board member did not consult him as his individual attorney, but rather as the attorney for the board, to have the attorney draft a resolution for the board. The member was not, therefore, in a position to demand secrecy or confidential treatment as to matters germane to the board's business. If the attorney had understood that the member was demanding secrecy or confidential treatment as against the board, he should have made it clear that he could not accept such confidences.

The school law bar was thrown a curve last October when the Disciplinary Review Board (DRB) issued a decision casting doubt on long-held assumptions about who the client is, but a recent ACPE opinion has cleared the air and provided much-needed guidance. In *Matter of Supsie*,[6] the DRB recommended an admonition for a school board attorney who advised the board's majority about a fellow board member's behavior that may have violated the New Jersey School Ethics Act. Citing a 1970 ACPE opinion, the DRB found that "[a]n attorney who represents a municipal body represents not only that body as a whole, but also its 'individual officials...in the performance of their official duties.'"[7]

On that premise, the DRB held that advising the board majority about potentially unethical behavior by another board member violated RPC 1.7's conflict of interest rules because he was asserting the interests of one concurrent client against the interests of another.[8] The DRB further found that the attorney had a "material limitation" conflict because his conduct posed a significant risk that his representation of the board would be materially limited by his decision to assist some of its members who sought to investigate a board colleague who was unaware he had been tasked with doing so.[9]

The concept that board attorneys automatically have lawyer-client relationships with individual board members was news to board attorneys around the state, and controversial even within the DRB. Three members disagreed and voted to dismiss the complaint, including the Chair at the time, usually one of the DRB's sternest disciplinarians.[10] Adding to the uncertainty on the governing ground rules, the state Supreme Court summarily dismissed the complaint in a brief order with no explanation.[11]

Since the Supreme Court's adoption of the RPCs in 1984, board attorneys have properly looked to RPC 1.13 for guidance on who their client is. Subsection (a) clearly states that the client is "the organization." For one limited purpose—contacts by other counsel subject to RPC 4.2 and 4.3—the organization's lawyer is deemed to represent those members of the organization's governing body comprising the "litigation control group." Otherwise, individual board members are not the client, at least not without a specific undertaking to represent them.

That board attorneys do not automatically represent the board's individual members is underscored by RPC 1.13(e), providing that they "***may*** also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of RPC 1.7..." (Emphasis added.) "May," in that context, clearly means only if the attorney chooses to do so.

Board attorneys typically do not involve themselves in disputes between individual board members, but there may be occasions where the board's institutional interests require action against a member of its governing body. Some

examples: N.J.S.A. 18A:12-2 provides for removal of a board member who is "interested directly or indirectly in any contract with or claim against the board." N.J.S.A. 18A:12-3 allows for removal of a board member who ceases to reside in the district or fails to attend three consecutive meetings without good cause. A rogue board member's violation of the New Jersey School Ethics Act may be so disruptive that the board feels compelled to authorize the filing of a complaint with the School Ethics Commission. In all of these scenarios, the usual practice had been for boards to seek advice and representation from their general counsel whose client is the district, not the individual board member whose conduct is called into question.

To be sure, board attorneys recuse themselves, as they must, if a real or perceived relationship with the adverse board member materially limits their ability to provide vigorous representation on the issue at hand.[12] But absent a particular relationship giving rise to a material limitation, board attorneys have not understood RPC 1.13 or 1.7 to pose a conflict in representing the board's interests when they clash with those of an individual member.

The DRB's thinking was likely influenced by their perception, clearly spelled out in the decision, that the respondent was, for all intents and purposes, doing the personal bidding of a board president seeking retribution for losing his bid for re-election. (The board attorney involved in the case vigorously denied that charge.) However, their general formulation of board attorneys' ethical responsibilities was far broader than necessary to address that concern, since it suggested that general counsel for a public body may not advise or represent the board in any matter adverse to the interests of one of its members.

Curiously, the DRB's analysis failed to mention, much less explain away, RPC 1.13's clear, unambiguous statement of who an organizational attorney's client is. What's more, virtually all of the authorities cited by the DRB predated the adoption of the RPCs in 1984, which was concerning in itself because, as the official comment to RPC 1.13 made clear, "[t]his rule, which has no [prior Disciplinary Rule] counterpart, sets forth guidelines for the corporate or other organizational attorney." In other words, previous precedents alone could not be relied upon as authority but must be reviewed against the backdrop of this change in the ethics rules.

The Supreme Court's summary dismissal of the complaint, without explanation, eliminated any precedential weight the DRB's opinion may have had, but also left practitioners uncertain of what the guidelines are going forward. Fortunately, in response to a request for clarification on behalf of board attorneys statewide, the ACPE issued an opinion this past July providing at least some helpful guidance.[13]

The ACPE confirmed the primacy of RPC 1.13's directive that counsel for an organization represents the organization, not the members or officers of its governing body, and that pre-RPC ethics opinions holding otherwise are no longer good law. Honoring a request to investigate wrongdoing by a board member is a "delicate affair," the ACPE observed, but there is no *per se* conflict because that board member is not the attorney's client. Still, attorneys must consider whether their relationship with the individual board member would materially limit their ability to provide competent representation in the matter and bring in special counsel if that is the case. Attorneys also should be certain they have due authority to move forward and must share their findings with the entire board.

The DRB's *Supsie* opinion and the ACPE's clarification focused on conducting investigations, performing research and rendering opinions potentially adverse to the interests of a board member. What if the board wishes to go further and initiate litigation against that member? Or the board needs to defend litigation that board member may initiate herself?

The ACPE opinion does not squarely address these questions. On one hand, if the individual board member is not a client, as the opinion clearly confirms, there should be no ethical impediment to representing the district in that litigation. Nor would there seem to be any ethical obligation to include that member in strategy discussions with the rest of the board. On the other hand, the opinion holds that if a lawyer conducts an investigation and finds that a member has been engaged in unethical conduct, "the lawyer's recommendation must be made to the entire board and not to only select members of the board." This suggests an ongoing ethical duty of communication with that board member, as is normally required with clients.[14]

Whatever the lingering uncertainties about board attorneys' ethical duties when the interests of boards and their members come into conflict, the ACPE's opinion reinforces practitioners' widely held understanding of the organizational lawyer-client relationship since the adoption of RPC 1.13. Going forward, the decision whether to enlist special counsel will appropriately be driven by board attorneys' good faith assessment of any material limitations on their effectiveness and other client-relations considerations, but any without further confusion about who their client is. ■

Endnotes

1. A disclaimer: This article uses the term "Board attorney," the title informally given to attorneys for school districts which, technically, is a misnomer. As discussed below, the client is the school district itself as an entity, not merely the board of

education that functions as its governing body, and certainly not the individual members of the board. In fact, RPC 1.13 authorizes counsel to blow the whistle on boards who engage in serious misconduct that puts the entity at risk. *See* RPC 1.13(c).

2. *See also* RPC 1.13(f)("For purposes of this rule 'organization' includes any...state or local government or political subdivision thereof[.]")
3. *See* RPC 1.6(a)(Absent certain exceptions, "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation[.]")
4. RPC 1.13(d).
5. *See* ACPE Opinion 327, 99 N.J.L.J. 298 (1976), accessible at tinyurl.com/bdep2rf5.
6. Docket No. DRB-23-091 (October 11, 2023), accessible at tinyurl.com/2afm6tdx
7. *Supsie*, at 25 (quoting ACPE Opinion 174, 93 N.J.L.J. 132 (1970), accessible at tinyurl.com/3skvuem7).
8. *See* RPC 1.7(a)(1)(prohibiting a lawyer from representing a client if "the representation of one client will be directly adverse to another client[.]")
9. *See* RPC 1.7(a)(2)(prohibiting an attorney from representing a client if "there is a significant risk that the representation...will be materially limited by the lawyer's responsibilities to another client...").
10. *See* Charles Toutant, "A Strict Disciplinarian is Leaving: What Does This Mean For Lawyer Ethics?" New Jersey Law Journal (March 26, 2024).
11. *See* tinyurl.com/2t9z2656.
12. *See* RPC 1.7(a)(2).
13. *See* ACPE Docket No. 07-2024, issued July 9, 2024, accessible at tinyurl.com/2p8yd2c6. Published opinions of the ACPE are binding on ethics committee in disciplinary matters. *See* RPC 1:19-6. Thus far, the ACPE has declined to publish this opinion but has authorized its public dissemination, and board attorneys (including this author) will justifiably regard its guidelines as a safe harbor.
14. *See* RPC 1.4(b) ("A lawyer shall keep a client reasonably informed about the status of a matter..."), even though that board member may be conflicted from discussion or decision-making involving his own personal interests.

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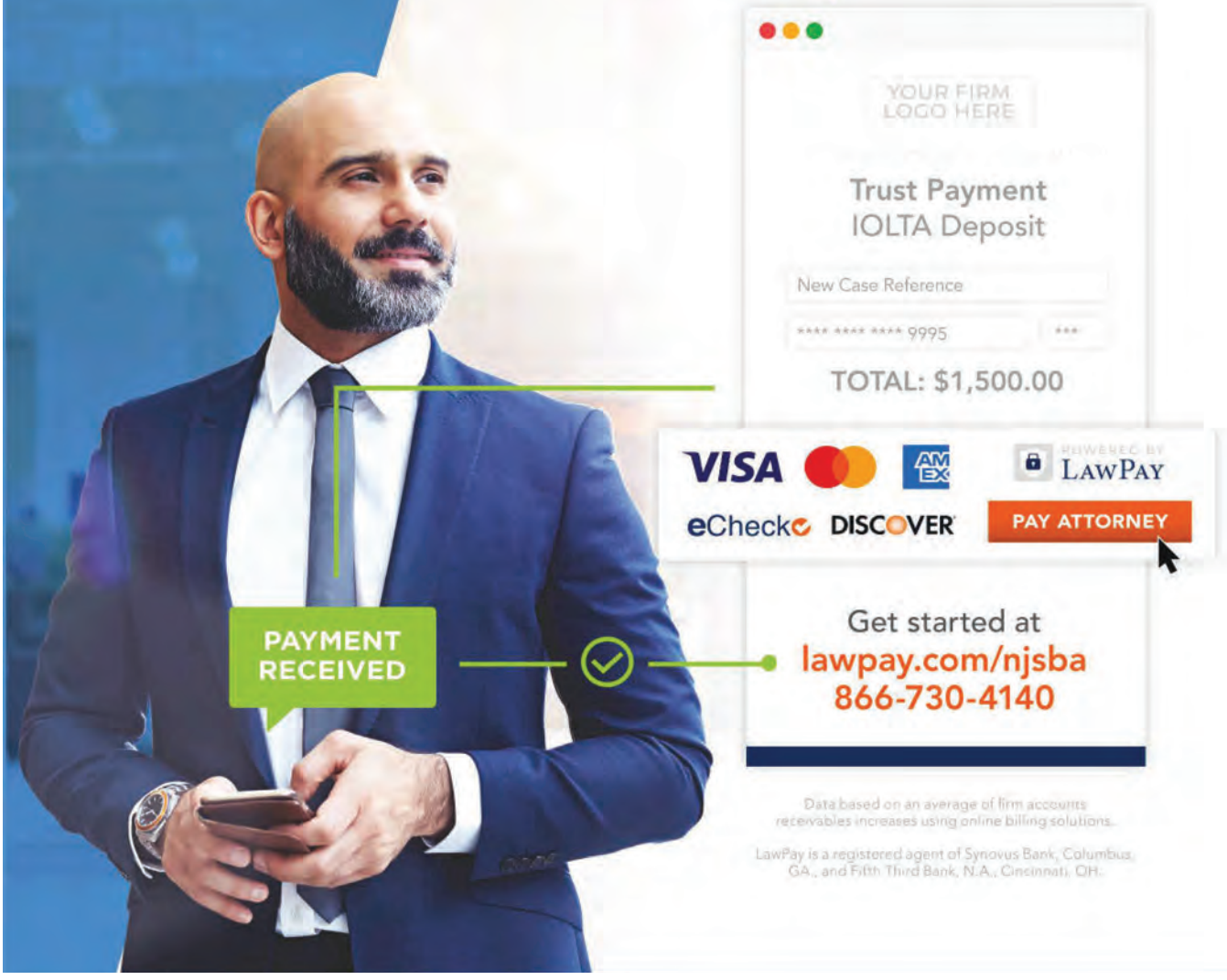

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Developments in Applications to Suspend Teaching Certificates for Failure to Provide Required Notice

Recent Laws, Court Decisions, Staffing and Societal Challenges Impact Standards

By Arsen Zartarian

ARSEN ZARTARIAN *is a partner at Cleary Giacobbe Alfieri Jacobs, LLC. Previously, he was Deputy General Counsel and Interim General Counsel of the Newark Board of Education, where he served as in-house counsel for 25 years. He frequently presents at statewide school and employment law seminars, and moderates the annual CLE programs "Administrative Law Forum," and "Representing School Employees and Boards of Education in Employment Law Cases."*

Today's school districts are confronted with myriad challenges—*e.g.*, an increased emphasis on harassment, intimidation and bullying investigations and reporting, controversies over curriculum and library materials, expedited special education due process/mediation procedures, myriad Department of Education directives, rising costs, and the re-institution of New Jersey Quality Single Accountability Continuum (NJQSAC) performance review monitoring.[1] Other specific challenges facing districts pertain to continued fallout from the recent COVID-19 pandemic—*e.g.*, mental health issues affecting both adults and students, student and staff absenteeism, school refusal, behavioral threat assessments, and delivery of compensatory education. Yet what is perhaps the single most formidable challenge for today's school district, overlapping both the aforementioned increased demands, exacerbated by the pandemic, and not exclusive to the business of education? The answer: staffing.

"Staffing" even affects the highest level of a district's governance, as many school boards of education are struggling with a paucity of candidates willing to serve as board members, uncontested elections, or eventually charged with appointing replacement board members for those who have left before completing their terms. With regard to the actual delivery of educational services, post-pandemic staffing shortages transcend all areas of school business—from transportation drivers to classroom teachers to classroom aides to related service providers to school and district-level administrators—creating a veritable "buyers' market" for individuals working in this area. While staffing shortages in areas such as entertainment or commerce may cause inconvenience or frustration, staffing issues in education impact a fundamental right—a thorough and efficient education—and, in the case of students found eligible for special education and related services, a free appropriate public education.

To address the educator shortage, the state has attempted to assist school districts by enacting laws that, among other things, develop creative certification programs, revisit teacher certification requirements, and allow for the temporary rehiring of retired educators without prejudicing their pensions.[2] Still, the staffing issues remain. One unfortunate by-product of this "buyers' market" is a type of "free agency" phenomenon that has materialized since the pandemic. Whereas in years past teaching staff members may have stayed in one school district for most of their careers or perhaps sought a different opportunity after a significant duration of time, the current environment has created a year-to-year world of instability with many educators shopping around to "take their talents" to the highest bidder, not unlike the recent NIL (name, image and likeness) phenomenon in college athletics.

With regard to non-tenured staff, districts are obligated pursuant to statute to make a written offer of employment by May 15 of each school year.[3] A negotiated, commonly used template of a one-year teacher employment contract generally contains a provision requiring that either side provide a certain period of time (generally 60 days) notice of intent to the terminate the contract. Although tenured teachers obviously cannot be terminated on a similar manner, tenured teaching staff have a statutory 60-day notice requirement.[4]

In the past, with the possible exception of some more difficult to fill positions (such as perhaps special education or mathematics), it was not uncommon for a school district to waive that 60-day notice provision, given that there may have been an abundance of qualified desirable candidates in the "hopper." These days, not so much. And the FOMO (fear of missing out) on a higher paying opportunity has emboldened some educators to openly defy that 60-day provision.

In such instances, two complimentary statutory provisions protect school districts, and presumably act as a deterrent for the teacher's cavalier breach of contract:

N.J.S.A. 18A:26-10. Suspension of certificate for wrongful cessation of performance of duties

Any teaching staff member employed by a board of education or an approved private school for the disabled, who shall, without the consent of the board or, in the case of an approved private school for the disabled, the board of directors of the school, cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.

N.J.S.A. 18A:28-8.

Notice of intention to resign required

Any teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve of a release on shorter notice and if he fails to give such notice he shall be deemed guilty of unprofessional conduct and the commissioner may suspend his certificate for not more than one year.

Although these two provisions are similar, the preliminary statute, *N.J.S.A.* 18A:26-10, references a "term of employment" and applies to nontenured staff, whereas the latter, *N.J.S.A.* 18A:28-8, by its language specifically applies to teaching staff members "under tenure of service." The obvious purpose of these statutes is "to provide notice to the school so that a suitable replacement can be hired without adversely impacting students" and thereby protect students.[5]

Faced with the prospect of teachers disregarding their obligations under their contracts and these statutes, upon receiving notice of a teacher's intention to abandon their jobs on short notice, chief school administrators have found themselves writing responding letters to these employees, threatening the filing of an application with the New Jersey Commissioner of Education to suspend the teacher's certificate. Obviously, it's in the district's best interest to retain the teacher while a suitable replacement is found and, to the extent that the teacher flouts the warning, a district's action to suspend the license can hopefully serve as a deterrent to other teachers who may be considering flouting their contractual notice provision and statutory obligations, leaving the district in the lurch. Given the marked spike in these filings over the past couple of years, this article will serve as a timely review of the status of the law in this area.

The district's application is commenced by Order to Show Cause filed with the commissioner.[6] Under applicable case law, the decision as to whether to suspend a teaching staff member's certificate is a discretionary determination vested in the commissioner, and all attendant circumstances specific to each case are evaluated.

The provision applies equally to charter schools. For example, in *In re Suspension of Teaching Certificate of Van Pelt*,[7] a teacher resigned from a charter school without giving required 60-day statutory notice only two days before staff training was to commence and eight days before opening of the school. In affirming the commissioner's decision, the Appellate Division held that the teacher wrongfully resigned her teaching position and thus suspension of the teacher's teaching certificate for one year was warranted due to the disruption caused in school.

Historically, a significant majority of decisions have resulted in the suspension of certificates for the maximum one-year period, especially when the facts demonstrate that individuals violated the notice requirement for strictly personal reasons, "putting their self-interest above the interest of the students and their professional obligation to provide adequate notice to the Board."[8] Generally, a full one-year suspension of a teaching certificate for leaving a district without sufficient notice is imposed, with the rare exception of "compelling reasons."[9]

In contrast, a few cases have found "compelling reasons" sufficient to avoid the imposition of a suspension. In *Board of Ed. of Black Horse Pike Reg'l School Dist. v. Mooney*,[10] the commissioner found that the teacher went "above and beyond" to ensure a smooth transition by developing a program through the end of the year and meeting with her successor to put the program in place and left final grades. In other situations, the commissioner neglected to order a full one-year suspension and instead imposed a reduced three-month penalty. For example, in *In re Rogers*,[11] the commissioner imposed a three-month suspension on a teacher of students with disabilities who switched jobs for "noble" reasons—to work with more severely disabled students in a state facility. In another situation, non-tenured teacher resigned following debilitating injury left her unable to drive or climb stairs. Although the commissioner determined that injured teacher's conduct was unprofessional within the meaning of the statute, her resignation was motivated by a medical crisis, supported by medical records and not personal gain, and imposed a three-month suspension.[12]

More often than not, however, the commissioner had determined that this standard of "compelling reasons" did not exist. Importantly, common predictable defenses such as "I did not receive sufficient support from my Principal or mentor," "I was deprived of an adequate amount of professional development," or "I had a lot of bad kids with behavioral problems" are not generally recognized. In that regard, in one case decided shortly after the pandemic, *In re Davidove, Long Hill Bd. of Ed.*,[13] the commissioner emphasized that a teacher's suggestion that "mental and emotional state" compromised by difficult students or lack of support by the administration despite requests for assistance was not a mitigating factor and "leaving to pursue different work because the work environment is difficult is not sufficient."

Similarly, a teacher's subjective feelings of inadequacy or fears of inexperience is not a defense. In *In re Savino*,[14] the teacher claimed she was uncomfortable being reassigned from elementary school to middle school, felt "unfit" to teach middle school even though she was fully certified to do so. Although the administrative law judge sympathized with the teacher and issued an initial decision concluding that the teacher's fear of unfitness constituted a mitigating factor warranting a shorter suspension and instituted a three-month suspension, the commissioner rejected that initial decision and imposed a full-year suspension.

Difficult staff or student relationships and interactions or a perceived fear of being embroiled in a possible law suit is not a mitigating condition. For example, in *In re Smith, Marion P. Thomas Charter School*,[15] a seventh grade teacher claimed he was forced to resign on three weeks' notice because a student called him a "pervert," another teacher accused him of harassment, and complained about

unscrupulous practices of the former administration of the charter school. This claim was rejected.

While the vast majority of recent decisions followed this similar pattern,[16] two recent decisions standout as outliers and may represent a more relaxing analysis, somewhat friendlier to the employee. In both these decisions, the commissioner appears to have placed an imprimatur on what could be deemed selfish actions by the employees and a disregard for the school districts and vulnerable students they abandoned, seemingly at odds with the spirit and policy of the statutes and making these applications somewhat less consistent.

In one such decision, *In re Castro, East Newark Bd. of Ed.*,[17] a certified social studies teacher entered into contract for the school year and the superintendent thereafter advised him that traditionally their social studies teachers were certified in both social studies and science and the district arranged to have him certified in science through a pilot program. The teacher resigned shortly before the school year because he did not want to teach science. The commissioner declined to suspend the teacher's certificate.

More recently, in a decision issued months ago regarding a controversy from the 2023-24 school year, *In re Chaiken, Elmwood Pk. Bd. of Ed.*,[18] a special education teacher answered a survey at the end of the prior school year that she would accept re-employment if offered, worked the extended school year summer program, came into school to set up her classroom on Aug. 28, but then quit with no notice for a higher paying job in another district. As a result, the district was left redeploying staff and using substitutes for over a month. The commissioner adopted the administrative law judge's initial decision dismissing the application because, notwithstanding her actions, the teacher never signed her employment contract. The commissioner determined there was no such concept as an "implied contract" in this area of the law and there was no acceptance of the district's offer of employment.

Despite these recent outlier decisions, the certificate suspension application procedure is a formidable tool that districts can use when confronted with the teacher placing their own self-interest above the school community. Evidence of disruption to the educational program such as redeployment of staff, use of substitutes, and compromised delivery of services should be keys to success in these applications, provided some extenuating "compelling reason" or other unique fact pattern does not override the public policy justification in statute. ■

Endnotes

1. As part of a comprehensive review to ensure that students are receiving a thorough and efficient education, districts are required to engage in a process of evaluation in five identified areas of school district effectiveness: instruction and program, fiscal management, governance, operations, and personnel. N.J.A.C. 6A:30.
2. These laws include P.L. 2021, c. 114 (Sept. 24, 2021)(DOE establishes a five-year pilot program to issue limited certificate of eligibility with advanced standing and limited certificate of eligibility for certain candidates); P.L. 2023, c. 70(June 30, 2023)(waives certain teacher certification and credentialing fees); P.L. 2023, c. 121 (July 20, 2023)(permits hiring of retired teachers and special service providers for up to two years without re-enrollment in the Teachers' Pension and Annuity Fund); P.L. 2023, c. 180 (Nov. 27, 2023)(permits authorization of an alternative teaching certificate); P.L. 2023, c. 215 (January 8, 2024)(establishes a pilot program to facilitate teacher certification of veterans; P.L. 2023, c. 251 (January 8, 2024) (prohibits limiting county college credits applicable towards educator preparation programs and teacher certification requirements): P.L. 2023, c. 327 (Jan. 16, 2024)(requires alternate route to expedite teacher certification of paraprofessionals employed in school districts).
3. See *N.J.S.A.* 18A:27-10.
4. See *N.J.S.A.* 18A:28-8, *infra*.
5. *Penns Grove-Carneys Point Bd. of Ed. v. Leinen*, 94 N.J.A.R. 2d (EDU) 405, 407.
6. See *N.J.A.C.* 6A:3-3.1(a)(4).
7. 414 N.J. Super. 440 (App. Div. 2010).
8. *In re Capshaw*, EDU 12318-06 (Apr. 30, 2007).
9. *Id.*
10. 1984 S.L.D. 810, adopted, 1984 S.L.D. 821.
11. 1989 S.L.D. 1962 (May 16, 1989), adopted, Comm'r (June 21, 1989).
12. *In re Borden, Edison Bd. of Ed.,* Comm'r 247-16.
13. 2020 WL 13032951, Comm'r, Oct. 9, 2020).
14. EDU 11688-04, Comm'r (Feb. 3, 2006).
15. EDU-09789-20 (July 26, 2021).
16. *See, e.g., In re Suspension of Teaching Certificates of Sullivan*, 2022 WL 18514993 (OAL Dkt. No. EDU-01767-22 Dec. 13, 2022), adopted, Comm'r (Feb. 2, 2023); *In re Suspension of Teaching Certificate of Johnson*, 2022 WL 7776582 (OAL Dkt. No. EDU-03411-22 Sept. 12, 2022), adopted, Comm'r (Oct 19, 2022); *In re Suspension of Teaching Certificates of Davidove*, 2020 WL 13032951 (OAL Dkt. No. EDU-01563-20 Aug. 31, 2020), adopted, Comm'r (Oct. 9, 2020).
17. Comm'r (May 25, 2023).
18. Comm'r (May 10, 2024).

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When is a High School Diploma Not a High School Diploma?

By Katherine A. Gilfillan

KATHERINE A. GILFILLAN *is a partner at Schenck Price Smith & King, LLP. She has more than 15 years of experience providing advice and counsel to public institutions, boards of education, trustees, and administrators in the area of labor and employment, public contracting, public governance, teacher and student discipline, FMLA/FLA, Title IX, FERPA, special education, Freedom of Speech and other constitutional issues.*

In New Jersey, a high school diploma is the credential awarded to a student who has completed the requisite course of study proscribed by the state of New Jersey. It indicates to employers, the military, and college admissions counselors, that the individual has achieved at least a minimal level of knowledge and understanding such that they are prepared to be successful in their careers and daily lives. For many, high school graduation is cause for celebration. But what happens when, after that diploma has been issued, a court finds that the student can return to their local high school and continue their education?

On Aug. 7, 2024, in the case of the *Board of Education of the Township of Sparta v. M.N. o/b/o A.D.*, New Jersey's Supreme Court held that a state-issued diploma, as compared to a state-endorsed diploma, does not constitute a "regular high school diploma" for purposes of the Individuals with Disabilities Education Act (IDEA). Had the facts and timing permitted, the student at issue, who had received a state-issued diplo-

ma, would have been permitted to re-enroll in his local high school.

The foregoing distinction is one without a difference. A school district issues a state-endorsed diploma after a student has completed a specific course of study, provided that the student meets attendance requirements and passes a state-adopted/created standardized test. The New Jersey Department of Education (NJDOE) issues the diploma under other circumstances where the student is not enrolled in high school but, on examination, demonstrates the competencies expected of graduates. Both diplomas signify that the holder has achieved and demonstrated the necessary competencies expected by the state.

On Aug. 7, 2024, in the case of the *Board of Education of the Township of Sparta v. M.N. o/b/o A.D.*, New Jersey's Supreme Court held that a state-issued diploma, as compared to a state-endorsed diploma, does not constitute a "regular high school diploma" for purposes of the Individuals with Disabilities Education Act (IDEA).

The Facts of the Case

A.D. was a disabled student who had been classified by Sparta as eligible to receive specialized instruction and related services under the IDEA. Despite district-provided support, the student dropped out of school after reaching age 16. The student's disenrollment form reflected that the student would be pursuing a General Educational Development diplomaGED and taking classes at the local community college. The student took and passed the GED testing and applied to the NJDOE which issued the student a high school diploma. The student sought to re-enroll in the district claiming that a diploma issued by the state was based upon a passing grade on the GED test and therefore did not constitute a "regular high school diploma" as contemplated by the IDEA's implementing regulations. Therefore, the student argued, he had the right to re-enroll in school until he attained either a state-endorsed diploma or he reached the age of 21.

The parent, on behalf of the now-adult child, brought a petition for due process claiming that the school district failed to provide the student a free, appropriate public education ("FAPE") by denying the student's re-enrollment.

The IDEA's regulation at issue in the *Sparta* case purports to terminate a school district's obligation to provide FAPE once the student has either "graduated from high school with a regular high school diploma" or reached age 21, whichever comes first. This same regulation defines a regular high school diploma as the:

> standard high school diploma awarded to the preponderance of students in the State that is fully aligned with State standards, or a higher diploma... A regular high school diploma does not include a recognized equivalent of a diploma, such as a general equivalency diploma, certificate of completion, certificate of attendance, or similar lesser credential."

The district filed an affirmative action with the Commissioner of Education requesting a declaration that the student's receipt of the state-issued diploma foreclosed the student's right to reenroll in the district and further declaring that the receipt of the state-issued diploma foreclosed the student's entitlement to receive special education and related services under both the IDEA and its concomitant state statute. The matters were not consolidated but were assigned to the same Administrative Law Judge (ALJ).

The school district moved for summary decision. The ALJ, citing an earlier commissioner case, determined that the state-issued diploma was aligned to the state's curricular expectations and therefore terminated the district's obligation to re-enroll the student or provide FAPE moving forward. The parent filed exceptions and the commissioner affirmed the ALJ's decision with little analysis. While awaiting the commissioner's decision, the special education/FAPE case was tried in the course of a day. The ALJ concluded that the school district afforded the student FAPE while he was enrolled in the district and further determined that A.D. was not entitled to prospective relief, including re-enrolling in the district, for the reasons set forth in the earlier decision.

The parent, now represented by counsel, appealed the due process/special education matter to the District Court of New Jersey and simultaneously filed an appeal of the commissioner's decision in the Appellate Division where the NJDOE and the commissioner were added as direct parties.

The Appellate Division rejected the plaintiff's request to stay the appeal pending a decision by the District Court. Ultimately, the Appellate Division upheld the commissioner's decision affirming that a student who is issued a high school diploma is no longer entitled to re-enroll in their local school dis-

trict and is consequently no longer entitled to FAPE.

In the interim, the District Court entertained a plethora of motion practice. Both the board and the NJDOE cited numerous abstention doctrines in support of their respective requests for the Court to decline jurisdiction. The Court rejected these arguments clarifying that the plaintiff's argument was that New Jersey's regulation, as applied, deprived the student of a federal statutory right. As Congress provided a pathway to the federal courts for parties dissatisfied with the decision in their special education cases, the Court reasoned that Congress…"did not believe that federal review of state action under color of the IDEA was an unwarranted interference with the state educational system."

The Court also denied the plaintiff's request for a preliminary injunction seeking A.D.'s immediate return to Sparta High School. While the Court found that the plaintiffs had a likelihood of success on the merits of the claim, as the state-issued diploma appeared to be based solely on A.D.'s passing the GED, the Court found that the plaintiffs had not demonstrated irreparable harm. Specifically, the Court noted the unexplained and significant gap in time between the student's disenrollment and attempts to re-enroll and the fact that the student had already dropped out of school twice. As the plaintiff acted unilaterally in disenrolling from school and Sparta had not taken any affirmative action to disenroll the student and had worked to accommodate the plaintiff's alternating decisions, the Court found that compensatory services would suffice to remedy any demonstrable harm.

On Dec. 5, 2023, the Supreme Court granted certification and on Aug. 7, 2024, rendered its decision reversing the Appellate Division and holding that a state-issued diploma is not a regular high school diploma for purposes of the IDEA. Therefore, a student who receives this credential from the state remains entitled to receive FAPE until receipt of a state-endorsed diploma or attaining age 21.

New Jersey High School Diploma Requirements

The New Jersey Legislature created the Department of Education and vested it with the authority to make, enforce, alter, and repeal rules for its own governance and for implementing and carrying out the school laws for which it maintains exclusive jurisdiction. As the chief officer of the Department, the commissioner is responsible for prescribing the minimum course of study to be administered by New Jersey public schools. These courses are fashioned to prepare students for college and career success in the 21st Century and impart the New Jersey Student Learning Standards, developed by the DOE, to students. The regulations require a minimum of 120 credits within core academic and elective classes and every student must pass a statewide standardized assessment. Then, and only then, may the local high school issue a state-endorsed diploma.

However, not all citizens are able, or have the opportunity, to attend regular public schooling. In consideration of numerous state and federal fiscal, social, and policy factors which attach to a high school credential, the New Jersey Legislature adopted a broad policy which allows individuals, who demonstrate the requisite level of academic skills, to obtain that credential. That credential assists the individual in becoming gainfully employed or continuing their educational/technical pathway. For example, a veteran may earn a state-endorsed diploma if they left high school for purposes of serving in the military ("Operation Recognition"). Students who leave high school but earn 30 college credits are entitled to receive a state-issued diploma. The commissioner may also issue a diploma to students who have successfully completed a state-approved adult high school program.

The commissioner has the express authority to award a state-issued high school diploma to certain individuals, age 16 and over, who have left high school without a high school credential. These students must take and pass a high school equivalency examination and if their passing score exceeds the "cut score" adopted by the State Board of Education, they are issued a high school diploma. Not all individuals who take the high school equivalency exam receive a diploma. According to the plaintiff, the state-issued diploma was merely "a GED in disguise." The Court expressed interest in, but eventually rejected, the commissioner's attempt to distinguish between a general equivalency diploma, as cited in 34 *C.F.R.* §300.102 and the General Education Development test as cited in New Jersey's regulation. Agreeing with the plaintiff, the Court noted that "all" the student had to do was pass the GED test or other adult education assessment in order to receive a diploma.

The Court focused its attention on the type of diploma that the majority of the students in the state receive; whatever the majority of students received constituted "the regular high school diploma." Undoubtedly, the majority of students in New Jersey receive a state-endorsed diploma from their local high school. However, even a student who attends a four-year high school program, and who receives a state-endorsed diploma, may take a different route from the majority of their peers to qualify for that same credential.

The state allows all students, classified, disabled non-classified, and neurotypical alike, to attend school up to the age of 20. If a student does not successfully complete 120 credits within four years, and they have not reached the age of 20, they may continue to seek a diploma

through the year in which they turn 20. Although many students complete their high school career within four years, there is opportunity for a student to take more time if they need to do so.

Students are required to pass that graduation cohort's statewide assessment which demonstrates high school proficiency. If a student is unable to pass that test, they are permitted to take alternative assessments such as the PSAT, SAT or ACT, in order to demonstrate their knowledge of the curricular standards. A student may have to complete a portfolio appeals process if the foregoing pathways are foreclosed. Even a student's curricular pathway may be different. In 2009, the DOE required local boards of education to establish a process to approve individualized student learning opportunities that met or exceeded the then-existing Core Curriculum Content Standards through alternative activities, commonly known as Option II. These individuals may not have even engaged in the same scope and sequence set forth in the New Jersey Student Learning Standards because of their particular strengths, weaknesses, personal circumstances or learning styles. Yet, they were entitled to a state-endorsed diploma.

None of these alternative pathways would be considered a "traditional" or "regular" route taken by the "majority" of high school students. Nevertheless, these students can eventually attain that state-endorsed diploma; they demonstrate the same basic set of skills as other students who gained their credential by following the "standard" proscriptions. If these individuals can demonstrate the necessary skills that the state has indicated are aligned to its expectations for student learning, they are entitled to receive all of the benefits and emoluments of that credential.

The Right to Control Education

The United States Constitution does not enumerate a right to education and therefore, under the Tenth Amendment, the responsibility for building and implementing a system of education is reserved for the states. There are no federal curricular standards. This task is left to the states. Arguably, localized control allows for diverse educational approaches that reflect cultural, social, and economic differences across various communities. Conversely, decentralization has led to disparities in educational quality and availability of resources, fueling an inequality of access debate at both the federal and state levels.

The federal government sets the country's broad educational policies through various funding statutes which have improved outcomes for many under-represented populations. The federal government's foray into establishing substantive educational standards has been met with resistance and less success.

By way of example, in 2002 President George W. Bush signed the No Child Left Behind Act (NCLB) which marked a significant increase in federal oversight of student academic achievement across the nation. NCLB required states to implement standardized testing and accountability measures to order for states to receive federal funding. While NCLB aimed to close achievement gaps, it faced criticism for its one-size-fits-all approach and punitive measures. In 2015, NCLB was replaced by the Every Student Succeeds Act (ESSA) which provided states "more flexibility" to develop accountability systems while focusing less on "high stakes" testing. These measures have also sought to improve outcomes for under-represented populations. Both laws were accepted with little contention.

In contrast, in 2010, the federal government sought to have states adopt federal curricular standards, i.e., the "Common Core." These rigorous standards would be imposed across the nation and be expected of all learners. Thus, learners in Idaho would be learning the same content as students in New Jersey. The majority of states, including New Jersey adopted the standards wholesale or with minor adjustments. A phrenetic backlash from parents and educators over the testing of these standards and having to demonstrate student progress in such an objective fashion, resulted in the majority of states repealing or revising the standards to coincide with the state's own determination of what and when a student should understand a particular concept. Thus, it is clear that ingrained within the American psyche is the idea that the state should maintain local control and decision-making over what should be taught to its students and when. Thus, where 34 *C.F.R.* §300.102(a)(3)(i) refers to a diploma that is fully aligned with state standards, these are standards are set, assessed and determined acceptable by the state, not any federal requirement.

The parent's argument in *Sparta Township* remained almost exclusively focused on the term "GED" and the fact that the regulation specifically called out that type of diploma or credential as being impermissible. The district urged the operative consideration to be whether the state-issued diploma was fully aligned with the state's academic standards, meaning, did the student know at least the minimum that the state expected of its graduates. As the IDEA's definition of a free and appropriate public education is one that "meets the standards of the state," it was a reasonable to focus on the substantive education rather than Congress' choice of terms to describe the lesser expectation for certain disabled students.

While the Supreme Court repeated the phrase "fully aligned with the State's academic standards" 21 times in its opinion, the substance of the district's argument was not squarely addressed. In fact, there was little to no discussion of curricular expectations for students. Rather, the Court commented that the defendants had overlooked the significance of

the singular predicate term "the" in the phrase "the standard high school diploma." According to the Court, New Jersey created two types of diplomas, a state-issued and a state-endorsed diploma. As the federal regulation specifies a singular diploma as the "regular" diploma, there can only be one diploma that meets this requirement. According to the Court, that is the state-endorsed diploma. The Court also found it meaningful that the DOE does not include individuals who obtain a state-issued diploma in its graduation report to the United States Department of Education under ESSA and cited to statistics posted on the DOE's website.

So, how does this decision impact local school districts and the DOE? Outside of the administrative nightmare that DOE will need to remedy how to code students who have received a diploma but then look to return to school, in the statewide student information system, districts will need to consider very practical questions. If a student returns four years after leaving, what happens to that four-year-old IEP? Potentially, that returning student's disability has been ameliorated to a point where the student may not be eligible for specialized instruction. What, if anything, is the student's programming while the student awaits evaluation? If the student has been employed for four years, what is the best scope and sequence of classes to offer this student? Should the student attain the necessary credits, does the school district issue another diploma and how is that coded in the state's system?

One final comment on the Supreme Court's decision is warranted because it demonstrates potential unintended consequences. The Court, in discussing the alignment of the IDEA's definition to ESSA's definition of a regular diploma, cites to ESSA's language which provides that a "regular high school diploma" is:

> the standard high school diploma awarded to the preponderance of students in the State that is fully aligned with State standards, or a higher diploma, except that a regular high school diploma shall not be aligned to the alternate academic achievement standards described in section 6311(b)(1)(e) of this title...

Section 6311(b)(1)(e) of ESSA discusses the alternate academic achievement standards for students with the most significant cognitive disabilities. For those who work within the special education field, this reference appears directly related to students using a Dynamic Learning Map assessment. However, it is equally plausible that a court could find that a student, who did not pass that year's state standardized assessment, and whose state-endorsed diploma is based upon a state-approved substitute competency test such as the PSAT, SAT, ACT, or ACCUPLACER, or who demonstrates proficiency through the portfolio appeals process, could similarly challenge the validity of their diplomas as these alternative assessments could be interpreted as alternate academic achievement standards and not representative of the "majority's" state-endorsed diploma. ■

Endnotes

1. (A-16-23)
2. 34 *C.F.R.*§300.102(a)(3)(i), (iv)
3. *N.J.S.A.* 18AL46-1.1 *et seq.*
4. *B.A. and J.J. o/b/o M.A.A. v. Bd. of Educ. of the Borough of Somerville, Somerset County*, 2009 N.J. AGEN LEXIS 24, Cmm'r of Educ #201-09, June 22, 2009
5. 2:21-cv-19977-JMV-JSA (filed 8/23/22)
6. 2:21-cv-19977-JMV-JSA (Filed 4/12/22). It is unclear from the record why the student was initially permitted to re-enroll in the district.
7. *N.J.S.A.* 18A:4-15; *N.J.A.C.* 6A:3-1.1(a)
8. *N.J.A.C.* 18A:4-25; *N.J.A.C.* 6A-8.1.1 *et seq.*
9. *N.J.S.A.* 18A:7C-4; *N.J.A.C.* 6A:8-5.1
10. *See*, *New Jersey High School Equivalency Test, More Test Options, Less Opportunity*, K. White, E. Zundl, Z. Heard, P. Sinha, Rutgers Center for Women and Work, Jan. 2018
11. *Ibid.*
12. *N.J.S.A.* 18A:7C-4.1
13. *N.J.A.C.* 6A:8-5.2(c), (d)
14. *N.J.S.A.* 18A:7C-8
15. *Ibid.*
16. *Ibid.*
17. nj.gov/education/adulted/pathways/ged/index.shtml
18. *N.J.S.A.* 18A:38-1
19. *N.J.S.A.* 18A:7C-1; *N.J.A.C.* 6A:8-5.1
20. *N.J.S.A.* 18A:7C-3; *N.J.A*.C. 6A:-5.1(f)(1)(ii)
21. *N.J.A.C.* 6A:5-1(a)(2)(i)(1), (2)
22. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (U.S. Const. amend. X)
23. *Individuals with Disabilities Education Act*, 20 U.S.C. §1400 *et seq.*, *No Child Left Behind Act* (NCLB 2002), Pub. L. No. 107-110, §115, Stat. 1425, *Every Student Succeeds Act*, 20 U.S.C. §6301 (2015)
24. Wil Greer, *The Journal of Educational Foundations*, Vol. 31, No. 3&4, Fall/Winter 2018
25. 20 *U.S.C.* §1401(9)

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1. Publication Title	2. Publication Number	3. Filing Date
New Jersey Lawyer	380-680	9/15/24
4. Issue Frequency	**5. Number of Issues Published Annually**	**6. Annual Subscription Price**
Bi-monthly	6	$60

7. Complete Mailing Address of Known Office of Publication *(Not printer) (Street, city, county, state, and ZIP+4®)*
1 Constitution Square
New Brunswick, NJ 08901-1520

Contact Person
Mindy Drexel

Telephone *(Include area code)*
(732) 937-7518

8. Complete Mailing Address of Headquarters or General Business Office of Publisher *(Not printer)*
1 Constitution Square
New Brunswick, NJ 08901-1520

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor *(Do not leave blank)*

Publisher *(Name and complete mailing address)*
Angela Scheck
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13. Publication Title	14. Issue Date for Circulation Data Below
New Jersey Lawyer	8/1/23

15. Extent and Nature of Circulation			Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
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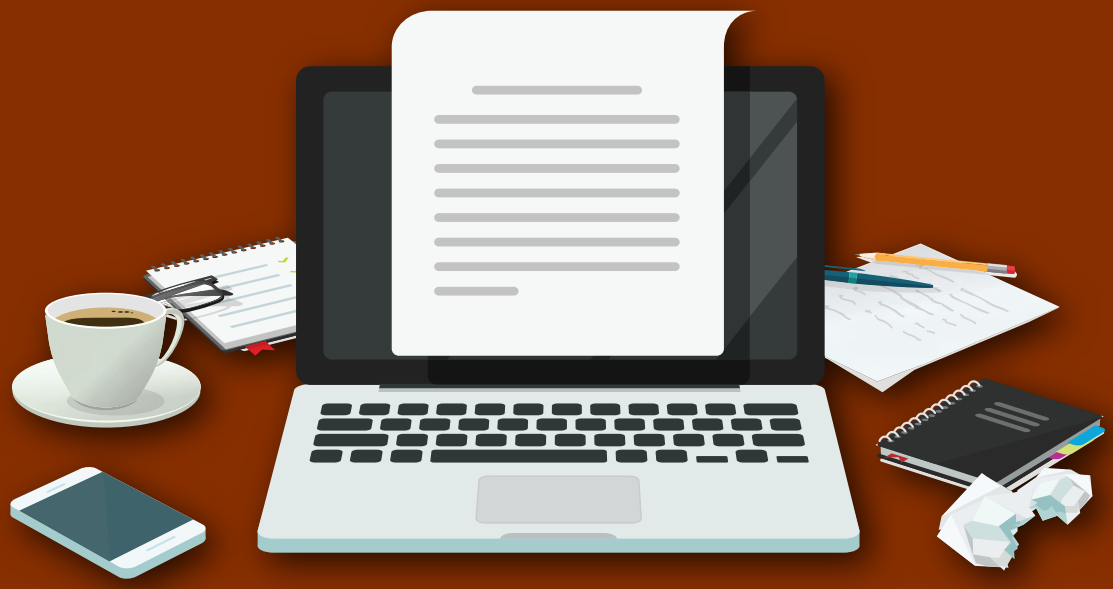

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