

PUBLIC FUNDING OF PRIVATE RELIGIOUS SCHOOLS - CONSTITUTIONAL OR UNCONSTITUTIONAL?

The United States Supreme Court recently sent a message to state legislatures that, in appropriate circumstances, states can enact legislation which permits the payment of public funds, based upon independent individual choice, for private religious school tuition. On November 27, 2006, the United States Supreme Court decided not to hear an appeal of a 2006 decision of the Supreme Judicial Court of Maine in Anderson et al. v. Town of Durham, effectively leaving the question of whether public funds can be used for the payment of private sectarian school tuition to individual state legislatures. The disputed Maine statute authorizes the use of public funds to pay tuition only at approved non-sectarian private schools on behalf of students who live in districts that do not operate a public high school. Implicitly, the use of public funds to pay tuition to sectarian or religious based schools is prohibited. In Anderson, the Maine Court was called upon to decide, for the second time, whether that statute, was constitutional. The Court had previously upheld the state's statute in Bagley v. Raymond School Department, a 1999 decision in which similarly situated plaintiffs had challenged the statute on constitutional grounds, including the free exercise of religion. As in Bagley, the Maine Supreme Court decided in Anderson that the statute was constitutional.

The plaintiffs in Anderson argued that subsequent to the decision in Bagley, a 2002 decision of the U.S. Supreme Court in Zelman v. Simmons-Harris, which upheld the constitutionality of an Ohio tuition voucher program, had changed the law and compelled a determination that the prohibition on payment for tuition to attend sectarian schools now violated the United States Constitution. However, the Maine Court in Anderson distinguished Zelman on the basis that the Supreme Court in Zelman did not focus on whether a religious institution benefited from receipt of public funds, but rather, whether the funds were channeled indirectly to that institution as a result of private choice. The Zelman court reasoned that the government aid went directly to numerous individual recipients. It was the individual recipients, not the government, who then made the decision to use the government aid for private religious school tuition.

While the Anderson court acknowledged such expenditures were permissible under Zelman, it declined to draw the inference that the Maine statute

was therefore unconstitutional and should be stricken. Rather, the Maine Court equated the Maine statute, which precluded the use of public funds for sectarian school tuition, to the 2004 United States Supreme Court decision in Locke v. Davey in which the Court held that a Washington state college scholarship program that prohibited the use of scholarship funds for pursuit of a devotional theology degree was constitutional. In Locke, the Supreme Court indicated that Zelman stood for the proposition that under the establishment clause, "the link between government funds and religious training is broken by the independent and private choice of recipients." The Supreme Court noted that if Washington State wished, it could, consistent with the establishment clause, permit scholarship recipients to pursue a degree in devotional theology. The issue in Locke was whether Washington could deny such funding without violating the free exercise clause. The Supreme Court determined that it could.

Similarly, the Maine Court in Anderson concluded that after Zelman, the state may be permitted to pass a statute authorizing some form of tuition payments to religious schools, but is not compelled to do so under Locke. Therefore, the Maine statute neither improperly infringed on the free exercise of religion nor violated the establishment clause. By declining to hear the appeal, the Supreme Court has effectively concurred in the Maine Court's analysis.



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DISTRICTS MUST NOW COMPLY WITH THE NEW IDEA PART B REGS

The 2006 final IDEA Part B regulations, which took effect on October 13, 2006, afford districts greater flexibility. Guidelines should be developed to assure proper implementation of the new regulations in several areas, including procedures for resolution meetings, excusing IEP team members from IEP meetings, child find requirements, removal of students for disciplinary reasons and FAPE eligibility. This article will highlight and summarize several areas addressed by the final regulations. However, due to the importance of compliance with the final regulations, our school attorneys stand ready to address any specific issue which your district faces in the area of special education.

One overarching theme of the 2006 final IDEA Part B regulations is to foster better communication, not only between parents and districts, but between everyone involved in the education of a student with special needs. Two excellent examples are the new provisions dealing with resolution and IEP meetings.

Impact of new regs on resolution meetings.

Resolution sessions were added to IDEA 2004 to assist parents and school districts in resolving their differences and hopefully avoid a drawn out and contentious dispute process. Under the 2006 IDEA final Part B regs, a resolution session must be held unless both the district and the parents have agreed to waive the resolution meeting. The resolution meeting must occur within 15 days of receiving notice of a parent's due process complaint. If the district does not hold the resolution meeting within 15 days or if it fails to participate in the resolution meeting, the parent may seek the intervention of a hearing officer to begin the due process hearing timelines. New language in the final Part B regs adds an additional provision that "if the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented using the procedures in Section 300.322(d)), the LEA may, at the conclusion of the 30-day period, request that a hearing officer dismiss the parent's due process complaint." However, even if the parent's complaint is dismissed due to their refusal and/or failure to participate in a resolution meeting, they have a right to refile the complaint.

Under the regs, a district may only bring its Solicitor to the resolution session if the parents bring their attorney. If the district is unaware whether the parents will have an attorney until they arrive at the resolution session, the district may refuse to participate in the resolution meeting until the Solicitor is contacted. However, the resolution session must nevertheless be held within the 15-day period. The greater likelihood is that, because attorney fees for parents are not awarded for attending a resolution session, the parents' attorney will not participate, and in the vast majority of resolution sessions neither party will be represented by legal counsel. Regardless, it is important for all school personnel who will attend the resolution session to meet to properly prepare. Preparations should include an outline of the district representatives' questions, a summary of the parent's requests and a basic plan to address those areas where the district is prepared to make changes in order to resolve the matter. Also, efforts should be made to assure that the right staff are available, including those who know the facts and those with authority to resolve the issues. Also, the staff should be prepared to develop a possible written agreement. Immediately after the

resolution session, the district staff should summarize in writing what, if anything, was resolved and whether a written agreement was either developed during the meeting or if the Solicitor should assist in developing a written agreement to reflect the outcome of the meeting.

Regulation revisions impacting IEP meetings.

There were two significant additions to the IDEA regs concerning parental involvement in IEP meetings. Section 300.322(d) now provides examples of the records the public agency must keep of its attempts to involve parents in IEP meetings. The new regs offer recordkeeping examples such as maintaining detailed records of telephone calls made or attempted and the results of those calls, copies of correspondence sent to the parents and any responses received, and detailed records of visits made to the parent's home or place of employment and the results of those visits. Also, a new Section 300.322(e) requires the district to take whatever action is necessary to ensure the parent understands the proceedings of an IEP meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English.

The 2006 final IDEA Part B regulations also permit some IEP team members to be excused from meetings. This provides greater flexibility to parents in scheduling meetings and assists the districts in promptly convening meetings. Members of the team, namely the regular ed teacher, special ed teacher, district representative, and other individuals who can interpret the implications of evaluation results, are not required to attend the meeting if the parent and district agree, in writing, that attendance is not necessary. Generally, that team member's area of curriculum is not being discussed.

However, anyone from the team can also be excused from the meeting, even when the meeting involves a modification to or discussion of that member's area of curriculum. The requirements are more strict and require the excused team member to submit his or her input, in writing, to the team before the meeting. Further, a written agreement and consent are required from the parents. Unfortunately, the 2006 final IDEA Part B regulations do not clarify exactly how much time, prior to the meeting, the parents should receive the written report from the person missing the meeting and what exactly should be included in that written report. The regulations do require that the parents be fully informed and understand that the IEP team member is requesting to be absent from the meeting. Also, the parent must be instructed that they do not have to agree to the absence and may at any time revoke the agreement which permits the team member to miss the meeting. Therefore, it is a good practice to provide the parents with notice of the request to excuse a team member as soon as possible. From a practical standpoint, if parents are not notified of the request to excuse a member until they arrive at the meeting, while they can always reschedule the meeting, it is in the best interest of the district to provide the information as far in advance as possible and avoid canceling and rescheduling meetings or holding additional meetings.

For a detailed summary of other areas of the regulations and how they are impacted by the 2006 Part B regs, log onto www.mbm-law.net. Our school law attorneys can also respond to any issue your district faces in the special education arena.