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**Education News**
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# WHAT'S IN A NAME?

## Sometimes it can be the difference for needed District capital improvements

As the attention of District Administrators and Business Managers turn to the process of final budget adoption, creative funding options, at times, must be considered. In the case of much needed capital improvements, many Districts are exploring the option of naming rights to publicly visible District facilities to attract donations from individual benefactors and corporate sponsors.

The School Code does not specifically address naming rights issues. However, general authorization for naming rights agreements can be found in School Code Section 502 which authorizes the School Board to establish, equip, furnish and maintain its schools and recreation facilities, Section 508 regarding entering into contracts of any kind and Section 511 which provides for financing of school programs and raising and disbursing funds for such purposes. If your District is considering the option of naming rights, it is strongly recommended that your District adopt a Board Policy which contains the criteria regarding the naming of school facilities. First Amendment issues regarding government speech, commercial speech and schoolhouse speech are all implicated in school naming rights cases. Acting outside of an established policy framework exposes school boards to First Amendment challenges and simultaneously takes away their best defenses. The Board Policy should include guidelines and criteria for corporate sponsors and guidelines for the naming of facilities or components of facilities after notable individuals. Once the Board Policy is in place, the Request for Proposal (RFP) criteria should mirror the Policy terms. Key criteria to consider for inclusion in both the Board Policy and RFP include:

1. The grant of naming rights by the District must not impact, restrict, or limit the Board's ability to purchase, sell or trade property and award contracts in the best interests of the District according to the Public School Code.

2. The person or entity for whom a facility is named should satisfy criteria established by the Board of Education to assure that the name will lend dignity and status to the school or facility.

3. The Board must reserve the right to change the name of any facility if the individual or principals of any entity for whom it is named is convicted of a crime or otherwise falls into disrepute to the extent that it brings disgrace upon the School District as determined in the sole discretion of the Board of Education.

4. A list of the facilities and/or components available for naming rights should be included with the RFP, and the name for all facilities or components of facilities must be approved by the Board by a majority vote.

5. In all cases of naming a facility or component thereof, placement of a plaque or dedication ceremonies must be pre-approved by the Board.

6. As a general guideline, the naming of an existing or new facility or component or substantial renovation to a facility should require a minimum contribution of a designated percentage of the estimated value of the facility, component or renovation as determined by the Board. Naming rights to components of facilities should require the benefactor to contribute a predetermined portion of the estimated value of the component. All estimated values must be determined, confirmed, and pre-approved by the Board of Education.

7. Corporate and/or other business entities approved for naming rights for any facility shall be in effect for only a specific term of years, such as a maximum period

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of ten (10) years, unless said entity is liquidated, dissolved and/or merged with another entity within the time period, in which event the entity will forfeit its naming rights. As an option, the entity could maintain naming rights for five additional years at an additional cost to be determined by the Board.

The above criteria places everyone on notice that the Board of Education reserves the right to decline any and all RFPs and will not be bound to name a facility and/or component of a facility after any proposed sponsor based solely upon the monetary consideration offered. Rather, the Board of Education must reserve the discretionary right in the selection of the name for the facilities, to determine whether the name will reflect honor, integrity, and dignity upon the school or facility. Although an excluded applicant may attempt to challenge the Board's discretion, the existence of a specific policy will help insulate the District from First Amendment challenges.

Our attorneys are prepared to assist your District in the preparation of Board Policy or RFPs to protect the District's interests while pursuing facility naming rights sponsors.

## THE BALANCE BETWEEN MEDICATION ADMINISTRATION NEEDS AND DISTRICT STAFFING CONCERNS

District staffing needs undergo careful scrutiny as final budget adoption approaches. In the case of school nurses, the School Code provides specific direction in Section 1402(a.1) that the number of students under the care of each school nurse shall not exceed 1,500. However, with the increasing demands for Districts to dispense medication to students at designated times in multiple buildings, the issue of whether the administration of medication can only be performed by school nurses or whether the District has greater flexibility in having other designated school personnel administer medication in the school nurses' absence must be answered. Historically, school nurses have raised the argument that the Pennsylvania Professional Nursing Law only authorizes medication administration to students by a licensed registered nurse. However, the regulations of Pennsylvania's State Board of Nurse Examiners which are promulgated pursuant to the Nursing Law only indicate that "a licensed registered nurse may administer a drug ordered for a patient in the dosage and manner prescribed," but it does not provide that the licensed registered nurse has the exclusive authority to administer medications, and of course, makes no reference to medication administration in the school environment.

The Nursing Law only controls the conduct and legal authority of licensed registered nurses. It does not govern the actions of others, such as practical nurses, who are not licensed nurses. In fact, the Practical Nurse Law, governs practical nurses, who may perform "selected nursing acts . . . which do not require the specialized skill, judgment and knowledge required in professional nursing." In addition, the Practical Nurse Law does not prohibit "auxiliary services" rendered by persons carrying out duties necessary for the support of nurses, including those duties which involve minor and very basic nursing services. As can be seen from the interplay of the various legislation, provision of care is not exclusive to licensed registered nurses unless that care is specifically contained in the law.

Administration of prescribed medication, where the dosage amount and the frequency of administration is established by the physician and the prescription has been filled by a pharmacist, is nowhere specifically identified in the Law as within the sole and exclusive authority of a registered nurse. In fact, neither the law nor the regulations prohibit a school employee from dispensing medication to a student pursuant to the consent of the parents. School Districts should require a written request and authorization from the student's parents that the District administer the medication and authorize the School Administration to designate the school personnel who will administer the medication. This will then give the School District the necessary flexibility to designate the appropriate personnel who will administer the medication. Support for this position can be drawn from Section 1317 of the School Code which provides that every teacher, vice principal and principal has the right to exercise the same authority as to the conduct and behavior of students as the parents, guardians or persons in parental relation to such pupils may exercise over them. In other words, the District stands in loco parentis to the student. As such, the parent, guardian or anyone acting on their behalf or with their consent, is authorized to administer medication to the child pursuant to the directions contained on the prescription label. Of course, to the maximum extent possible, the District should train the staff who will be administering the medication, especially regarding recording the type, dosage and time the medication was administered.

Further support for this position is found in regulations of the Department of Health with respect to child residential and day treatment facilities codified at 55 Pa. Code § 3800.187, 3800.188 and 3800.189. These regulations specifically anticipate that, due to a parent's incapacity or inability to provide appropriate parental control over their children, trained staff persons at the facilities, other than licensed registered nurses, may administer necessary medications. In addition, the regulations of the Department of Public Welfare with respect to family child day care facilities codified at 55 Pa. Code § 3290.133 also authorize staff persons, other than nurses, to administer prescription medications according to the instructions on a prescription label. Therefore, the only reasonable approach to dispensing medication in the school setting is that, in the absence of the school nurse, medication may be administered by another individual designated by the school after the school receives appropriate parental consent.

## CHANGES TO FERPA REGULATIONS PROPOSED BY U.S. DEPARTMENT OF EDUCATION

On March 24, 2008, the United States Department of Education published in the Federal Register proposed amendments to the regulations implementing the Family Education Rights and Privacy Act (FERPA). FERPA is the federal statute which secures the privacy rights of public school and university students and governs the collection and retention of certain student-related information.

FERPA has not been amended since 2000, and several of the proposed changes were made necessary by court decisions and recent legislation, such as the Patriot Act, and developments in technology. The proposed regulations undergo a period of public comment and review before becoming final, so there may be some change in the text of the regulations before their eventual adoption, or they may be withdrawn altogether.

Specifically, the proposed changes include the following:

- The definition of "personally identifiable information," which presently is comprised of information such as a student's name, social security number or student number, would be broadened to include information such as date and place of birth and mother's maiden name.

- With regard to directory information, under the proposed regulations, a student's social security number or student I.D. number are added to the types of personally identifiable information which may not be disclosed as part of directory information. Social security numbers and student I.D. numbers may, however, continue to be used on schedules or class rosters provided only to individuals with a legitimate educational interest.

- Schools would be permitted under the new regulations to disclose any education records or personally identifiable information from education records to a student's new school if the disclosure relates to the student's enrollment in the new school and such disclosure may take place even after the student is already attending the new school.

- The proposed regulations amend the term "attendance" to include students who receive instruction through Cyber School or other similar technological means.

- The proposed amendments permit school districts to disclose student data without obtaining the consent of parents to any outside contractors or non-district employees who perform work normally undertaken by school employees, such as testing or record keeping. This amendment may prompt school districts to amend their annual FERPA notification to specify that outside parties may be provided access to education records.

- Another amendment would refine the process by which certain school employees obtain access to records on the basis of having a "legitimate educational interest" in the record. Under the new regulations, school districts would be required to use "reasonable methods" to insure that only employees with a legitimate educational interest obtain access to either computerized or paper records. Schools could fulfill this requirement either by restricting access with some physical or technological restraint, such as a locked cabinet or password-based or role-based software security system, or by some other effective method to restrict information access to individuals with legitimate educational interest.

- The proposed amendments would mandate that a district disclosing educational records to comply with a court order or subpoena provide notice to parents and eligible students of such disclosure.

We will update the status of these proposed regulations and any changes made to them in a future edition of School Law News.

## FEDERAL COURT APPROVES USE OF ANTI-PLAGIARISM WEBSITE

The proliferation of technology has created more ways for students to plagiarize work and many districts have turned to outside services to screen student-written compositions. www.turnitin.com is a website operated by iParadigms, LLC to which high school or college students submit their written papers over the internet. The site then attempts to match the student text against archived documents to see whether there is cause to suspect plagiarism. If similarities are found between student work and archived work, turnitin.com sends a report to the school the student attends so that an administrator can compare the student work with the similar archived work. The website also archives any submitted student work for comparison with future submissions to the website.

A recent decision of the Eastern District of Virginia U.S. District Court addresses the legal rights at issue when districts employ such a service. In A.V. et al. v. iParadigms, LLC, high school students who were mandated to submit their compositions to turnitin.com or they would receive no grade for the assignment under their school policy. They filed a lawsuit on the basis that the involuntary archiving of their compositions violated copyright. The District Court ruled in favor of the company that operates turnitin.com and specifically found that the service does not infringe any student copyright.

The Court noted there are over 7,000 educational institutions worldwide using turnitin.com's service and over 100,000 works are submitted every day to the website as an indication of the prevalence of plagiarism. The Court found that "[s]chools have a right to decide how to monitor and address plagiarism in their schools and may employ companies like iParadigms to help do so." The Court further found that any use made of students' work was protected "fair use," a concept holding that certain kinds of uses or appropriations of otherwise copyrighted work are protected. In determining that turnitin.com made fair use of the students' work, the Court found that the website was not using the student compositions as compositions, but was instead transforming them into a database for anti-plagiarism purposes. The Court found that the site does not discourage students in producing creative work, and that continued use of a service like turnitin.com would not have a negative effect on any potential use of the student work or upon any future market for the student work. The Court noted that the compositions which are archived on turnitin.com are not publicly accessible or disseminated in any fashion, and rather than harming the rights of students and their work, the services have a protective effect in that they discourage and may prevent others from plagiarizing original student work. The Court opined that any policy objections the students had to the turnitin.com service should be directed to their own school districts or legislators, and not to the service itself, which is not violating protected copyright in any fashion.

The students have appealed the decision to the Fourth Circuit Court of Appeals. We will update the status of this litigation through a subsequent edition of School Law News. If you wish to review the full opinion issued by the Court in this matter, please go to www.mbm-law.net and follow the link to a PDF file containing the opinion.

In summary, while the litigation is not yet concluded, at least one Court has recognized the value and legitimacy of using services such as turnitin.com and has rejected arguments that the service infringes copyright. If the District Court is affirmed and its rationale recognized elsewhere, school districts will continue to have this valuable tool at their disposal.

# MB&M Education News

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## PILOT PROGRAM ANNOUNCED FOR NO CHILD LEFT BEHIND ACT


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While Congress has yet to reauthorize the No Child Left Behind Act (NCLB), on March 18 the Secretary of Education proposed a pilot program to explore models of "differentiated accountability" for school districts to meet the targets imposed by NCLB. For some time, there has been a recurring criticism of NCLB that it categorizes school districts too simplistically by determining a District either "meets Adequate Yearly Progress (AYP)" or "does not meet AYP." As a result, a school district having, for example, 25 separate AYP targets will still be classified as failing to meet AYP even if it fails to attain proficiency in only one of those 25 targeted areas, as compared to a district that fails to meet all 25.

Secretary Margaret Spellings has proposed that 10 states apply to the Department of Education for permission to develop programs which would create differentiated consequences for school districts by matching the severity of the sanction to the number and type of AYP targets not achieved. For example, the penalties for missing only one or two goals, or a goal related to an IEP subgroup, might be lesser than or different from missing other goals.

As this newsletter goes to press, it is not known whether Pennsylvania will submit an application to participate in the pilot program, but even if Pennsylvania does not participate, the program might alter the way in which NCLB is applied. We will continue to update this matter in future editions of this newsletter.




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