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News For School Clients

Identification of Gifted and Talented Students

Wisconsin law provides that students who are gifted and talented must have access to an appropriate program consisting of a systematic and continuous set of instructional activities or learning experiences that expand the students' development. It defines "gifted and talented pupils" as pupils enrolled in public schools who give evidence of high performance capability in intellectual, creative, artistic, leadership or specific academic areas and who need services or activities not ordinarily provided in a regular school program in order to fully develop such capabilities. Wis. Stat. § 118.35. The law further requires that "the state superintendent shall by rule establish guidelines for the identification of gifted and talented pupils."

In November 2005, parents petitioned the Wisconsin Department of Public Instruction (DPI) to create rules to ensure that the needs of gifted and talented students are met. However, DPI declined to issue new rules. Subsequently, Todd Palmer, a parent, filed suit against DPI in Dane County Circuit Court, alleging that DPI had failed to promulgate any administrative rules that were sufficient to establish guidelines for the identification of gifted and talented students, for defining what specialized educational services must be provided to them, and for auditing school boards to ensure compliance. Palmer alleged that school districts have largely ignored their

obligations to gifted and talented students. He cited a survey conducted by the Wisconsin Education Association Council (WEAC) and argued that sixty percent of school districts were planning to reduce or eliminate their gifted and talented programs.

Palmer contrasted the specificity of the criteria in DPI's rules for identifying children with cognitive disabilities (which include consideration of the student's level of performance on standardized tests of intellectual and adaptive functioning) with the generality in the rules governing the identification of students who are gifted and talented. That is, the rules for gifted and talented students stated simply that their identification shall consist of the use of "multiple criteria that are appropriate for the category of gifted including intelligence, achievement, product evaluations, and nominations," without further definition of the term "multiple criteria."

Palmer also argued that the rules should include due process protections similar to those provided to students with disabilities, including the right to appeal a decision of the school board before an impartial hearing examiner when a dispute arises between the parent and school district over any issues related to the identification and programming of students who may be or are gifted and talented. Palmer contended that DPI had

improperly shifted its rulemaking responsibilities to the local school boards.

DPI defended against the complaint, arguing that its rules properly provided general guidelines while preserving a level of local initiative in selecting and developing particular identification procedures and specific instruments for measuring the abilities and needs of individual students. It denied that state law requires detailed regulations similar to those for students with disabilities, which are promulgated as a condition of participation in federal funding under the Individuals with Disabilities Education Improvement Act.

DPI also argued that it may exercise discretion regarding what rules are needed when required by the legislature to promulgate rules to administer a statutory section, including whether more specificity is required for defining an “appropriate program.” Finally, DPI asserted that local audits of school district compliance with the school district standards set forth at Wis. Stat. § 121.02, including programming for pupils identified as gifted or talented, are discretionary.

The court ruled in favor of the parent on the issue related to the need to establish more specific guidelines for the identification of gifted and talented pupils, and denied the request related to the other two issues, dismissing them. The court instructed DPI to promulgate a rule with guidelines that are sufficient to identify gifted and talented students. DPI has completed its rulemaking process and recently issued a final order modifying its administrative rule, Wis. Admin. Code § PI 8.01(2)(t), to establish more specific guidelines for identification purposes, as

ordered by the court. The revised rule became effective April 1, 2008, and provides as follows (with the additions identified by underlined text):

Each school district board shall establish a plan and designate a person to coordinate the gifted and talented program. Gifted and talented pupils shall be identified as required in s. 118.35(1), Stats. This identification shall occur in kindergarten through grade 12 in general intellectual, specific academic, leadership, creativity, and visual and performing arts. A pupil may be identified as a gifted or talented in one or more of the categories under s. 118.35(1), Stats. The school district board shall build a pupil profile using multiple measures, including but not limited to standardized test data, nominations, rating scales or inventories, products, portfolios, and demonstrated performance. Identification tools shall be appropriate for the specific purpose for which they are being employed. The identification process and tools shall be responsive to factors such as, but not limited to, pupils’ economic conditions, race, gender, culture, native language, developmental differences, and identified disabilities as described under Subch. V. of Chapter 115. The school district board shall provide access, without charge for tuition, to appropriate programming for pupils identified as gifted or talented as required under ss. 118.35(3) and 121.02(1)(t), Stats. The school district board shall provide an opportunity for parental participation in the identification and resultant programming.

It is advisable that school boards review their policies related to the identification of students who are gifted and talented to conform to the new rule.

This FYI was prepared by members of the Lathrop & Clark LLP School, Municipal, Labor and Employment Law Team. If you have any questions regarding this topic, please call either of the following members:

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