

IN THIS ISSUE:

- *Individualized Healthcare Plans* 1
- *Construction Updates*..... 2
- *Volunteer Provisions – Fair Labor Standards Act*..... 3
- *Special Education Burden of Proof*..... 3
- *Procurement Codes* 3

Individualized Healthcare Plans

Based on a law signed on May 26, 2005, by Governor Mark Sanford, school districts in South Carolina are required to develop policies implementing Individualized Healthcare Plan (IHP) procedures for students with special health care needs. An IHP is a written plan of care designed for an individual student, which provides for meeting the health monitoring needs and care of the student during the school day or at school-sponsored functions.

The State Department of Education (SDE) has interpreted the law to require IHPs for students who have chronic health conditions requiring treatments, procedures, and/or monitoring, which must be performed by school personnel and that:

- are complicated and/or lengthy;
- require multiple contacts with the nurse or health assistant during the school day;
- are needed to prevent death or disability on an emergency basis; and/or
- are needed for students who have medically fragile health conditions.

The SDE also considers students who have been granted permission to self-medicate or self-monitor in accordance with a district's policies as students with health care needs.

The statute requires a district's IHP policies to provide for the authorization of a student to self-monitor and self-administer medication under certain conditions as prescribed by the student's health care provider, unless sufficient evidence exists that unsupervised self-monitoring or self-medicating would seriously jeopardize the safety of the student or others. Policies must include provisions addressing written parental authorization for a student to self-monitor and self-administer medication; statements from the student's health care practitioners who prescribed the

medication; and authorization for the student to possess the medication and administer it during the designated time.

Further, IHPs must be developed with input from the prescribing health care practitioner; the parent or legal guardian; the student, if appropriate; and the school nurse or other designated school staff member. Moreover, according to the SDE, a registered nurse must develop and coordinate all IHPs.

Additionally, the statute requires that the parent or legal guardian and the student, if appropriate, authorize the school to share the IHP with school staff who have a legitimate need to know the information in the plan. Finally, the IHP statute provides details regarding how the medication should be carried; the revocation of permission to self-monitor or self-administer medication under certain circumstances; and a statement parents must sign indemnifying and holding harmless the district against claims arising from self-monitoring and self-administering medication.

Based on the terms of the statute, the SDE was required to develop guidelines to assist districts in developing IHP policies; however, the SDE's guidelines were not finalized and released until February 2, 2006. The guidelines provide very detailed advice on the SDE's expectations for school districts to address some procedural issues, as well as some specifics about what districts should include in their policies and plans. While guidelines do not carry the force of law, they certainly provide districts with a sense of the SDE's interpretation of the law and what the SDE would consider a compliant policy.

Even with the release of the SDE guidelines, we are particularly concerned about the interplay between the state-mandated IHP and federal requirements such as Section 504 Accommodation Plans or Individualized Education Plans; the three page notification districts must send unmodified to parents of all students in the district annually regarding the IHPs and other health or special education programs as required by SDE; and the ambiguity that still exists about what illnesses or conditions warrant IHPs and under what circumstances a district can deny a student the opportunity to self-monitor or self-medicate. Of additional concern is a district's potential exposure to liability under some circumstances, regardless of the statute's attempts to limit such exposure.

To address these concerns, we will be sending a more detailed "Legal Alert Memo" to our clients in the near future. Meanwhile, we are available to assist individual school districts with any concerns that may arise.

Construction Updates

There have been three recent South Carolina Supreme Court decisions involving construction law that are important for school districts.

In Martin Engineering, Inc. v. Lexington School District One, the lowest bidder for a construction project requested to amend its bid immediately after the bid opening, claiming that its bid had omitted the cost of roofing on the project. In the alternative, the bidder requested to withdraw the bid entirely. The school district allowed the low bidder to amend the bid by adding the roofing cost. After amendment, the bid was still the lowest. The second-highest bidder brought suit to prevent the amendment. The language at issue in the district's procurement code, which is similar to most codes in use in school districts, was that "a bidder will not be permitted to correct a bid mistake after bid opening that would cause such bidder to have the low bid, unless the mistake, in the judgment of the school district, is clearly evident from examining the bid document."

The Court stated that "where the bid correction does not cause the bidder to have the low bid," the district's review was not "confined" to the bid document itself. In this case, there was evidence of pre-existing subcontractor bids to support the missing roof cost and, the Court stated, "we find it was within [the school district's] discretion to determine that correction of [the] inadvertently erroneous bid was proper, and that the correction would not be prejudicial to the interests of the school district or fair competition." The Court further stated that the challenging second-place bidder "has not shown that the procedures followed by the District render the upward correction unfair or unjust"

The Martin case provides some latitude to correct bids in the rare situation where a low bidder has literally left out an element of cost but remains the low bidder even when the cost is put back into the bid. As a caution, however, we note that this case also opens the door for low bidders to seek an increase in their bids after having seen the second-highest bid. Further, as the Court suggests, the second-highest bidder is still entitled to attempt to show that, given all the circumstances, the district's discretionary deviation impaired the integrity of the bidding process.

In Sloan v. Department of Transportation, the Court allowed Mr. Sloan to sue for a declaration that, for the Cooper River Bridge, the Department of Transportation (DOT) had not followed the procurement rules governing

its operations. Less important than the holding of the underlying case, which turned on statutes specific to the DOT, is the issue of Mr. Sloan's ability to bring the suit in the first place. With this most recent Sloan opinion, the Court has essentially agreed with the Court of Appeals that any citizen can bring a suit to challenge a public procurement action in court on the basis of the "public importance" of the issues.

Traditionally, procurement officials have considered their solicitations complete after the protest period provided in the procurement code is exhausted, and even then, the universe of challengers is typically limited to the other bidders. Under the Sloan case, however, this "clean break" after the exhaustion of the protest period appears to be disappearing.

The lesson of the Sloan line of cases is that procurement, particularly of construction or other potentially controversial items, should be conducted with a renewed focus on compliance with the underlying procedural requirements and the limits of available discretion imposed by procurement codes.

Finally, in L-J, Inc. v. Bituminous Fire and Marine Insurance Company, the Court held that a contractor's faulty workmanship, which causes damage to the work product of the construction project itself, is not an "occurrence" under the terms of the contractor's commercial general liability insurance policy. At issue was a deteriorating roadway caused by faulty workmanship in the construction of the roadway itself. The Court stated that "because faulty workmanship is not something that is typically caused by an accident or by exposure to the same general harmful conditions, we hold that the damage in this case did not constitute an occurrence."

The Court further stated that "the insurance policy will not stand to cover liability for the Contractor's contract liability for a claim that was for money damages to compensate for the defective work," and, "[c]onsequently, our holding today ensures that ultimate liability falls to the one who performed the negligent work – the subcontractor – instead of the insurance carrier. It will also encourage contractors to choose their subcontractors more carefully instead of having to seek indemnification from the subcontractors after their work fails to meet the requirements of the contract."

School districts should simply be aware that, given the thinly capitalized nature of many construction contractors and subcontractors, under L-J the availability of one source of funds to correct construction defects has been reduced. The L-J holding may provide a reason for school districts to examine alternate delivery methods, more stringent responsibility criteria, more extensive use of

prequalification of contractors and subcontractors, longer-term bonded warranties, or other enhancements or investments in initial quality.

Volunteer Provisions Fair Labor Standards Act

The United States Department of Labor (DOL) recently provided clarification regarding the amount of stipend that classified school employees, who serve as assistant coaches or supervise other extracurricular activities, may receive and still be exempt from overtime requirements due to their status as bona fide volunteers for that service.

As a general background, the Fair Labor Standards Act (FLSA) requires that non-exempt employees either be paid time and a half for all hours worked beyond the normal forty per week or receive an equivalent amount of compensatory time. Importantly, hours committed to volunteer work do not count as hours worked for purposes of overtime calculations as long as the volunteer:

- 1) performs hours of service without promise, expectation or receipt of compensation for services rendered;
- 2) offers services freely and without pressure or coercion, direct or implied, from an employer; and
- 3) is not otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer.

These requirements have caused some confusion among school districts across the nation. In response to a question raised by a school district representative in another state, the DOL issued a November 10, 2005, opinion letter seeking to provide further guidance as to what constitutes a "nominal fee."

The DOL opined that a nominal fee cannot serve as a "substitute for compensation" or be "tied to productivity." As explained in the recent opinion, these standards mean that the amount of the fee cannot vary depending on the amount of time the volunteer spends on the activity or the success or failure of that activity. The opinion elaborates that where different activities inherently demand different amounts of time, such as by the type of sport, different fee amounts are acceptable. On the other hand, where time commitments within a given activity fluctuate, for example because of making the playoffs, changing or varying fee amounts is not acceptable.

Additionally, the DOL applied an "economic realities test" comparing a volunteer's stipend to what it would normally cost a school to compensate a paid employee to perform the volunteer's services. The opinion states that

any fee greater than 20% of what it would otherwise cost to obtain the services in question will not be considered nominal. The opinion also explains that, in the context of coaches at least, the benchmark for measuring this ratio should come from other coaches on the school district's payroll, or absent that information, from similar information available from neighboring school districts, the state or even the nation.

As a result of this recent guidance, school districts should examine any payments made to volunteers to ensure they can be considered "nominal" compensation and make changes as appropriate. We will be glad to provide assistance with this process to ensure each school district's specific needs are met.

Special Education Burden of Proof

On November 14, 2005, the United States Supreme Court decided Schaffer v. Weast, a special education case that may help school districts reduce costs associated with due process complaints brought by parents under the Individuals with Disabilities Education Act (IDEA). The case, which originated in Maryland, involved the issue of which party has the burden of proving the appropriateness or inappropriateness of a child's Individualized Education Plan (IEP).

The Court, stating that the parents were essentially asking the Court to assume that every IEP is "invalid until the school district demonstrates that it is not," determined that the IDEA does not support such an assumption. The Court further determined that the IDEA offsets the advantage that districts have in "information and expertise" by providing for procedural safeguards and access to records for parents. Accordingly, the Court ruled that the burden of proof in an administrative hearing challenging the IEP is on the party seeking relief.

Procurement Codes

All South Carolina school districts that spend in excess of \$75 million dollars (including capital spending) must have a procurement code that is certified as "substantially similar" to the State Consolidated Procurement Code ("State Code), by the Office of Audit and Certification of the State Budget & Control Board (B&CB). The number of school districts crossing this threshold has risen to at least 26, with more expected to qualify based on their FY05 audits.

As of 2006, a wide variety of the codes have been certified as "substantially similar." Some are using a format that retains the State Code's split between statutes and regulations, while others are considering a code that merges

all the rules into one document. The wide variety of procurement codes in use today can impair the ability of school district procurement officials to fully benefit from the B&CB's extensive procurement training programs, to easily adapt and use model procurement documents provided by the State, and to share expertise between themselves in solving problems. Overall transaction costs may be higher for all school districts where there is variety in rules and practices that must be adapted to by vendors.

Beyond dissimilarity among the "substantially similar" codes, there is another issue that needs to be resolved: the competing authority of the B&CB over procurement in the 26+ "big" school districts, with the claimed authority of the State Department of Education (SDE) to control school construction procurement and authority through the "Facilities Planning and Construction Guide." This leads to school districts in this State being provided information regarding potentially conflicting mandatory rules for construction procurement by two different State agencies. There is also a conflict in the permissive rules of the two agencies. For example, the SDE believes it has authority to allow a 10% retainage rate for construction, while the B&CB has advised larger school districts that they must cut retainage to a bare 3.5% in order to comply with recent amendments to the State Code. As the State Code continues to be amended by the General Assembly, some effort at compromising on a clear set of rules is imperative to the success of school building programs.

An effort to draft a new "model procurement code," which will both achieve more uniformity and deal with existing ambiguities and problems in a way acceptable to the B&CB, is underway now. Many school districts are participating in reviews and commentary, and we urge those that have not done so to get involved. Among the issues are matters such as whether or not a "model" will become mandatory or merely permissive, what level of retainage will be permitted, and what discretion in solicitation advertising requirements will be maintained.

On a parallel track, the B&CB has developed a new document entitled the "Uniform State Provisions & Clauses for the Information Technology Management Office & State Procurement Office," which is available on the internet at <http://www.ogs.state.sc.us/DDP/terms/> under the heading "Compendium." Also included is the State's new standardized solicitation format. As discussed above, these documents can provide valuable guidance and examples for preparing solicitation and contract documents for non-construction procurement, particularly for school districts with "substantially similar" procurement codes. The B&CB is inviting school district procurement professionals to a two-day training conference to be held on February 27, 2006, and March 1, 2006, to become familiar with these

new standard documents. The conference will be held in Columbia, with live concurrent video presentations in Greenville and Charleston. Interested parties may call 803-737-0611 for registration information.



We are pleased to announce that Allison Aiken Hanna has become a shareholder with Childs & Halligan.



We are pleased to announce that Kim Kelley Blackburn has joined the firm as an associate. She was admitted to the South Carolina Bar in 2005. Kim received a B.S. in Elementary Education, *cum laude*, at the College of Charleston; M.S.P. +30, Speech Pathology, Certificate on Long-Term Rehabilitation of Communication of Brain Injured Patients, 1997, at the University of South Carolina Arnold School of Public Health; and her J.D. from the University of South Carolina School of Law.



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