



# Ennis Roberts Fischer SCHOOL LAW REVIEW



1714 West Galbraith Rd.  
Cincinnati, Ohio  
45239

### PHONE

(513) 421-2540  
(888) 295-8409

### FAX

(513) 562-4986

September 2010

## Sixth Circuit Limits School Districts Claims Under IDEA

### Traverse Bay Area Intermediate School District v. Michigan Department of Education, No. 08-1228 (6th Cir., 2010).

The United States Court of Appeals for the Sixth Circuit, recently held that school districts do not have a right to sue States to compel them to comply with procedural safeguards of the IDEA. IDEA claims may only directly regard a child's IEP.

Traverse Bay Area Intermediate School District and Traverse City Area Public Schools (the Districts) became involved in the present suit when a parent sued them both alleging her child's IEP did not address her child's needs. After numerous appeals, the Districts filed a complaint in Federal Court. They alleged, in part, that the State did not monitor and enforce the IDEA's procedural safeguards as it should in violation of § 1415(b) of the statute.

The Court first looked to the statute to determine whether the IDEA expressly creates a right for a district to maintain a § 1415

(b) action against a state education agency. This included determining whether the Districts were aggrieved parties. The Sixth Circuit decided they were not. The IDEA only allowed claims regarding FAPE, identification, evaluation, or placement of a child.

The Court next determined whether the IDEA creates an implied right of action. The Sixth Circuit used the United States Supreme Court's test which states a court must consider: 1) whether the statute was enacted to benefit a special class; 2) whether the drafters intended to create a private right to sue; 3) whether a private right to sue would be consistent with the purposes of the statute; and 4) whether the right to sue is one not traditionally relegated to the states. Importantly, the second factor is dispositive.

When applying the test, the Court focused on sections of § 1412 and 1415 stating that "children with disabilities and their parents" are guaranteed certain safeguards. The Court concluded that the safeguards were implemented so children and parents

could enjoy their right to FAPE. There was no implication that Congress intended to extend this right to local education agencies. In addition, enforcement of the IDEA was delegated to the Secretary of Education, not school districts. School Districts do not have a right to compel state compliance with IDEA's § 1415(b) procedural safeguards without a claim that directly regards a specific IEP.

### How this Affects Your District:

This case is controlling in Michigan, Ohio, Kentucky, and Tennessee. Though schools likely will only sparingly assert similar claims, school districts should be aware that litigation involving the IDEA, especially § 1415, must be in regard to a specific child's IEP.

Further, this case could easily be extended to cover litigation against other parties, not just the State of Ohio or its Department of Education.

### Inside This Issue:

**Sixth Circuit Limits School Districts' Claims Under IDEA** 1

**Insurance Provider Must Pay Damages in Maine IDEA Suit** 2

**Ohio to Receive Federal Funding for Jobs in Education** 3

**Federal Legislation Review** 3

Ennis, Roberts & Fischer's School Law Review has been developed for use by clients of the firm. However, the review is not intended to represent legal advice or opinion. If you have questions about the application of an issue raised to your situation, please contact an attorney at Ennis, Roberts, & Fischer for consultation

## Insurance Provider Must Pay Damages in Maine IDEA Suit

### **School Union No. 37 v. United National Insurance Co., No. 09-2040 (1st Cir. Aug. 19, 2010).**

A three judge panel for the United States Court of Appeals for the First Circuit has decided that educational expenses provided for under the Individuals with Disabilities Education Act (IDEA) are ‘monetary damages’ for purposes of insurance policies purchased to pay for litigation costs.

School Union No. 37 had purchased Educator’s Liability insurance from United National. In 2005 School Union was sued under the IDEA for reimbursement of room, board, and transportation by a child who had been placed in a private school outside of Maine and had graduated. Eventually, School Union won the suit.

During the IDEA case, School Union filed an insurance claim, which United National Insurance Company denied. When School Union won the IDEA case, it sued United National to collect on the insurance policy. The policy stated that the insurance company would “pay on behalf of the Insureds loss and defense expenses in excess of the stated deductible and up to the stated limit of liability for any claim due to a Wrongful Act to which the policy applies.” ‘Claim’ was defined as “any written demand for money damages” and ‘loss’ as “any amount which the Insureds are legally obligated to pay as damages including back and future pay awards.”

United National claimed that IDEA reimbursement did not constitute damages, which meant it did not have to pay on the policy. The first issue the Court dealt with was whether a third party claim under the IDEA for reimbursement is covered as money damages. Generally, IDEA costs are considered compensatory equitable relief, not damages. It is money that should have been paid all along.

On the other hand, that consideration is largely based on public policy. The Court pointed out that the same public policy does not apply to insurance claims.

The next significant issue the Court tackled was whether reimbursement was a type of relief the parties intended the policy to include. United National argued that Maine courts distinguish between different types of “money damages” and reimbursements would not be covered under the policy. The Court rejected that argument.

The Court then focused on Maine law governing contract interpretation. Since an ordinary person would not understand that the insurance policy did not cover all monetary damages, the contract was ambiguous and was interpreted in favor of the insured. “Money damages” was not defined and the contract referred to damages in a way that suggested reimbursement could be covered. The Court would not, therefore, limit the damages the policy would pay.

Further, if United National intended to exclude certain damages, it should have specified as so.

Finally, United National argued that failure to provide a FAPE is not a wrongful act. Since the insurance policy covered only wrongful acts, the damages would then not be covered.

The Court also struck down this final argument. The magistrate and the District Court found that failure to provide FAPE was a wrongful act. United National failed to object to this conclusion by the magistrate so they are barred from raising the argument at the appellate stage.

### **How this Affects your District:**

First, school districts should be aware that insurance is available to cover liability they may encounter. Ohio Revised Code section 3313.203 allows school districts to purchase various types of liability insurance.

Though *School Union No. 37 v. United National Insurance* is not controlling in Ohio, it certainly provides a good lesson for all school districts. Districts should read all insurance policies carefully and determine what damages are and are not covered.

While ambiguities will be resolved in favor of the district, it may incur expensive legal fees in coming to that conclusion. If a district is unsure of the intent of a policy, it should consult legal counsel for clarification.

## Ohio to Receive Federal Funding for Jobs in Education

A federal bill passed earlier this month established the Education Jobs Fund. The Fund provides \$10 billion dollars to save, create, or keep jobs in education all over the country. It is estimated that Ohio will receive \$361 million dollars from the Fund.

The Education Jobs Fund provides money for jobs in early childhood, elementary, and secondary education. A district may spend the money on education personnel.

Jobs created are intended for the 2010-2011 school year but may be used for the 2011-2012 school year in some cases. The positions will be compensated per local pay scales.

State governors must submit applications to the Secretary of Education by September 9th 2010. If, however, the governor of a state has not submitted an application thirty days after the deadline, the Secretary of Education may disperse the funds to another entity of the state if he believes the funds will be utilized as required. Ohio's governor is currently working with the Ohio Department of Education on an acceptable application.

At this time, the Ohio Department of Education cannot determine exactly how much money districts will receive. However, the funds will be allocated per the state's primary funding formula.

### How This Affects Your District:

School districts should be aware that this money may become available to them. Unfortunately, this money is not available to educational service centers or career technical centers.

Local districts who have not submitted an SFSF form should submit a separate Education Jobs application to the governor to receive money from the Education Jobs Fund.

For more information visit the Features section of ODE's website ([www.ode.state.oh.us](http://www.ode.state.oh.us)).

## Federal Legislation Review

The following Federal Acts require District action and are summarized from a NSBA publication.

### The Age Discrimination Act:

- Districts receiving federal funds must publish a grievance procedure regarding the Act.
- One employee must be assigned to coordinate compliance.

### Asbestos Hazard Emergency Response Act

- Districts must create an asbestos management plan for each school in the district.
- The plan must be periodically updated per ongoing maintenance, surveillance, inspection, and response action activities.

### Children's Internet Protection Act

- Schools receiving money through E-rate or the Enhancing

Education Through Technology must have an internet safety policy.

- The policy must include filters of obscene and other inappropriate or dangerous content, education for minors about online safety, student internet activity monitoring, email protections, and prevention for unauthorized access and other criminal activities.
- The FCC has also released a notice that requires a revision to the policies about appropriate behavior and cyberbullying.

### Copyright Act

- Teachers may use copyrighted materials in some teaching situations.
- Districts must create control procedures to preserve the integrity of the Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes.

### Drug-Free Workplace Act

- Districts must publish a statement notifying teachers that controlled substances are not allowed in the workplace.
- It must notify teachers that discipline will be taken.
- Each employee must receive a copy of this notice.

### Family and Medical Leave Act (FMLA)

- As an employer, districts must post a notice explaining the FMLA and it's complaint process.
- The notice must be in an area where is it readily seen.
- It should be given to employees when they are hired or published in handbooks.
- Electronic posting is permitted.

## Federal Legislation Review

### Health Insurance Portability and Accountability Act (HIPAA) and Health Information Technology for Economic and Clinical Health Act (HITECH)

- If a group health plan is sponsored by a school it must have reasonable policies and procedures that comply with HIPAA security.

### IDEA

- Districts must have procedures to make sure children with disabilities and their parents have procedural safeguards to ensure a Free Appropriate Public Education (FAPE).
- It must be in the parent's native language if possible.
- A copy must be given to each relevant parent once per year and when a parent requests one, requests an evaluation, requests a due process hearing, and where there is a change in placement.

### McKinney-Vento Homeless Assistance Act (MHAA)

- Policies that make enrollment and retention of homeless children easier.
- Includes transportation and segregation and stigmatization prevention.

### National School Lunch Act, Child Nutrition Act, and Child Nutrition and WIC Reauthorization Act of 2004 and Food and Nutrition Act

- District that participate in a federal food program must have a school wellness policy.
- The policy must address goals for promoting wellness, how to implement that plan, and nutrition guidelines for all food at school.
- The guidelines for reimbursable school meals cannot be

less restrictive than federal regulations.

- The policy may not allow sale of food with little nutritional value in cafeterias during breakfast and lunch.

### No Child Left Behind (NCLB)

- Districts that allow transfers must have policies that allows students at dangerous public schools, or who are victims of violent crimes at school, to attend different, safe schools in the district.

### NCLB Title I, Part A

- If Title I funds are received, a District must have a parent involvement policy.
- The policy must ensure support for carrying out parental involvement activities, build capacity for the involvement, and implement strategies, and evaluate the policy.
- The policy must also share responsibility for student achievement, capacity for involvement, and be accessible.

### NCLB: Comparable Services

- Districts in Title I programs must use federal funds for certain programs to supplement other funds.
- Districts must file assurance with ODE that they have: 1) a district salary schedule, 2) a policy for equivalence in staff, and 3) a policy for equivalence between schools in materials and supplies.
- Records on compliance must be documented biennially.

### Omnibus Transportation Employee Testing Act

- Districts need policies to test employees for drugs and alcohol if the employees are in

safety-sensitive positions.

- Bus drivers MUST be tested if the District provides transportation.

### Protection of Pupil Rights Amendment (PPRA)

- Federally funded districts must have policies allowing parents to inspect students' surveys, procedures to protect privacy in surveys on certain topics, allow parents to inspect instructional materials, physical examinations of students, governance of students' personal information for marketing or sale, and the parents' right to inspect such instruments.

### Section 504 of the Rehabilitation Act and Americans with Disabilities Act

- Districts must assign one employee to guide compliance, create and publish a grievance procedure, and notify certain persons and groups that they do not discriminate for disability.

### Safe and Drug-Free Schools and Communities Act (SDFSCA)

- If a school receives a grant under this Act, it must have school discipline policies that disallow disorderly conduct, illegal weapon possession and illegal student use, dissemination and possession of drugs, alcohol and tobacco.

### Title IX of the Education Amendments of 1972

- Districts that receive federal funds must publish their own grievance procedures for efficiently addressing student and employee discrimination complaints on sex in education programs or other activities run with federal money.

## Education Law Speeches/Seminars

Ennis, Roberts & Fischer regularly conducts seminars concerning education law topics of interest to school administrators and staff.

Popular topics covered include:

Cyber law  
School sports law  
IDEA and Special Education Issues  
HB 190 and Professional Misconduct

To schedule a speech or seminar for your district, contact us today!

### Upcoming Speeches

Bronston McCord and Bill Deters  
at Great Oaks on September 23, 2010  
*ERF Administrators' Academy*

Bill Deters  
at Warren County ESC on September 27, 2010  
*Evaluations*

### Contact One of Us

**William M. Deters II**  
wmdeters@erflegal.com

**C. Bronston McCord III**  
cbmccord@erflegal.com

**J. Michael Fischer**  
jmfischer@erflegal.com

**Gary T. Stedronsky**  
gstedronsky@erflegal.com

**Jeremy J. Neff**  
jneff@erflegal.com

**Rich D. Cardwell**  
rcardwell@erflegal.com

**Ryan M. LaFlamme**  
rlaflamme@erflegal.com

**Erin Wessendorf-Wortman**  
ewwortman@erflegal.com

**Pamela A. Leist**  
pleist@erflegal.com