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## LEGAL UPDATE

February 19, 2010

**To:** Superintendents, Member School Districts (K-12)

**From:** Carl D. Corbin, Assistant General Counsel *CDC*

**Subject:** Failure to Properly Identify a Student's Primary Disabilities has Legal Significance Even if a "FAPE" Has Been Provided  
Memo No. 06-2010

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The Ninth Circuit Court of Appeals recently held that when a parent of a special education student prevails on an eligibility category determination, this changes the legal relationship between the parties and entitles the parent to "prevailing party" status under the Individuals with Disabilities Education Act ("IDEA") and the right to recover attorneys' fees notwithstanding the school district's provision of a Free Appropriate Public Education ("FAPE").<sup>1</sup> The decision in this case is unusual in that the student was specifically found not to have been denied a FAPE; rather, the District only "...refused to recognize his additional primary disability of autism, and thus his legal right to such placement..."<sup>2</sup>

In *Weissburg v. Lancaster School District*, the district initially assessed the seven-year-old student and classified him as having mental retardation, not autism. The student's parents disputed the district's classification based on a private psychologist's opinion that the student had autism, not mental retardation. The student's parents requested an Independent Educational Evaluation ("IEE") at the district's expense. The district chose not to pay for an IEE and instead filed a request for a due process hearing seeking a ruling that the District's assessment was appropriate.

The Office of Administrative Hearings ("OAH") concluded the district's assessment was appropriate<sup>3</sup> but the district's disability classification was "flawed" because the student should have been made eligible for special education under the disability categories of mental retardation and autism. OAH further concluded that the student had received a FAPE which

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<sup>1</sup> *Weissburg v. Lancaster School District* (9th Cir. 2010) \_\_\_ F.3d. \_\_\_, 2010 WL 114960.

<sup>2</sup> *Id.* at 3.

<sup>3</sup> By so finding the district was not required to reimburse the parents for the IEE. (Education Code sec. 56329(c).)

included instruction by a special education teacher who was credentialed to provide instruction to students with mental retardation and autism.

On appeal the Ninth Circuit held that, although the IDEA does not confer the right to a proper disability classification, there are legal ramifications associated with a student's disability category. Specifically, the determination that the student should have been made eligible under mental retardation and autism entitled the student to placement in a classroom with a teacher qualified to instruct students with primary disabilities in both categories. Prior to the change in his special education disability category, he could have been placed with a teacher who was not qualified to instruct students with autism.

This case has significant legal implications for school districts because a student may be determined, as in *Lancaster*, to have more than one primary disability, and the failure to identify any such additional disability could render school districts liable for parent attorneys' fees even if a FAPE has been provided.

The Ninth Circuit Court also concluded that while attorney-parents are not entitled to attorney's fees if they prevail in an IDEA dispute, attorney-grandparents (and presumably attorney-uncles, aunts, siblings, cousins, etc. who do not serve in the place of natural or adoptive parents) are potentially entitled to attorney's fees.

Please contact any of the attorneys in any of our offices if you have questions regarding this Legal Update or any other legal issues.