




## Challenging Adequate Yearly Progress

by Albin Bauer II and Amy J. Borman

The Franklin County Court of Appeals has issued rulings in favor of two public schools' complaints challenging the administrative procedures for appealing the Ohio Department of Education's determination of Adequate Yearly Progress (AYP) status under the No Child Left Behind Act (NCLB). The cases are entitled *W C Cupe Community School v. Zelman* and *Victory Academy v. Zelman*.

According to the Department each school did not meet AYP. The first school learned of its AYP status when the Department issued local report cards on August 15, 2006. The school filed an appeal with the Department because it believed the AYP determination was in error. Since the school's appeal was filed after the July 28, 2006, deadline stated in the "AYP Appeals Procedures" the Department denied it. The second school learned of its AYP status the same day as the AYP appeals deadline, July 27, 2007. Its appeal was denied by the Department's AYP Appeals Team on the basis that, under the AYP Appeals Procedures, incomplete or inaccurate data submissions do not constitute grounds for appealing an AYP determination. Both schools appealed the Department's denials to the Franklin County Common Pleas Court on the contention that the AYP Appeal Procedures were invalid since they were not promulgated as rules in accordance with the notice-and-comment rulemaking requirements of the Ohio Administrative Procedures Act.

In *Cupe*, the common pleas court dismissed the school's action saying that schools do not possess a private right of action to enforce the requirements of NCLB. The Court of Appeals reversed the Common Pleas Court's dismissal, finding that the NCLB issue is separate from the issue of the Department's compliance with Ohio's Administrative Procedures Act. The Court of Appeals rejected the Department's position that the AYP Appeals Procedures, are merely non-substantive measures that are exempt from rulemaking requirements. The Court



upheld that if the AYP Appeals Procedures enlarge the scope of the statute from which it derives (NCLB), rather than simply interpreting it, then the AYP Appeals Procedures cannot be enforced unless they are formally promulgated as rules by the Department. This issue will be addressed by the Common Pleas Court on remand.

In *Victory Academy*, the Common Pleas Court dismissed the school’s action, stating that the Department’s denial of the AYP appeal was not a final adjudication under Chapter 119 of the Revised Code and declined to address whether the AYP Appeals Procedures were unenforceable because they were not promulgated as rules. The Court of Appeals held the Common Pleas Court erred in dismissing the complaint because the school stated a valid claim for declaratory judgment that the AYP Appeals Procedures were unenforceable under the rulemaking provisions of Ohio’s Administrative Procedures Act.

The significance of these decisions to traditional public school districts and community schools is they validate schools using causes of action based on state law to enforce their rights derived from NCLB. In addition, if upon remand the schools prevail on their claims, the Department will need to promulgate the AYP Appeals Procedures as rules, which will provide public schools and other interested parties an opportunity to comment on weaknesses in the Department’s procedures, and to work with the Department, the Joint Committee on Agency Rule Review and other members of the legislature, to make changes to the appeals procedures to create an effective and fair appeals process.

*Mr. Bauer’s and Ms. Borman’s biographies appear on the following page.*

**Disclaimer**

The articles in this newsletter have been prepared by Eastman & Smith Ltd. for informational purposes only and should not be considered legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney/client relationship.

# Background Check

*featuring*

## Amy J. Borman and Albin Bauer II

Firm member Amy J. Borman returned to her native Midwest from New York City in 1985. She and her husband Bob have raised three children in the Toledo area. Dena (25), an Indiana University School of Music graduate, is a high school choral conductor in the Chicago Public Schools; Gabe (23) is a University of Maryland graduate and currently a paralegal at the U.S. Department of Justice, Antitrust Division in Washington D.C. and Ethan (18) graduated from the Toledo School for the Arts this spring. He will be attending Berklee College of Music in Boston this fall. Mr. Borman has multiple degrees, including one from New York University and he is a school counselor at Saint John's Jesuit High School.



Ms. Borman attended Wittenberg University and the University of Michigan where she obtained her bachelor's and master's degrees in music, respectively. She earned her law degree from the University of Toledo. Obviously, her interests lie in the arts. She is active in the arts organizations as well as professional women's organizations and educational advocacy endeavors.

In her practice, Ms. Borman advises businesses and educational institutions in all matters of compliance with laws. Ms. Borman provides guidance to educational clients nationwide and has been a guest speaker at businesses, universities and schools throughout the United States and Europe.

Ms. Borman can be reached at our Toledo or Columbus offices (419-241-6000; 614-280-1770).

Albin Bauer II joined Eastman & Smith in 1993 and has been a member of the Firm since 1999. He and his wife Veronica have a son, also named Albin, who will be a senior at Penta Career Center studying automotive technology. Mrs. Bauer is a former teacher.

Prior to joining Eastman & Smith, Mr. Bauer worked seven years for General Motors in various positions including in quality control and metallurgy. Soon after joining the Firm, he and his wife built their dream home using their own sweat equity to construct the floor joists, roof rafters and everything that goes in between.



Recently, Mr. Bauer indulged his interest in the early auto industry by purchasing a 1912 Ford Model T.

Mr. Bauer graduated from the General Motors Institute (now known as Kettering University) where he earned a bachelor's degree. His law degree is from the University of Toledo. Mr. Bauer concentrates his practice on public law, environmental law, school law and constitutional issues. He counsels and represents cities, counties, special governmental districts, economic development agencies, community schools and other educational institutions. He can be reached at our Toledo office by calling 419-241-6000.

