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Ohio House Proposes Many Changes to Evaluation Procedures under Substitute S.B. 229

The Ohio House Education Committee has unveiled sweeping changes to Substitute Senate Bill 229 with regard to teacher and principal evaluations. The original version of SB 229, which passed the Senate unanimously on December 4th, 2013, modified frequency and composition of teacher evaluations and reduced some of the burden on school administrators. The new version of the Bill proposed by the House Education Committee, however, would modify both the OTES and OPES evaluation systems in ways that would undoubtedly place additional strain on the relatively untested evaluation systems. The proposed changes include the following:

- Bumps student growth measures back up to 50% from the 35% proposed by the Senate, unless a district elects to use an alternative "student survey" framework (available for grades 4-12), in which case the final rating would be comprised of 40% SGM, 40% teacher performance rating, and 20% student survey results;
- Requires that an evaluator use an average score if a teacher receives different scores on the *observations* and *review* components of the evaluations;
- Increases SGM from three to five total possible ratings: "Most Effective", "Above Average", "Average", "Below Average", and "Least Effective";
- Adds new performance level rating of "Effective" that will exist in the realm between "Skilled" and "Developing";
- Requires that at least one formal observation of a teacher be unannounced;
- Beginning in 2015, allows districts to evaluate "Accomplished" and "Skilled" teachers every other year, but only if the teacher's SGM score is rated "Average" or higher (teachers must still receive one observation and a conference in the "off" year);
- District can elect not to evaluate 1) a teacher who is on leave for 70% or more of the year, and 2)a teacher who submitted notice of retirement before Dec. 1st;
- Teachers rated "Effective" "Developing" or "Ineffective" must be placed on an improvement plan;
- In 2015 and beyond, districts cannot assign students to a teacher who has been rated ineffective for two or more years (but does not specify what a district should do with these teachers!);
- A district is also prohibited from assigning a student teacher to a teacher who is "Developing" or "Ineffective" during the previous year;
- If a teacher with at least ten years of experience receives a designation of either "Least Effective" or "Below Average" on his/her SGM rating, that teacher may be rated "Developing" only once;
- Mandates that results of an evaluation must follow the teacher even if he/she is transferred to a new building or takes employment elsewhere;
- Requires ODE to develop a standardized framework for assessing SGM for all non-value added grade levels and subjects by 2016;
- By 2016, districts must administer assessments to students in each of grades K-12 for English Language Arts, Mathematics, Social Studies, and Science. Assessments must be selected by ODE and based on value-added progress dimension or vendor-developed student growth measures (may include assessments already required by law);
- Beginning next July, evaluators must verify completion of at least one evaluation training course outlined in the bill;

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Ohio House Proposes Many Changes to Evaluation Procedures under Substitute S.B. 229, Cont.

- After July 1, 2015, the State Board must ensure individuals seeking licensure as superintendent, assistant superintendent, principal, vocational director, administrative specialist, or supervisor have completed a teacher evaluator training;
- The revised bill mandates that the State Board of Education must develop a standards based system for principals and assistant principals, which districts must conform to;
- Third grade reading guarantee assessments must either be value-added or vendor-approved assessments;
- ODE must provide detailed report of school performance on evaluations to general assembly, and must accept comments for improvement from districts that it passes on to general assembly;
- Exempts from collective bargaining all amendments made by the bill to 3319.111, 3319.112, 3319.113, 3319.114, 3319.115, and 3319.117;
- Permits a district to enter into a MOU with union that stipulates value-added progress demission rating issued for 2014-2015 will not be used when making decisions regarding dismissal, retention, tenure or compensation.

The Bill currently awaits approval in the House Education Committee before it will be sent to the full House for a vote. The bill will also need to be voted on again by the Senate before it proceeds to the governor for final signature. We will keep you posted on the progress of the bill, and also encourage clients to voice opposition to the drastic changes listed in the bill.

Hair Length Restrictions Further Explored in the Seventh Circuit

***Hayden v. Greensburg Cmty. Sch. Corp.*, No. 13-1757 (7th Cir. Feb. 24, 2014).**

Once again, the topic of hair cut requirements in sports reaches the courtroom. On February 24th, 2014, a U.S. Court of Appeals for the Seventh Circuit ruled that an Indiana school district's policy regulating hair length for members of the boys' basketball team violated the Fourteenth Amendment's Equal Protection Clause and Title XI.

A school district in Greensburg, Indiana adopted a provision in its athletic code of conduct which forbid hairstyles that either obstruct vision or draw attention to an individual athlete. Hairstyles prohibited by the policy included Mohawks, dyed hair, or figures cut into the hair. The policy stated that "each varsity head coach will be responsible for determining acceptable length of hair for a particular sport." Hence, the varsity basketball coach established an unwritten hair-length policy that required hair to be cut above the "ears, eyebrows, and collar" in order to promote a "clean-cut" image. No similar policy existed for female athletes.

When a high school junior's hair disqualified him from playing on the boys' basketball team, his parents filed suit in federal district court against the district. The parents claimed that the policy violated the student's (1) substantive due process rights because it arbitrarily infringed upon his liberty interest in choosing his own hair length, (2) rights under the Equal Protection Clause, and (3) right to equal treatment under Title XI.

First, the court noted that, due to past case law, hair length was no longer a fundamental right, but was a "cognizable aspect of personal liberty" creating "a residual substantive limit on government action which prohibits arbitrary deprivations of liberty by the government." Here, the district need only prove the intrusion upon the liberty interest, or right to choose his personal hair length, was rationally related to a legitimate government interest, where the parents' burden was to prove that the policy was arbitrary. The parents did not present any factors or argument on this issue. Hence, the court declined to express an opinion on whether the policy would survive the rational basis review.

However, because there was not a similar policy for the girls' basketball players, the Seventh Circuit court concluded that the policy resulted in illegal sex discrimination, and upheld the Equal Protection and Title XI claims. "The hair-length policy applies only to male athletes, and there is no facially apparent reason why that should be so," the judge stated, and "girls playing interscholastic basketball have the same need as boys do to keep their hair out of their eyes, to subordinate individuality to team unity, and to project a positive image."

The court went on to suggest that the inference of sex discrimination could have been defeated had the school district implemented the policy in the correct fashion. If the district were to have shown that the hair-length policy was "just one component of a comprehensive grooming code that imposes comparable although not identical demands on both male and female athletes," the policy would have been acceptable. Instead, the particular policy drew an explicit distinction between male and female athletes, whereas the males are subjected to an additional burden that the females were not, and the school did not supply a legally sufficient justification for the sex-based classification.

How this Affects Your District:

It is important to note, first, that this decision is not binding in Ohio and, second, that the decision fails to give us a full picture of the law on the issue. The court here was unable to fully address each of the three claims brought by the student's par-

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Hair Length Restrictions Further Explored in the Seventh Circuit, Cont.

ents because of the parties' failure to present facts. For example, the school's hair length restriction for boys was upheld under a liberty interest claim but it may not have been had the plaintiffs presented sufficient evidence that the policy lacked a rational basis. Similarly, where the parents succeeded on the Equal Protection and Title XI claims, had the school produced evidence that female athletes were subject to comparable restrictions a different result could be reached.

Taking this into consideration, it is therefore important to make sure that any grooming policies include comparable, even if not identical, restrictions for male and female participants. It is also important to note that, again, a court has found there is indeed a cognizable liberty interest, but NOT a fundamental right, in one's hair length when participating in school athletics, and that a district may restrict hair length in sports if rationally based. However, if the policy does not have a sufficient rational basis, it could be additionally found in violation of substantive due process.

Workers' Compensation Denied due to Voluntary Abandonment Finding

***State ex rel. Robinson v. Indus. Comm.*, Slip Opinion No. 2014-Ohio-546.**

On February 20th, 2014, the Supreme Court of Ohio denied an employee's temporary-total-disability workers' compensation claim on the basis that the employee's discharge from employment for violating written workplace rules had been a voluntary abandonment.

Progressive Parma Care Center, LLC/Parma Care Nursing and Rehabilitation ("Parma Care") hired the employee as a licensed practical nurse ("LPN") and gave her an employee handbook and a written job description, setting forth her job duties and responsibilities. Over the course of employment, the employee received discipline on several occasions. After violating work rules on February 29th, 2008, the employee acknowledged on the discipline form that she had been warned any future violations would result in her termination.

Subsequently, a series of events occurred in April of 2008. First, on April 10th the employee sustained an injury at work. After allowing her workers' compensation claims, Parma Care moved her to light duty work. On April 15th, a state surveyor reported to Parma Care that the employee had failed to perform a series of duties appropriately during her shift on April 11th. Thus, on April 16th, the director of nursing prepared the paperwork necessary for termination. On the 16th and 17th, the employee was not scheduled for work, but the supervisor called her each day, leaving messages asking her to call. On the 18th, the employee did return the phone call, but refused to meet with the supervisor. Eventually, Parma Care sent the employee a letter dated April 30th, informing her that she had been terminated for cause effective April 16th, 2008.

In the meantime, the employee visited a medical clinic for assessment on April 17th and April 21st. At the second visit, a physician certified the employee as temporarily and totally disabled from all employment beginning on the date of her injury – April 10th.

A staff-hearing officer denied the employee's request for temporary-total-disability compensation based on the conclusion that this termination was a consequence of her own misconduct. By violating a written work rule, she had voluntarily abandoned her employment and was, therefore, ineligible for benefits. The employee appealed the decision to the Supreme Court of Ohio.

The Court determined that an employee who voluntarily abandons his or her employment for reasons unrelated to workplace injury cannot receive the temporary-total-disability compensation, as sought by the employee here. In addition, the Court defined when an employment discharge is voluntary abandonment as "when the discharge arises from a violation of a written work rule that (1) clearly defined the prohibited conduct, (2) identified the misconduct as a dischargeable offense, and (3) was known or should have been known to the employee."

Parma Care presented evidence showing that the employee was provided a copy of the handbook that set forth policies, rules, and disciplinary procedures, as well as the fact that the employee had acknowledged her violation of another workplace rule would result in termination on the February discipline form. The Court determined that this was enough to notify the employee of her job description so that she was put on notice that her actions could result in termination. Thus, her discharge constituted voluntary abandonment of employment. In addition, because the record demonstrated that the supervisor called the employee on separate occasions and that the employee refused to meet with the supervisor before obtaining the second medical assessment, the employee's termination was indeed effective before the consultation and, thus, Parma Care's decision to terminate her was not a pretext to avoid payment of compensation.

How this Affects Your District:

The above decision is binding for all employers in Ohio. It serves as a reminder for districts about the importance of providing the appropriate resources, handbooks, and notices to employees. For example, the employee in this case needed to be on notice of the duties expected of her, as well as on notice that any further violations would result in termination. When appropriate handbooks are provided and documentation is used and retained effectively, employers are able to defeat certain unwarranted workers' compensation claims.

Prior Written Notice Clarification from ODE

On December 20, 2013, the Ohio Department of Education (ODE) issued a memo regarding an immediate change to the use of Prior Written Notices (PWNs). ODE indicated that a district must provide the parent with a PWN "when a change is proposed to the child's free and appropriate public education" even when the parents agree to the IEP. No formal change was made to the regulations which allow an IEP to serve as PWN when there is parental consent. Nonetheless, ODE indicated that it would enforce its new guidance.

Many questions arose regarding what constituted a proposed change necessitating PWN. In response to these questions, ODE has released updated guidance on the topic. ODE's "Questions and Answers" document, provided March 7, 2014, indicates that a PWN must be sent for each IEP meeting or amendment "if…the district is proposing a change or refusing a change to the identification, evaluation or educational placement of the child or the provision of a free appropriate public education (FAPE) even if a change never takes place." Despite these limitations, another ODE document entitled "Prior Written Notice, Informed Consent and Procedural Safeguards," dated March 17, 2014, indicates an unconditional requirement to send PWN for every IEP meeting and amendment.

How this Affects Your District:

Because there has been no formal revision to Ohio's special education regulations which explicitly allow the IEP to serve as PWN when there is parental consent, school districts must rely on ODE's guidance for compliance. That guidance has become progressively broader in the application. Therefore, it is recommended that PWN be sent following every IEP meeting. The various ODE guidance documents are available at http://education.ohio.gov/Topics/Special-Education/Federal-and-State-Requirements/Procedures-and-Guidance.

Court Rules in Favor of District in Expulsion Case

***C.Y. v. Lakeview Pub. Sch.*, No. 13-1791 (6th Cir. Feb. 11, 2014).**

The Sixth Circuit Court of Appeals ruled in favor of a Michigan district despite a student's claim that the district violated her due process rights. The case involved a freshman student, C.Y., who threatened to stab another student and allegedly brought a knife to school. The district relied upon a number of factors to support these allegations. First, C.Y. tweeted the target student early in that morning stating that she was going to stab her and see her insides. Additionally, the district obtained written statements from three students stating that they heard C.Y. say she was going to stab the target student. One of the students also reported that C.Y. showed her a steak knife hidden in C.Y.'s binder. Finally, while one of the students was writing her statement, C.Y. sent a text to the student bragging that the district had no way to prove C.Y. had a knife at school. Because C.Y. had left school early, the administrator was unable to verify the existence of a knife.

Based on the evidence, the administrator called C.Y.'s parent and scheduled a conference for the next day. At the conference, the administrator provided C.Y. with all the evidence against her and provider her with an opportunity to respond. C.Y. admitted the tweet and threats made during conversations with the other students, but she denied bringing the knife to school. Following the conference, the administrator suspended C.Y. with the possibility of expulsion for possession of a knife blade over three inches. The district then conducted a pre-expulsion hearing, in which an expulsion was recommended. The student received an expulsion hearing before the school board, and the board ultimately voted to expel C.Y.

C.Y. filed suit against the district, alleging violation of her constitutional right to due process. The Sixth Circuit Court of Appeals affirmed the lower court's ruling for the school district, and rejected all of C.Y.'s allegations against the district. Applying well-established due process standards, the Court addressed the following allegations. First, C.Y. argued that the district suspended her over the phone prior to providing any due process. Although this was disputed, the Court held that even if the district did suspend C.Y. over the phone, the district had the right to do so on an emergency basis due to the information obtained by the district that indicated C.Y. posed a danger to others. Second, the court held that the conference met the minimum requirements for due process because C.Y. was informed of the charges against her and had an opportunity to respond. Third, C.Y. argued that her suspension violated due process because it was longer than ten days (by approximately two class periods). The Court held that an extension of the suspension by two class periods above the ten day standard did not amount to a deviation from the standard. Fourth, C.Y. argued that she was not afforded due process with the expulsion proceedings because she was not allowed to read the witness statements or the administrator's report. The court held that regardless of whether C.Y. was provided the opportunity to read the statements and report, C.Y. had been informed about the information contained in the statements which enable her to prepare a defense.

By addressing C.Y.'s additional allegations, the Court concluded that C.Y. was provided a fair a hearing that met the due process standards. Specifically, C.Y. alleged that she was deprived of her right to present witnesses because her brother was not allowed in the expulsion hearing. The court balanced the interests of C.Y. with the interests of the district, and determined that, under the facts in the case, allowing her brother's written statement but not his presence in the expulsion hearing did not deny her of her due process rights. C.Y. also claimed that she did not have access to an impartial tribunal because the ad-

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Court Rules in Favor of District in Expulsion Case, Cont.

ministrators had already convinced the board that she was guilty. The court held that, absence a showing of bias, it does not violate due process for administrators to communicate with board members prior to the expulsion hearing or participate in the board's expulsion hearing. Lastly, C.Y. alleged that she was not told she had the right to an attorney. The court also concluded that "students do not necessarily have a due-process right to an attorney at expulsion hearings, let alone a right to be notified that they are entitled to an attorney." Thus, the district's expulsion was upheld.

How this Affects Your District:

The Sixth Circuit's decision in this case is binding in Ohio. Although the Court primarily applied the classic *Goss v. Lopez* standard as well as other leading precedent in the area of student discipline to the facts at issue, it is helpful to be reminded of the importance of following due process requirements. The district in this case prevailed because it provided the necessary due process to C.Y.

The Court also addressed the issue of whether the district had an obligation to tell the student that she had the right to an attorney at the expulsion hearing. In addition to clarifying that the district did not have such an obligation, the court also pointed out that the student handbook stated that students may be represented by counsel at expulsion hearings. Including this information in the student handbook may be a way for districts to ensure that students are provided with notice of the right.

FMLA "Health Care Provider" Certifications Rarely Acceptable From Chiropractors

We've recently seen an increase in the number of FMLA "Health Care Provider" certifications completed and submitted by chiropractors. As many of you know, the FMLA grants eligible employees up to twelve weeks of unpaid leave for several reasons, including a serious health condition. An employer is permitted to request certification from an employee's health care provider to verify that the employee does indeed have a serious health condition. Many school districts and other employers have been accepting certifications completed by chiropractors. However, under the FMLA it is very rare that such a certification must be accepted.

Although many people seek treatment from chiropractors for very serious injuries and ailments, the Department of Labor has concluded that a chiropractor is not to be considered a health care provider unless the treatment provided consists of "manual manipulation of the spine to correct a subluxation." This diagnosis must also be verified by an X-ray.

The DOL's conclusion means that school districts and other employers are not required to accept FMLA certifications from chiropractors except in the circumstance when an employee has seen the chiropractor for the aforementioned treatment of subluxation. Therefore, the next time an employee submits a FMLA Health Care Provider certification from a chiropractor, a district may properly refuse to accept it unless it is for the limited treatment and diagnosis of manual manipulation of the spine to correct a subluxation. The certification must also indicate that such a diagnosis was confirmed by an X-ray.

For more information on this topic and a list of other health care providers that can complete FMLA Health Care Provider certifications, please see the U.S. Department of Labor's website at: http://www.dol.gov/whd/regs/compliance/1421.htm

Delay in Providing Public Records Request did Not Allow for Attorneys Fees

***State ex rel. DiFranco v. S. Euclid*, Slip Opinion No. 2014-Ohio-539.**

The Ohio Supreme Court recently held that the city of South Euclid was not liable for the attorney's fees of the opposing party even though the city delayed in providing records for a public records request. At issue in this case was the interpretation of a 1997 amendment to the Ohio Revised Code 149.43(C)(2)(b), which provides for either discretionary or mandatory attorney's fees in public records cases.

The plaintiff in this case emailed a public records request to the city of South Euclid. Due to an inadvertent oversight, the city did not fulfill the request until the plaintiff filed an action in court. The plaintiff argued that she should receive mandatory attorney fees because the city of South Euclid failed to provide the public records she requested until six months after she submitted the request (i.e., two days after she had filed a complaint).

Instead, the Court held that that the statute requires a court order to produce the public records before a plaintiff can be awarded either mandatory or discretionary attorney fees. Because the city provided the records within two days after the plaintiff filled the complaint, there was no need for the court to order the city to provide the records. Further, since there was no need for a court order, the plaintiff was not entitled to attorney's fees.

How this Affects Your District:

First, this case is a reminder for districts to make sure there is a clear process and procedure for fulfilling records requests. Failing to respond to a records request could result in court costs and damages awarded to the other party. In addition, this case provides encouraging news for public entities. In order for an opposing party to obtain attorney's fees, a public entity must have delayed it's response to the request to such an extent that a court order is required. This ruling encourages those requesting public records to remind a school that it has failed to fulfill the request before resorting to litigation.

Firm News

Attorney Assists the Law and Leadership Institute

The Law & Leadership Institute is a program founded by the Ohio Supreme Court to inspire and prepare students from underserved communities for college and possible careers in law. In the past attorney Jeremy Neff has drawn on his teaching experience to assist LLI with curriculum development, and this year Jeremy is helping to connect LLI with Cincinnati-area schools. Rising freshman may apply for the four-year summer program hosted by the University of Cincinnati School of Law. The program includes ACT and SAT test preparation, assistance with college admission and financial assistance applications, and legal internship opportunities. For the application and more information visit http://www.lawandleadership.org or contact Jeremy. The application deadline for this summer's program is April 15.

Education Law Speeches/Seminars

SAVE THE DATE! 2013-2014 Administrator's Academy Seminar Series

Seminars will take place at the Great Oaks Instructional Resource Center or via live webinar from 9:00 a.m. to 11:30 a.m. unless otherwise noted. Additional registration information will be provided in the near future!

OTES and OPES Trends and Hot Topics – June 12th, 2014
Presented by Bill Deters and Bronston McCord

Education Law Legal Updates 2013-2014 – July 10th, 2014 (Webinar ONLY, from 8:00 a.m. to 12:00 p.m.)

Other Upcoming Presentations:

April 9th: OASBO Annual Workshop-Minimum School Year & OTES/OPES Presentations
Bronston McCord and Pam Leist

April 10th: Butler County ESC Presentation
Erin Wessendorf-Wortman

May 22nd: Section 504 and IDEA Compliance Seminar
Pam Leist, Jeremy Neff, and Erin Wessendorf-Wortman

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Want to stay up-to-date about important topics in school law? Check out ERF's Education Law Blog at www.erflegal.com/education-law-blog.

Webinar Archives

Did you miss a past webinar or would you like to view a webinar again? If so, we are happy to provide that resource to you. To obtain a link to an archived presentation, send your request to Pam Leist at pleist@erflegal.com or 513-421-2540. Archived topics include:

- Education Law Legal Update - Including SB 316
- Effective IEP Teams
- Cyberlaw
- FMLA, ADA and Other Types of Leave
- Tax Incentives
- Prior Written Notice
- Advanced Topics in School Finance
- Student Residency, Custody and Homeless Students
- Ohio Budget Bill/House Bill 153
- Student Discipline
- Media and Public Relations
- Gearing Up for Negotiations

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Special Education

Due Process Claims, IEP's, Change of Placement, FAPE, IDEA, Section 504, and any other topic related to Special Education

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School Finance

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