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Inside This Issue:

Deficiencies in an IEP Meeting's Procedural Requirements May Not Result in a Denial of FAPE

***Jalloh v. District of Columbia*, 62 IDELR 18 (D.D.C. 2013).**

A District Court ruled that in the case of a teenager with ADHD, an SLD, and an emotional disturbance, the school district did not violate IDEA when it held an IEP meeting in the parent or guardian's absence.

The fifteen-year-old student was eligible for special education and related services in the District of Columbia Public School District (DCPS). Records kept by the school reflect that the DCPS Progress Monitor attempted to contact the student's grandmother to inform her that an IEP Team meeting had been scheduled regarding her grandson. A letter was sent by both regular and certified mail. Representatives of the district also made multiple phone calls and even left a copy of the letter at the grandmother's house after trying to discuss the meeting with her via house visit. DCPS eventually held the meeting without the grandmother present. After the meeting, the district contacted the grandmother by telephone in order to inform her of the proposed IEP and to address any concerns.

The IEP developed at the meeting was the same as the student's previous IEP with regard to the amount and type of services. However, the grandmother filed an administrative due process complaint, alleging that her grandson was denied a free and appropriate public education (FAPE), and further that she was entitled to reimbursement for tuition expenses incurred when the student was removed from the public school system and placed in a private school. The Hearing Officer found that DCPS had failed to comply with the IDEA's procedural requirements without substantively denying FAPE. The grandmother appealed the case to the District Court in the District of Columbia.

The Court agreed with the Hearing Officer's determination that the parent was not entitled to tuition reimbursement. Although the Court decided not to address the Hearing Officer's finding that the district's notification efforts regarding the meeting did not represent a diligent effort to ensure parental participation, it did address what would constitute a substantive denial of FAPE. The Court discussed how the team had considered the student's past educational progress, classroom observations, attendance, prior team input in designing the student's program, and had maintained the same level of services that had proved success for the student in the past. The Court also focused on the fact that, post meeting, the district notified the grandparent about an open house at the student's proposed placement which the grandparent attended, and further that the district addressed concerns brought by the parent regarding various elements of the placement.

The District of Columbia may have violated the IDEA when it failed to ensure that a student's parent had the opportunity to attend an IEP meeting, but the Court found that those procedural violations did not result in a denial of FAPE, because the proposed program was appropriate regardless of whether the district had erred in holding the meeting with a parent. Therefore, the Court upheld an administrative determination that the parent was not entitled to a tuition reimbursement for the student's private school costs.

How this Affects Your District:

Whether a district took adequate steps to contract a parent regarding an upcoming IEP meeting may be viewed differently by vari-

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Deficiencies in an IEP Meeting's Procedural Requirements May Not Result in a Denial of FAPE, Cont.

ous hearing officers. In this case, the district sent meeting invitations by mail, made two phone calls to the parents, and attempted to visit the student/parent's home. Even after the district held the meeting in the absence of the student's guardian, the district followed up with the student's grandmother after the meeting. The follow-up minimized the impact of any procedural violation. Therefore, if a district's efforts to get into contact with the parent before the meeting are unsuccessful, it should contact the parent post-meeting to discuss the proposed IEP and any concerns the parent may have.

Overturning DOMA: Implications for Ohio School Districts

Supreme Court Overturns DOMA

On June 26, 2013, the U.S. Supreme Court overruled parts of the Defense of Marriage Act (DOMA), which limited marital benefits under federal law to the union between a man and a woman. As a result of the Court's ruling in *United States v. Windser*, individuals in same-sex marriages are now entitled to the same marital benefits under federal law as opposite-sex couples.

Implications of the *Windsor* Decision

Application of the *Windsor* ruling to individual states is complicated because many states do not recognize same sex marriage, while others recognize same sex marriage performed legally elsewhere but do not permit such marriages within their borders. According to guidance released by the federal government, some federal benefits will be provided to same sex couples regardless of whether their state of residence or state of employment recognizes same-sex marriage. To provide states with additional guidance, the Department of Labor (DOL) & Internal Revenue Service (IRS) have recently released notices regarding the implications of the Court's ruling. Other federal agencies are expected to release guidance in the near future.

Currently, Ohio and surrounding states do not recognize same-sex marriage. However, the following changes are nonetheless applicable to Ohio employers.

FMLA & Social Security

Family & Medical Leave Act (FMLA) & Social Security benefits are only modified for individuals who live in a state that recognizes same-sex marriages. Because these benefits are based on the state in which an employee lives, there is likely no current impact to Ohio employers regarding FMLA benefits and social security.

Taxes

The DOMA ruling applies to the IRS Tax Code regardless of whether the couple's state of residence recognizes same-sex marriages. The term spouse, husband, or wife should therefore be read in a gender-neutral way to include same-sex spouses. Changes became effective Sept. 16, 2013, but may also be applied retroactively for the purposes of employee benefit plans or for filing returns or refunds. These changes impact gift taxes, estate taxes, and income taxes including filing status, personal and dependency exemptions, standard deductions, employee benefits, contributions to IRA, and claiming the earned income tax credit or child tax credit. See Revenue Ruling 2013-17 for additional information.

Employer Sponsored Health Coverage

When determining changes to employer sponsored health coverage, employees of same-sex marriages must be treated the same as employees in opposite-sex marriages regardless of whether the couple's state of residence recognizes same-sex marriage. The value of employer-sponsored coverage will no longer be included in the employee's gross income and will no longer be subject to Federal Insurance Contributions Act (FICA) taxes. Employees can now pay premiums for employer-sponsored health coverage provided to the same-sex spouse on a before-tax basis. Since the value of the employer-sponsored coverage will not be subject to FICA and Federal Unemployment Tax Act (FUTA) taxes, school districts will no longer be liable for additional costs of Medicare (FICA) and federal unemployment (FUTA) taxes.

COBRA

Employers are required to offer an employee's same sex spouse, and the spouse's children, the option to participate in continued coverage through COBRA regardless of whether a state recognizes same-sex marriages.

Health Saving Accounts (HSA)

Same-sex spouses must share the HSA family contribution limit regardless of whether a state recognizes same -sex marriages.

Dependent Care Flex Spending Accounts (FSAs)

Expenses related to the care of a same-sex spouse's child are now eligible for reimbursement regardless of whether a state recognizes same-sex marriages. Same-sex spouses are subject to the maximum annual contribu-

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Overturning DOMA: Implications for Ohio School Districts, Cont.

tion limit for married couples.

Qualified Retirement Accounts (ERISA)

A same-sex spouse is considered a spouse under ERISA regardless of whether a state recognizes same-sex marriages as applicable to federal tax laws. Same-sex spouses have automatic beneficiary rights (if a beneficiary is not selected). Spousal consent for designation of a non-spouse beneficiary and receipt of a participant loan now applies. Additionally, same-sex spouses are entitled to survivor benefits. Same-sex spouses are considered spouses for the purpose of minimum required distribution and right to roll over distribution from a deceased participant's retirement account. Participants qualify for hardship withdrawals related to qualifying events for the same-sex spouse. Qualified domestic relations orders (QDROs) apply to a dissolved same-sex marriage as it would to an opposite-sex marriage. ERISA changes are effective as of Sept. 16, 2013.

Changes to State Bans on Same-Sex Marriage?

Because the impact of the Supreme Court decision at least partially depends on whether a particular state recognizes same sex marriage, it is likely that states will grapple with a flurry of new court cases and proposed legislation in the near future to address the issue. Currently Ohio and surrounding states (Kentucky, Indiana, West Virginia, Pennsylvania, and Michigan) ban same-sex marriage, but several lawsuits are pending in each state to challenge the constitutionality of these bans.

This past December, a federal judge in Ohio ruled that the state must recognize same-sex marriage performed legally in another state, at least in some instances. In *Obergefell v. Kasich*, Judge Black of the US District Court for the Southern District granted both a temporary and a permanent injunction requiring the state of Ohio to recognize the legal marriage of a Maryland same-sex couple and include the status of "married" on the death certificate of one partner.

Judge Black concluded that a permanent injunction was necessary because currently Ohio's Constitution and the Ohio Revised Code prohibit recognition of same-sex marriages, which Judge Black determined was a violation of the U.S. Constitution. Specifically, Judge Black states that same-sex couples "are denied their fundamental right to marriage recognition without due process of law; and are denied their fundamental right to equal protection of the laws when Ohio does recognize comparable heterosexual marriages from other jurisdictions, even if obtained to circumvent Ohio law." The final order authorizes a funeral director to "report the name of the decedent's surviving same-sex spouse as a 'surviving spouse' when assisting with completing Ohio death certificates."

As noted above, lawsuits have also been filed in Kentucky, West Virginia, Pennsylvania, and Michigan challenging each state's ban against same-sex marriages. Although the full implications of these cases are not known, the rulings in these cases could affect Ohio employers in the future.

How this Affects your District:

1. **Notice to Employees:** Failure to inform employees of potential changes to benefits could constitute discrimination.
2. **Language:** Policy, collective bargaining, and benefit plan language should simply use the general terms "marriage" or "spouse." This allows state and federal law to determine how these terms apply and keeps districts in compliance with changing laws.
3. **Mid-Year Election Change:** Since marriage is a qualifying event (and same-sex couples were considered legally married as of the *Windsor* decision), same-sex couples should be allowed to add spousal coverage as well as a spouse's children immediately and do not need to wait until an open enrollment period.
4. **Claiming a Refund:** Both the employer and employee may claim a refund for open periods (typically the previous 2-3 years) related to overpayment of FICA taxes and employment taxes. See IRS Notice 2013-61.
5. **Additional Guidance:** Contact your legal counsel to discuss application if *Windsor* to your policies and procedures. See also IRS Notice 2014-1 (released December 16, 2013) for additional guidance.

Updates of Pending Legislation

As the year came to a close, several bills moved through the houses of the Ohio Legislature. Senate Bill 229 unanimously passed the Ohio Senate on December 4th and currently awaits committee assignments in the House. If passed by the House, SB 229 would reduce the student academic growth measure factor for teacher evaluations from 50% to 35%, and would permit each local board of education to determine how the remaining 15% will be attributed. Options include: (1) attribute additional percentage to SGM, (2) increase performance rating value, (3) incorporate student survey results, or (4) assign any other factors or a combination of factors "the board deems necessary and appropriate." Additionally, SB 229 would reduce the frequency of formal evaluations for teachers who receive ratings of accomplished or skilled unless the board passes a resolution to evaluate those teachers more often.

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Updates with Pending Legislation, Cont.

House Bill 215 also passed the Ohio House on December 4th with a vote of 63 to 27. If passed, HB 215 would allow a school district to enter into an agreement with a current or retired law enforcement officer to provide volunteer patrol services. It would also require the sheriff of each county to maintain a list of qualified current and retired law enforcement officers who wish to provide volunteer patrol services. Any retired law enforcement officer who agrees to provide volunteer patrol services would be required to undergo a criminal records check at the officer's own expense every five years. The law would grant qualified immunity for each school district that enters into any agreement with an officer, and would provide tax credits for volunteer officers.

Finally, House Bill 296 passed the Ohio House unanimously on November 20th. As discussed in last month's newsletter, HB 296 would authorize schools to stock epinephrine auto-injectors (epi-pens) without a license for emergencies. On December 3rd, the Bill moved to Senate, and was referred to the Medicaid, Health & Human Services Committee.

Tax Court Strikes Down Exempt Status of Booster Club

***Capital Gymnastics Booster Club, Inc. v. Commissioner*, TC Memo 2013-193.**

On August 26, 2013 the Tax Court ruled that Capital Gymnastics Booster Club, Inc. failed to qualify as a tax exempt organization because the Booster group provided an excessive level of private benefits to individuals.

At Capital Gymnastics, parents of the athletes in question paid tuition and fees to the gym. If athletes participated in outside meets, they incurred additional expenses. The booster club was organized to support the athletes of the gym who participated in competitions, and to pay the expenses incurred by those athletes at meets.

Parents of athletes who wished to compete in meets were required to join the Booster organization. Each had to option to either pay an assessment or participate in the organization's fundraising activities. The assessment fee ranged from $600 to $1,400, and any amount personally raised by the parent through fundraising was credited directly against the assessment due. No other options or assistance was provided to help parents reduce the assessment fee.

Ninety-three percent of the fundraising profit was allocated to offset the assessments of parents that participated in fundraising. The organization explicitly prevented individuals referred to as "freeloaders," from benefiting in any way from the fundraising activities. Besides fundraising, the only other income received by the organization was from the membership fees and assessments.

The organization received §501(c)(3) exempt status by the IRS when it was founded. Many booster clubs are organized as tax-exempt §501(c)(3) charities. To be eligible for tax exempt status under the IRS code, a charitable organization must meet the following criteria: 1) the group must serve the public interest and 2) the earnings of the group cannot benefit individuals. The second requirement is commonly referred to in tax law as "private inurement."

The IRS claimed that the organization failed to operate exclusively for its exempt purposes. Agreeing, the Tax Court found that by offering an impermissible benefit to insiders, the organization violated the IRC §501(c)(3) prohibition on private inurement. The Court reasoned that the "dollar-for-dollar arrangement constituted inurement and private benefit in violation of §501(c)(3) because the methodology furthers private interests rather than the team or the organization as a whole."

The organization argued that its operations did not give rise to constructive distribution because it did not give any actual cash to the parents: the money went directly to competition related activities. In addition, the booster club attempted to compare themselves church youth groups, Cub Scouts, or public school athletic boosters that allegedly conduct fundraisers which do not jeopardize their tax exempt status.

However, the Court disagreed with the organization's argument, noting that there was a direct link between a parent's fundraising results and the expenses incurred for that parent's child. The link resulted in a specific benefit that individual parents received. While no cash was directly distributed to each parent, a parent's fundraising earnings were directly applied to reduce the parent's expenses.

The fundraising in the case was also the primary function of the organization. The booster group created a "pay when you play" program, where parents had the option of either participating in fund raising or simply writing a check. Thus, the Court found that parents at the gym received an impermissible and significant private benefit from fundraising that was directly tied to their production, which violated the rules for tax-exempt organizations.

How this Affects Your District:

Typically, booster clubs are tax-exempt organizations that are formed by parents to provide support to children either in the classroom or for specific extracurricular activities. However, it is likely that the IRS will apply the holding to all booster groups. Because school districts are often implicated when booster groups run afoul of the law, districts should discuss the topic with booster groups to make sure they are operating exclusively for tax-exempt purposes. Districts should place particular emphasis on fundraising activities to ensure private benefits are not obtained.

Facebook Public or Private Speech

***Gresham v. City of Atlanta*, 1:10-CV-1301-RWS, 2011 WL 4601020 (N.D. Ga. Sept. 30, 2011) *adhered to on reconsideration*, 1:10-CV-1301-RWS, 2012 WL 1600439 (N.D. Ga. May 7, 2012) and *aff'd*, 12-12968, 2013 WL 5645316 (11th Cir. Oct. 17, 2013).**

In *Gresham v. City of Atlanta*, a case before the 11th Circuit Court of Appeals, a police officer claimed that a police department retaliated against her in violation of her First Amendment Free Speech Rights when she did not receive a promotion after she posted a comment on Facebook that criticized another officer. The police officer was not promoted because, at the time the promotion was made, the department was conducting an investigation against her for violation of the police department's policy the required employees to submit criticism of fellow officers directly through official department procedures and not in such a way that would harm the reputation of the police department. The Court applied the *Pickering* Test to determine the level of First Amendment protection for the officer's Facebook speech, and ultimately concluded the police department did not violate the officer's Free Speech rights.

The *Pickering* Test, used to determine the level of speech protection for public employees, requires an analysis the following: (1) whether the speech involved a matter of public concern; (2) whether the interest in speaking outweighed the government's interest in restricting the speech; (3) whether the speech played a substantial part in the government's challenged employment decision; and (4) whether the employer would have made the same employment decision even if the speech had not occurred.

After the Court assumed that the speech involved a matter of public concern under the first prong, the Court weighed the interest of the plaintiff's speech against the interest of the police department. The Court concluded that the officer's Facebook post was not presented in a way that would bring attention to the public and generate public pressure for change, nor was it presented to supervisors who had the authority to make corrections. Instead, it was presented through a "newsfeed" post on the police officer's personal Facebook profile, which was "set to private" and viewed by an unknown number of "friends." Although not specifically addressed by the 11th Circuit Court of Appeals, the district court stated the following: "[w]hile this choice of forum certainly does not exempt her speech from First Amendment protection, which extends to all forms of protected speech, it does suggest that her interest in making the speech is less significant than if she had chosen a more public vehicle, calculated to lead to serious public scrutiny [of the department's] internal affairs." The district court indicated that this speech appeared to be made to vent frustration, as opposed to "crying out to the public." The 11th Circuit likewise concluded that the police officer's speech was "not a strong one."

The Court also recognized that the government had a legitimate interest to maintain the working relationship of officers in the police department and concluded that the Facebook comments presented a reasonable possibility of disruption to the police department's operations. The Court determined that the officer's claim failed under the second prong of the *Pickering* Test because the legitimate government interest of the police department outweighed the police officer's free speech interest. Since the second prong had not been met, the Court did not need to address the final two prongs. Based on this analysis, the case was dismissed on summary judgment in favor of the police department.

How this Affects Your District:

Although this case is not binding on Ohio, it may nonetheless be persuasive to other courts that consider the free speech rights of public employees who use social media. The case implies that speech made only to "friends" on social media pages, while protected by the First Amendment, may warrant less protection than speech made in a more public forum.

Firm News

Gary Stedronsky Named Rising Star

We are very pleased to announce that Gary Stedronsky was nominated as a SuperLawyers Rising Star for 2014! SuperLawyers is a national rating service that publishes a list of attorneys from over seventy practice areas who have attained a high degree of peer recognition and professional achievement. To qualify as a Rising Star, an attorney must score in the top ninety-third percentile during a multi-phase selection process that includes peer review and independent evaluations.

Please join us in congratulating Gary on this achievement!

Adopt-A-Class Holiday Celebration

ERF staff visited the Pleasant Hill Academy in Cincinnati on December 19th to celebrate the holiday season with the firm's Adopt-A-Class students. The students made homemade ice cream and holiday-themed sundaes. Afterward, ERF handed out holiday gifts and helped students to complete classroom assignments.

A good time was had by all!

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!

Special Education Legal Update – March 6th, 2014
Presented by Bill Deters, Jeremy Neff and Erin Wessendorf-Wortman

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:

January 11th: "School Laws and Board Responsibilities," OSBLC School Board Member Training
Bill Deters

January 31st: Ohio State Bar Association Education Committee Meeting
Bill Deters

February 3rd: "Special Education Legal Updates" Brown County ESC/Southern Ohio ESC
Bill Deters & Jeremy Neff

February 4th: NWOESC Administrators Retreat
Bronston McCord and Gary Stedronsky

February 12th: Butler County ESC Counselor's Consortium
Pam Leist

ERF's Education Law Blog

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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ERF Practice Teams

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Bronston McCord
Ryan LaFlamme
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Workers' Compensation

Administrative Hearings, Court Appeals, Collaboration with TPA's, General Advice

Team Members:
Ryan LaFlamme
Pam Leist
Erin Wessendorf-Wortman

Special Education

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

Team Members:
Bill Deters
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Jeremy Neff
Erin Wessendorf-Wortman
Michael Fischer

School Finance

Taxes, School Levies, Bonds, Board of Revision

Team Members:
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