Ennis Roberts Fischer
School Law Review

1714 West Galbraith Rd.
Cincinnati, Ohio
45239

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

FAX
(513) 562-4986

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Student Pregnancy: Test Your Knowledge

Title IX of the Education Amendments of 1972 is a federal law that prohibits discrimination on the basis of sex. It protects students from sex discrimination in all educational activities and programs. Under Title IX, it is illegal for schools to discriminate against pregnant students due to pregnancy, false pregnancy, childbirth, recovery from pregnancy, termination of pregnancy, and parental status.

Although this mandate may sound easy enough to follow, there are some complicated situations surrounding student pregnancy that may violate Title IX state and federal laws. The U.S. Department of Education & the Office of Civil Rights recently published guidance to assist secondary schools in supporting the academic success of pregnant students. Test your knowledge with some frequently asked questions below.

Can a school offer different programming to pregnant students?
Yes. Although Title IX prohibits a school from requiring a different program or extracurricular activity, schools may offer voluntary alternative programs, as long as those programs are comparable to regular programs. For example, alternative programs must allow a student who is taking college preparatory courses to continue taking courses at that level. Additionally, schools must provide clear guidelines on how alternative programs provide course credit towards graduation requirements.

Are districts required to provide additional accommodations or services to pregnant students?
Yes. Districts must provide reasonable accommodations such as more frequent restroom breaks, larger desks, or access to an elevator. Districts must also provide special services, such as homebound instruction or tutoring, if the district would provide those special services to other students who suffer from any other temporary medical conditions. Following childbirth, districts must allow students the opportunity to make up missed work. For example, a school may provide the student the option of retaking a semester or participating in an online course credit recovery program.

Can a school require a pregnant student to provide a doctor's note before allowing her to participate in extracurricular activities?
In general, no. A school cannot require a pregnant student to provide a doctor's note to continue participation in any curricular or extracurricular activity, including sports, unless the district requires all students under a doctor's care to provide a doctor's note.

Is a school required to excuse absences due to student pregnancy or childbirth?
Yes. There is no set time limit for excused absences related to pregnancy or childbirth. Instead, a school must excuse any absences deemed necessary by the student's doctor. A student can be required to submit a doctor's note if the school requires other students with medical conditions to submit a doctor's note. However, the student must have a medical need.

Do minors need parental consent to obtain reproductive health care?
No. In Ohio, minors can obtain reproductive health care services without parental consent. Reproductive health care includes testing and treatment of STD's; family planning, such as obtaining birth control, condoms, and emergency contraceptives; and pregnancy and prenatal care.

Does a school have an obligation to inform a minor's parents that she is pregnant?
No. Schools are under no legal obligation to inform a minor's parents that she is pregnant. Ohio does not provide any explicit guidance on the subject, however, even minor students have a right to privacy. Note that Ohio provides a judicial bypass option for

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ODE Temporarily Permits Submission of Online Make-up Plans for 2013-2014, Cont.

pregnant minors related to abortion decisions, which allows a minor to have an abortion without parental consent. Because pregnancy is somewhat related to the issue of abortion, there is a strong argument that privacy rights also attach to a student's existing pregnancy. Therefore, school officials should respect student privacy when possible unless there is a particular threat of harm to either the student or the unborn child as discussed below.

Are there situations that may allow a school the discretion to tell a minor's parents she is pregnant?

Yes. In general, it may be appropriate for school personal to inform a student's parent that she is pregnant if the student or baby may be in danger. For example, the following situations may require the discretion of school personnel:

- The student is engaged in drug or alcohol use.
- The student has refused to seek prenatal care.
- The student does not seem to have the mental capacity to comprehend the situation.

Even in these situations, school personnel should attempt to discuss and address these concerns with the student before telling the parent. If the student refuses to address these concerns, let her know that the district plans to inform her parents and work to make her part of the discussion, thereby giving her every opportunity to tell her parents herself.

How this Affects Your District:

Be proactive. Review your district's current policies and procedures to insure protections and supports are in place for pregnant students. First, consider your district's policy for requiring medical documentation for participation in extracurricular activities. A comprehensive policy requiring medical clearance for any student being treated by a doctor will also apply to pregnant students. Second, consider what options your district offers for students to make up missed work during pregnancy or after childbirth. These options should allow students to continue to work towards graduation requirements on the same path as prior to pregnancy. Therefore, options cannot be limited to only vocational-track programs.

Also remember that pregnant students maintain certain privacy rights. Despite these rights, a district has the discretion to release limited information to a student's parent if there is a threat of harm. Due to the fact sensitive nature of these decisions, school personnel must decide whether to disclose a student's pregnancy on a case-by-case basis. For questions regarding a specific scenario, please contact us.

Resource: *Supporting the Academic Success of Pregnant and Parenting Students Under Title IX of the Education Amendments of 1972*, U.S. Department of Education & Office of Civil Rights (2013).

Affordable Care Act Employer Mandate Delayed (in part) Again

On February 10, 2014, the U.S. Department of the Treasury and the Internal Revenue Service gave businesses an extra year to comply with the Affordable Care Act's employer mandate.

Effective immediately, businesses with 50-99 employees will not face penalties for failing to provide health care coverage until 2016. However, these businesses will have to provide the government with information regarding their employees' health insurance plans.

Previously, businesses with 100+ employees needed to provide health care coverage by January 1, 2015 for at least 95% of full-time workers or face a penalty of $2,000 per full-time employee (minus the first 30 employees). Now, the administration has amended this requirement so that on January 1, 2015, businesses with 100+ employees must offer health care coverage to at least 70% of their full-time workers, or face a penalty. This percentage jumps back up to 95% on January 1, 2016.

For the U.S. Treasury Press Release, visit: http://www.treasury.gov/press-center/press-releases/Pages/jl2290.aspx .

Exemption from Transfer Rule Denied Regardless of Athlete's Need for an IEP

***Mann ex rel. Mann v. Louisiana High Sch. Athletic Ass'n Inc.*, 62 IDELR 87 (M.D. La. 2013).**

A district court in Louisiana refrained from giving a high school student with an anxiety disorder an exemption from the state athletic association's eligibility rule despite the fact that the student presented evidence which showed he needed special education services to receive an educational benefit.

The student transferred schools to a new high school and wanted to participate in football. It was clear from the record that the transfer had nothing to do with football. At the time of transfer, the student suffered from an anxiety disorder that had a negative impact on his academic performance. The state's athletic association had a rule that declared transfer students ineligible for interscholastic sports for one year from the date of transfer. Consequently, the student sought an exemption from the rule, which would allow him to play football again immediately.

The court determined that proving an ADA-eligible disability was necessary if an exception from the transfer rule was to be obtained. To do so, an individual would need to show that his disability made him unable to perform or restricted his

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Exemption from Transfer Rule Denied Regardless of Athlete's Need for an IEP, Cont.

ability to perform a major life activity that the average person could perform.

Here, the court found that the student failed to meet either of the two standards. The judge wrote that "merely having an impairment … does not make one disabled for purposes of the ADA." Therefore, the fact that a student's disability has some impact on a major life activity does not always necessarily mean the student will be considered an individual with a disability under the IDEA.

For this reason, the court ruled no exemption from a state athletic association rule prohibiting a transfer player from playing for one year was appropriate based solely on a football player's showing that the purpose of the transfer was to obtain the IDEA services he needed to address his anxiety disorder.

How this Affects Your District:

The fact that a student's disability has some impact on a major life activity does not always mean that a student should be considered an individual with a disability under the IDEA. As seen here, although the student needed special education services to address his anxiety, the deficiencies he reported in academic functioning did not establish an inability to learn or a significant restriction on learning. In this jurisdiction, the 5th U.S. Circuit Court of Appeals has interpreted the "substantially limit" criteria to mean that the student is unable to perform or be significantly restricted in his performance of a major life activity. Since the major life activity of learning exemplified by the case was not substantially limited, the threshold was not met, and the exception was not proper. Therefore, it is important to keep in mind that an impairment alone does not always warrant ADA exceptions.

Private Acts on District Laptop Allowed

***Winland v. Strasburg-Franklin Local School District Board of Education, et al.*, 2013-Ohio-4670.**

Although a teacher accessed forbidden content on a district issued electronic device, termination of his teaching contract was not proper because the occurrence caused no hostility to the community, and had no impact on his professional duties as a teacher.

The case involved an elementary school teacher whom had been part of the district for twelve years. The teacher had received exceptionally high evaluations. In addition, the teacher had only one prior disciplinary action on his record for an unrelated issue.

The district provided a laptop computer to the teacher for use in his classroom. In this district, each teacher also received a handbook containing an Acceptable Use Policy for the use of the school computers, computer network, and electronic messaging system. Within the Policy, one form of unacceptable use is the transmission of any language or images which are of a graphic sexual nature.

Subsequent to the 2010-2011 school year, the teacher requested permission to use the same laptop during the summer months. The laptop had to be returned by a certain date, and the teacher signed a release stating that he would only use the device for school-related purposes, where violations of the district Acceptable Use Policy would be documented and reported for further action. Unfortunately, the teacher did not comply with these rules. He brought the laptop with him on various personal trips over the summer months as well as trips for the football team he coached for the District. When he returned from the last football clinic, he left the laptop on his desk in the elementary school. The school principal noticed, and confiscated the device, turning it back in to the IT department.

The IT department found 84 thumbnail images of graphic, sexual images in the computer's temporary internet files. The image time-stamps showcased that the teacher viewed them within a 23-minute span during the evening on his last trip.

Afterwards, the teacher received a letter notifying him that the Board of Education ("BOE") planned to consider a suspension and/or termination of his teaching contract due to his "failure to follow prescribed procedures and policies with respect to the possession and use of school district technology." Eventually, the BOE issued a resolution authorizing the suspension of the teacher without pay, pending termination proceedings.

Contrary to the referee's recommendation, the BOE determined that it had just cause to terminate the teacher. The teacher appealed his termination to the common pleas court, requesting reinstatement. The court reviewed the evidence presented, and found that the teacher's conduct in viewing the images "was not hostile to the community and was private conduct that had no impact on his professional duties." They therefore ordered reinstatement of the contract with full back pay and benefits. The BOE appealed that decision.

The Ohio appeals court recognized that there are procedural requirements a board of education must follow before it can terminate a teaching contract for disciplinary reasons. R.C. 3319.16 states that the contract "may not be terminated except for good and just cause." In addition, the court discussed how Ohio appellate courts have tradition-

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Private Acts on District Laptop Allowed, Cont.

ally interpreted just cause to mean the conduct complained of must be hostile to the school community and not merely a private act which has no impact on the professional duties of a teacher.

According to the appellate court, the evidence presented clearly and convincingly indicated that the teacher's conduct was private conduct. It did not occur on school property, had not impacted his professional duties or his students, did not constitute a criminal act, and could not have been construed as "hostile to the community." The court stated "the private sexual practices or proclivities of educators, if perchance revealed or learned, cannot serve as a predicate for Board discipline if that conduct has not implicated or transgressed the sacred boundaries of students and school." Ultimately, the court determined that the weight of the evidence did not support the BOE's decision to terminate the teacher's contract because it did not constitute a "fairly serious matter," and did not rise to the level of "good and just cause" for termination.

How this Affects Your District:

Typically it is true that an employee using an employer-provided computer has no expectation of privacy for the data on the computer. This case does not dispute that finding, but instead considers whether a private act committed on the device impacted the professional duties of the teacher in such a way that was hostile to the school community. Here, the case shows that balancing where the conduct occurred, the impact it had on job responsibilities and/or students, and whether the act was hostile to the community in violation of the terms of the Policy is necessary to prove "good and just cause." Because a district must prove just cause before terminating a teacher's contract, it is important to carefully weigh the evidence presented. While the decision is binding in Ohio, it is likely another court might reach a different conclusion.

Ice Slip Claimant Not Required to Show Prior Medical Documentation

***Gardi v. Board of Education of the Lakewood City School District, et al.*, 2013-Ohio-3436.**

While working for Lakewood City School District, Gary Gardi sustained injuries when he slipped and fell on black ice. Gardi filed for workers' compensation, and his claims for injuries included lumbar sprain/strain, left hip sprain/strain, and left knee contusion were granted. Subsequent to his initial claim, Gardi sought to include an additional allowance for substantial aggravation of pre-existing osteoarthritis of the left knee. This second claim was denied, and Gardi filed an appeal in the common pleas court. The District denied the claim, concluding that he had failed to present pre-injury medical evidence documenting his osteoarthritis, and thus, could not demonstrate substantial aggravation of a pre-existing condition.

The trial court summarized the rule in R.C. 4123.01(C)(4) that any condition a claimant asserts as substantially aggravated by a workplace injury must be medically documented *prior* to the injury set forth in the claim. In this case, Gardi had not presented such evidence. Disagreeing with this reasoning, Gardi appealed to the 8th Appellate District for review.

R.C. 4123.01(C)(4) states that an injury sought to be included in a workers' compensation claim does not include "a condition that pre-existed an injury unless that pre-existing condition is substantially aggravated by the injury." It goes on further to state that, "such aggravation much be documented by objective diagnostic findings, objective clinical findings, or objective test results."

They are not to make any additions or subtractions therefrom. Here, the appellate court noted that the statute specifically required that a substantial aggravation of a pre-existing injury must be documented by objective diagnostic findings, objective clinical findings, or objective test results. However, nowhere therein does the statute set forth that the pre-existing condition must be medically documented *prior* to the workplace injury that allegedly aggravated the condition. Therefore, the trial court's decision impermissibly added a condition that is not in the statute.

The appellate court proceeded to consider whether there was some objective evidence of substantial aggravation of a pre-existing condition at any point in the medical records, not necessary only those records obtained before the injury. In light of doctors' testimony, the court found that Gardi had produced the evidence necessary, regardless of whether he provided pre-injury documentation. Therefore, Gardi's second claim for the osteoarthritis was allowed.

How this Affects Your District:

In light of the heavy winter conditions this season, there may be an increased risk of injury for employees while on the job. This case serves as a reminder that, while there must be evidence a pre-existing condition was substantially aggravated by a workplace injury, a claimant need not necessarily provide evidence in form of prior medical documentation.

Court Rules for Transgender Student's Bathroom Choice

***Doe v. Regional School Unit 26*, 2014-ME-11.**

Maine's highest state court recently ruled that schools within the state must now permit transgender students to use communal bathrooms in accordance with their chosen gender identity.

A student identified as Susan Doe was born male, but began to exhibit a female gender identity at the age of two. By third grade, Susan had begun to fully identify as female. In third grade, the choice of restroom was not an issue –third and fourth grade students had single-stall facilities available to them for use. However, in fifth grade the students transition to communal bathrooms separated by gender, so the district began to develop a plan to address the student's gender identity.

Also at the time, Susan received a diagnosis of gender dysphoria, or psychological stress stemming from identifying with a gender different than the one a child is born with. The resulting plan constructed by the school encouraged recognition of Susan's identity as female, and additionally recommended she use the girls' restroom.

After the school allowed Susan to access the girls' bathroom, a subsequent incident took place that made the district reconsider it's decision. Under the instruction of a member of the community who opposed the allowance, a male student followed Susan into the girls' bathroom, claiming he was also able to use it if Susan was. The incident compelled the school to go against Susan's family's wishes, and they terminated her use of the girls' communal bathroom, requiring instead that she use a single-stall, unisex staff bathroom that was previously off limits to students. As a result, the family removed Susan from the district, and moved to a different part of the state. They filed a complaint with the Maine Human Rights Commission against the district as well.

In Maine's Supreme Judicial Court, a judge wrote that the school's action constituted discrimination based on Susan's sexual orientation. The school's subsequent ban of Susan from the girls' bathroom was not based on a determination that there had been a change in Susan's status, but instead on others' complaints about the school's thoroughly considered decision.

Maine's Human Rights Act prohibits discrimination in public accommodations on the basis of sexual orientation. Sexual orientation is defined by law to include gender identity. Thus, the court determined that a transgendered person has the right to use the restroom designated for whichever gender he or she identifies.

The Court wrote that, "particularly where young children are involved, it can be challenging for a school to strike the appropriate balance between maintaining order and ensuring that a transgender student's individual rights are respected and protected." Here, the Court relied heavily on Susan's gender dysphoria diagnosis. Although laws were in place in the state that requires schools to provide sanitary restrooms, the Court found that it did not establish guidelines for the use of the bathrooms or guidance concerning how gender identity relates to the use of such facilities. Thus, it was found that the district discriminated against Susan when it barred her from the girls' restroom in response to community pressure.

How this Affects Your District:

This landmark decision represents the first time a state court has ruled that schools are required to allow transgender students the opportunity to use a bathroom based on their gender identity. Although it is not binding in Ohio, each state has similar Human Rights Acts prohibiting discrimination in public accommodations such as schools. Therefore, it is important to look closely at both the Human Rights Acts as well as the evidence of gender identity in order to develop appropriate plans for students that do not result in discrimination. Ultimately, districts should be careful to adapt and follow any plans that are carefully constructed based on student needs, and not let community pressure subsequently augment those plans.

Firm News

Attorneys Assist in OSBA Publication

On February 3rd, 2014, attorneys Bill Deters and Jeremy Neff prepared a "Law You Can Use" article for the Ohio State Bar Association. These articles are intended to provide broad, general information about the law.

In particular, the article prepared by ERF attorneys discussed the Rules governing Educator Misconduct in Ohio. It identifies how state law defines educator misconduct, and also addresses the steps necessary if a violation of these rules occurs.

For more information and to view the article, visit: https://www.ohiobar.org/ForPublic/Resources/LawYouCanUse/Pages/What-Rules-Address-Educator-Misconduct-in-Ohio.aspx.

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:

March 10th: OSESC and Brown ESC Special Education Workshop
Bill Deters and Jeremy Neff

March 21st: OSBA Special Education Workshop
Jeremy Neff

March 26th: OASPA HR Administrative Assistants Seminar
Bill Deters and Erin Wessendorf-Wortman

March 28th: OSBA Technology Conference—"Cyberlaw and CIPA"
Pam Leist

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

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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

Need to Reach Us?

William M. Deters II
wmdeters@erflegal.com
Cell: 513.200.1176

J. Michael Fischer
jmfischer@erflegal.com
Cell: 513.910.6845

Jeremy J. Neff
jneff@erflegal.com
Cell: 513.460.7579

Pamela A. Leist
pleist@erflegal.com
Cell: 513.226.0566

C. Bronston McCord III
cbmccord@erflegal.com
Cell: 513.235.4453

Gary T. Stedronsky
gstedronsky@erflegal.com
Cell: 513.674.3447

Ryan M. LaFlamme
rlaflamme@erflegal.com
Cell: 513.310.5766

Erin Wessendorf-Wortman
ewwortman@erflegal.com
Cell: 513.375.4795

ERF Practice Teams

Construction/Real Estate

Construction Contracts, Easements, Land Purchases and Sales, Liens, Mediations, and Litigation

Team Members:
Bronston McCord
Ryan LaFlamme
Gary Stedronsky

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Team Members:
Ryan LaFlamme
Pam Leist
Erin Wessendorf-Wortman

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

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Taxes, School Levies, Bonds, Board of Revision

Team Members:
Bill Deters
Bronston McCord
Gary Stedronsky
Jeremy Neff