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Inside This Issue:

Changes to RC-2 and RC-3 for Public Records Purposes

A recent webinar conducted by the Ohio Historical Society ("OHS") mentioned a change to public records retention requirements that will potentially lessen the burden on Ohio school districts. HB 153, effective September 29, 2011, made changes related to notifying OHS prior to disposing of particular public records.

Each school district is required to adopt RC-2 schedules, which list the type of documents a district plans to retain, as well as the length of time the district plans to retain each type of document. In the past, when the retention period set forth on the RC-2 schedule expired, the district had to notify OHS by filing a certificate of records disposal (RC -3 form) before destroying any of the records. HB 153 created a new section of the Revised Code, §149.381. Now, when a district turns in the RC-2 schedule to OHS, OHS will review it and specifically mark which records on the RC-2 form they would like to see an RC-3 form for prior to disposal of the record(s).

In order to facilitate this new process, OHS has updated the RC-2 form to include a sixth column. In that sixth column OHS will mark each record that it will require a RC-3 form prior to disposal of the record(s). Therefore, when a district receives the RC-2 form back from OHS, the district will be able to see which documents OHS requires an RC-3 form for, and it will only have to provide OHS with the RC-3 form for those documents.

How This Affects Your District:

For any RC-2 schedules that were approved prior to September 29, 2011, a district will have to follow the old method of filing an RC-3 form for every document on that RC-2 schedule prior to disposal. However, for any RC-2 schedules approved on or after September 29, 2011, districts will only have to turn in an RC-3 form for the documents OHS specifically requested. Therefore, if your district would like to take advantage of the new rules, you will need to resubmit the RC-2 schedule to OHS for re-approval. After the re-approval, your district will only have to provide an RC-3 form for the documents specifically requested by OHS.

No Reasonable Accommodation for Swimmer Who Fears Drowning

***S.S. by Schor v. Whitesboro Cent. Sch. Dist.*, 44 NDLR 155 (N.D.N.Y. 2012).**

Parents of a student with a panic attack anxiety disorder sued a New York school district, alleging the district did not provide a reasonable accommodation to their daughter under Section 504 and the ADA in reference to her participation with the school's swim team. A New York district court dismissed the claims, finding that the accommodations requested were not reasonable.

The student enrolled in the school for the 2009-2010 school year and subsequently joined the school's swim team. When the student first enrolled at the school, the parents informed the school of her condition and gave the school instructions regarding what to do when she suffered an anxiety attack. As a member of the swim team, the student was required to stay in the swimming pool for an extended period of time. However, during some practices and competitions she would have severe anxiety attacks that would trigger fears of drowning. When that happened, she needed to exit the pool in order to ease her anxiety. On at least two occasions, the student exited

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No Reasonable Accommodation for Swimmer Who Fears Drowning, Cont.

the pool during a swim competition or time trial.

The accommodation the parents and student requested was for the student to be able to exit the pool at any time in order to deal with an anxiety attack and to do so without being removed from the team. The court stated that "there is no reasonable accommodation that a swim teach coach could make for an athlete who is suddenly and sporadically afraid of the water and thus has to exit the pool during practices and competitions." It noted that one of the essential requirements of being on a swim team is the ability to enter and remain in the pool when required to do so for the purpose of practice or competitions.

Also, the court noted that a student has no right to participate in school sports teams as a part of his or her federally protected right to education. It cited a Seventh Circuit case regarding a student wanting to play basketball, where that court stated, "the fact that [the plaintiff's] goal of playing…basketball is frustrated does not substantially limit his education. The Rehabilitation Act does not guarantee an individual the exact educational experience that he may desire, just a fair one." Following the same logic, the student in this case was not denied a fair educational experience just because she was not able to participate in the swim team. She could have participated in other sports that did not involve her fear of drowning.

Another important fact here is that the district did not remove the student from the team. She quit the team, stating that she felt like she was belittled because of needing the particular accommodation. Therefore, the coach did not take any adverse action against her, and she was always allowed to get out of the pool when she started to have an anxiety attack.

How This Affects Your District:

The court's main holding is that an accommodation for a student to participate in an extracurricular activity is not reasonable if it would fundamentally alter the nature of the activity. Extracurricular activities are not necessarily required in order for a student to fully participate in the educational process. Thus, because a student's disability keeps him or her from participating in a particular extracurricular activity does not mean that a district is responsible for making sure that the student can participate in that activity.

If, however, the student's IEP or 504 plan requires that the student participate in a particular extracurricular activity, then it is mandatory that the district develop some type of accommodation to allow for the student's participation. Another thing to take into account is the fact that the student, in this case, was not precluded from participation in all extracurricular activities. There were other sports that she could have participated in that would not have affected her anxiety disorder as much and which possible accommodations could have been made that would not have fundamentally altered the nature of the sport, as was the case here.

Be reminded that this case is not binding on any court in Ohio, but it does stand as a good example of when an accommodation for the ADA is not reasonable, and therefore not required.

Viewpoint Discriminatory Internet Filters Violate the First Amendment

***Parents, Families, and Friends of Lesbians and Gays, Inc. ("PFLAG") v. Camdenton R-III School District*, Case No. 2:11-CV-04212 (W.D. Missouri 2012).**

A federal court found that a school district violated the First Amendment when it used an Internet filtering program that was both overly broad and narrow in its filtering capabilities. The filter was overly broad because it filtered out websites that expressed positive messages regarding homosexuality. It was too narrow, because the program did not effectively filter out materials that are prohibited by the Children's Internet Protection Act ("CIPA").

The district used a custom internet-filter system based around a free product called URL Blacklist. The contention of the district was that they used this filtering system in order to comply with CIPA, which requires districts to protect its students from viewing, on school computers, images that are obscene, child pornography, or harmful to minors. One of the filtering categories that the district used from URL Blacklist was "sexuality." Rather than filtering out pornographic material, the "sexuality" filter had the effect of filtering out websites that expressed positive viewpoints towards LGBT individuals. On the other hand, websites that tended to express negative viewpoints towards LGBT individuals tended to be categorized as religious and thus were not filtered out. That created a system where the filter was viewpoint discriminatory as to opinions regarding the LGBT community.

The district further argued that there was a method for students to anonymously request that particular websites filtered out would be allowed. However, in order for a student to request this, he or she had to either: (1) send the superintendent an email requesting that the site be allowed; or (2) fill out a form that popped up on the computer screen, requesting the site be opened. Then, there was at least a 24 hour waiting

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Viewpoint Discriminatory Internet Filters Violate the First Amendment, Cont.

period before the request would be approved or denied. The request method that required filling out an online form asked for the student's username. The district stated that the student could have put any name in the box and the request would still have been considered, however, the directions on the form specifically stated, "Please use your Novell Username Below. (Example: jdoe for John Doe, otherwise you will not receive email responses!)." This would lead any student to believe that it was required for the student to enter a username and therefore the identity of the student would be known.

The other main problem the court had with the filtering system used by the district is that the system did not effectively filter out websites that were prohibited by CIPA. The developer of another filter that was designed to help school districts comply with CIPA tested 500 CIPA-prohibited websites on URL Blacklist's filter system. Over 30% of the CIPA-prohibited websites were not blocked by URL Blacklist. On the other hand, at least 41 websites that express a positive viewpoint regarding LGBT issues were blocked by URL Blacklist. When tested on five other filter systems that were all designed to help schools comply with CIPA, none of these 41 websites were blocked. Further, the other filter systems were much more successful in blocking actual CIPA prohibited material, with only about 2% of prohibited material making it through the system, as opposed to the 30% shown for URL Blacklist.

Prior to filing a lawsuit, the ACLU notified the district of the discrepancies with its filtering system. Even after being notified and having notice that other filtering systems were better for filtering CIPA prohibited sites, the district continued to use its viewpoint discriminatory system. Even more harmful was the direct evidence that the district intended to discriminate based on viewpoint. One board member stated that he had "concern with students accessing websites saying its okay to be gay." Community members spoke at the board meeting where this topic was discussed and all of those who spoke were in support of keeping the current filter in place. One parent stated, "If the parent allows this in the house, that's one thing, but to do it outside the family circle, you usurp the authority of the parents." All of this pointed to the district purposefully continuing to use this filtering system in order to keep students from viewing the websites that expressed positive viewpoints towards homosexuality.

How This Affects Your District:

Districts have a responsibility to ensure that students are not viewing inappropriate material, such as pornography, on school owned technology. This responsibility is created by CIPA. However, the district also has a responsibility to ensure that the filtering program that it uses does not filter out websites based on their viewpoint. It is understandable that a district might first use the term "sexuality" as a category to filter out material that may be pornographic. However, the district should check to make sure that the categories it uses are actually filtering out material that is prohibited by CIPA and is not filtering out material based on its viewpoint.

Students use school technology to do a lot of research. If the filtering system is filtering out material that students may need for research for school or personal purposes, and that material is not prohibited by CIPA, districts should be careful to make sure that the blocked material is not blocked based on the fact that the material is not the preferred way that the community would like students to look at a certain issue. In cases such as this, students may be looking for support, and by allowing only material that is negative towards the LGBT community, the district is creating a situation where students may not be able to find the support they are looking for.

When looking for the best filtering system, it is best to use one that has been particularly developed for the purpose of helping school districts to adhere to CIPA regulations. By doing this, the district can show that it is using a system that has a legitimate governmental purpose, and it is less likely that websites will be blocked based on viewpoint dis-

Districts Must Inform Students of Evidence Against Them Prior to Expelling

***McGath v. Hamilton Local School District*, 2:10-cv-1156 (S.D. Ohio 2012).**

A Columbus, Ohio district violated a student's due process rights when it expelled the student without giving him information regarding the testimony that was being used against him.

A student in the district was accused of smoking marijuana before coming to school one morning. He was questioned by the school's assistant principal, at which time the student denied having smoked marijuana. One other student who rode in the car with the accused had smoked and the accused commented that he may have traces of second hand smoke on his lips, but that he did not smoke the marijuana himself. The next day, the district sent the student a "Notice of Suspension and Intended Expulsion." The stated reason for the discipline was "Drugs/Alcohol." Sent on the same day was a "Notice of Expulsion," which informed the student and his parents that a hearing would be held in five days.

At the hearing, it was decided that the student would be expelled.

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Districts Must Inform Students of Evidence Against Them Prior to Expelling, Cont.

At that point, the student and his parents obtained counsel and appealed the expulsion. The appeals hearing was held at a regular meeting of the Board, and the Board informed the student that the Board would meet privately in executive session to discuss the appeal. In the executive session, the Board took testimony of the high school principal and assistant principal without the student's attorney present. After the hearing, the Board sent a letter to the student informing him that the suspension had been affirmed. That letter mentioned that in addition to the principal and assistant principal, that testimony had been taken from another parent. That parent's testimony was a contributing factor in the decision to expel the student. The problem was that this was the first time the student, his parents, or his attorney had been notified that this particular person was going to give testimony in this matter.

According to the court, a student who is accused of an infraction has the right to rebut any evidence the district brings against him. Since the student was not informed of the testimony from the parent, he was not given the opportunity to rebut the testimony with other evidence. In this case, his attorney could have cross-examined the parent witness, but that opportunity was not afforded the student or the attorney. Therefore, the district was found to have violated the student's due process rights.

How This Affects Your District:

When a district brings charges against a student for violating school rules, a student has the right to rebut any evidence the district may have. This is particularly true when the district is trying to discipline the student through suspension or expulsion. When a suspension is short term, generally less than 10 days, students still need to be given an informal hearing. At this hearing, the student needs to be informed of what he or she is accused of, and be given the opportunity to tell his or her side of the story.

When a suspension is long term, or when an expulsion is being sought, a more formal hearing should be arranged. In this case, the district's method of completing the hearing was legally sound. The problem arose when the student was not given the opportunity to know what evidence was being brought against him. Districts cannot keep information regarding evidence of impropriety hidden. If the information is being used against the student, the student must know what the information is and from where or whom it is coming.

IEP Teams Must Consider Parent Views, But Parents Cannot Dictate the Outcome

***Cabarrus County Board of Education*, 112 LRP 14679 (SEA NC 03/01/12).**

The parents of a child with autism argued that the district violated the Individuals with Disabilities Education Act ("IDEA") by excluding them from the Individualized Education Plan ("IEP") process. The administrative law judge ("ALJ") denied the parent's claim, because it found that the parents had been able to meaningfully participate in the IEP process.

The district invited the parents to all of the IEP meetings and the parents were in attendance at each meeting. In addition, the parents always had private consultants in attendance with them. During the meetings the parents and the consultants were allowed to share their views regarding the student's IEP and the district took all of those views into account when developing the IEP.

After implementing the student's IEPS the student showed marked improvement. He was progressing towards his stated goals and had mastered some. In addition his behavior became better and he was less physically aggressive. Still the parents complained that they did not feel enough was being done for their child. The parents wanted the IEP to reflect their exact wishes for how their child should be educated.

The ALJ noted that while parents have a right to participate in the formulation of their child's IEP, there is no right for parents to dictate an outcome. As long as the school district allows the parents to express their wishes related to their child's educational goals and process, the district has met its burden regarding allowing parents to participate in the process. Then, the district is just responsible for ensuring that the plan developed provides the student with an educational benefit, and that the plan is implemented as written.

How This Affects Your District:

Because a parent does not get exactly what he or she wants in his or her child's IEP does not mean that the parent was refused meaningful participation in the development of that IEP. IEP teams need not implement every idea that a parent has into the IEP. Rather, in order to provide a parent with a meaningful opportunity to participate an IEP team should listen to and address a parent's concerns and be willing to change the child's IEP when that is fitting. That does not mean that every concern a parent has needs to be implemented, only that the concern should be given an appropriate amount of consideration.

Education Law Speeches/Seminars

Administrator's Academy Dates at Great Oaks Instructional Resource Center

You can enroll in an Administrator's Academy session using the form on our website or by emailing Pam Leist at pleist@erflegal.com.

June 14, 2012 — *Special Education Update*

July 12, 2012 — *Education Law Legal Update*

Other Upcoming Presentations

Bill Deters
Warren County ESC on June 5
Teacher Evaluations

Jeremy Neff
OCSBA Spring Seminar on June 15
Technology Trends and Troubles

Bronston McCord
2012 OSBA Sports Law Workshop on June 22
Facebook and the Athletic Code of Conduct

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:

- FMLA, ADA and Other Types of Leave
- Tax Incentives
- Prior Written Notice
- 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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