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School Law Review

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Inside This Issue:

Time to Think About Possible Non-Renewals

We are entering the time of the year when it is important for districts to begin taking action on possible non-renewals. March 31 is the last day to take action to non-renew contracts of administrators, other than the superintendent and the treasurer. If a district is planning to non-renew a superintendent or treasurer, the last day to take action and deliver written notice of that non-renewal is March 1.

Prior to taking any action to renew or non-renew the contract of an administrator, the board must notify the employee of the date his or her contract expires and the employee may then request a meeting with the board. If an employee does request a meeting, they may request that it be held in executive session and the board must meet that demand. During that meeting the board must discuss its reasons for considering renewing or not renewing the contract.

In a year when an administrator's contract is due to expire, the district must complete two evaluations. The final evaluation must indicate the superintendent's recommendation to the board regarding the contract for the administrator. Further, a written copy of the evaluation must be provided to the employee at least five days before the board acts to renew or not renew the contract.

April 30 is the last day for a board to take action on and give written notice of intent to non-renew teachers and non-teaching employees. If the board plans to non-renew a teacher who is on a limited contract, that teacher must have been evaluated at least twice during this school year. The second evaluation must be completed between February 10 and April 1, and the teacher must receive a written report of the results of that evaluation no later than April 10. In the same manner administrators must be given notice of the intent to non-renew, the board must give written notice to teachers when there is a plan to non-renew.

ED Civil Rights Office Issued Guidance on ADA-AA

Recently the U.S. Department of Education issued a "Dear Colleague" letter as well as FAQ document to guide schools on their responsibilities regarding the ADA and the Rehabilitation Act after the Amendments Act of 2008 and the effects on 504 plans. The FAQ document that was developed by the Civil Rights Office addresses the broadened definition of disability and provides guidance on how the Amendments Act affects Section 504. The Amendments Act broadened the scope of protection under the ADA, expanded the definition of disability, and made it clear that the analysis of whether someone's impairment is a disability should not be extensive. The definition of disability is now highly inclusive. Students with peanut allergies, ADHD, and other common impairments may now have to be considered for the implementation of a 504 because of the possibility that their impairment is a disability.

The main changes from the Amendments Act are: (1) the inability to take into account mitigating measures, other than ordinary eyeglasses or contact lenses, when determining whether an individual has a disability; (2) expanding the term "major life activities" with a non-exhaustive list of activities and bodily functions that could fall under the definition; (3) a clarification that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active; and (4) a clarification of how the ADA applies to individuals who are "regarded as" having a disability.

While the elements that define a disability were not changed, the Amendments Act has changed how the term "disability" is to be interpreted. The document gives numerous examples of how a student may not have had a

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ED Civil Rights Office Issued Guidance on ADA-AA, Cont.

qualifying impairment prior to the Amendments Act, but now they will. The main goal being to make schools focus less on whether there is a disability and more on the school district's actions and obligations to ensure equal educational opportunities.

In order to qualify as a disability a student's impairment can limit any major life activity such as seeing, walking, or breathing. The question is not only how an impairment affects a student's ability to learn, rather whether any major life activity of the student is affected because of the impairment. If that is the case, then a disability exists. The next analysis is an assessment of what is needed to ensure that the student's equal opportunity to participate in school and school activities is met.

An issue that we have had questions about that is also addressed in the FAQ document is whether a district can use mitigating measures to assess the plan to give a student. While districts can no longer consider the effects of mitigating measures when making a determination regarding a disability, mitigating measures are relevant in the evaluation of a student's need for special education or services. For example, a student with ADHD may be taking medication, but a district might still need to do an evaluation of the student to decide whether his or her ADHD would substantially affect a major life activity if the student was not taking the medication. If the answer is yes, then the student has a disability and then the district can take into account the ameliorative effects of the medications to decide if any special education services are needed.

It should be noted that grades alone are an insufficient basis on which to determine whether a student has a disability. It is possible that a student is making very good grades because that student is using other outside resources or adaptive strategies to maintain grades and thus a disability may be present and the student may need to be provided with services.

How This Affects Your District:

The class of students who are considered to have a disability has greatly expanded because of the ADA-AA. Students who would not have been identified as disabled previously may be now. Some parents may ask for their children to be reevaluated and that would need to be done in order to make sure the student is not now eligible either.

California Federal District Court Holds District Liable for Title IX Violations

***Ollier v. Sweetwater High School District*, No. 07-714 (S.D. Cal. Feb. 9, 2012).**

The Federal District Court for the Southern District of California found in favor of current and former female athletes and one coach from a California school district in a Title IX claim, decided in February. Members of the softball team at Castle Park High School ("CPHS") filed a suit on behalf of all female athletes in the school district alleging that they were unlawfully discriminated against because the male athletes in the district had overall better facilities, locker rooms, equipment, coaches, schedules, publicity, and funding.

The Court decided that the district had unequal participation opportunities for females. Then, the Court further found there was unequal treatment and benefits and retaliation for reporting a possible Title IX violation.

Title IX compliance in the area of equal treatment and benefits is assessed by looking at the overall comparison of male and female athletic programs. Courts will look at recruitment benefits, provision of equipment and supplies, scheduling of games and practices, availability of training facilities, athlete opportunities to receive coaching, provision of locker rooms and other facilities, and publicity. All of these components are looked at collectively; however, a large disparity in one of the components can be substantial enough to be a Title IX violation. Conversely, a disparity in one program can be offset by a comparable advantage to that sex in another area. Title IX compliance essentially requires that the overall effect of any difference is negligible.

In the current case, the Court looked at each of the criteria and found there was always a greater than negligible disparity between the male and female athletic treatment and benefits. Coaches at the schools were in charge of recruiting players for the teams. Since there were greatly fewer coaches for the female teams than for the male teams, the ability to recruit was inhibited. Further, some coaches for female teams were acting as head coach for multiple sports. This double and triple duty caused the coaches to have less ability to recruit effectively for all of the sports they were involved with. That was never the case for the male teams. Further, many female athletic teams were discontinued when the district was not able to find coaches for the teams. The Court found that the district did not expend the appropriate effort to find coaches for those teams and thus the opportunities for the females were greatly reduced when the entire season was canceled. Even when a coach was found for the following year, the scheduling of the games and competitions was negatively affected because the athletic conference the district was a member of did not schedule teams that had not been in place the prior year. Therefore, the lack of coaches for the female teams caused major issues with both scheduling and retention of female athletic programs.

In looking at the locker room situation, the Court found that approximately 30% of male athletes had access to superior facilities. No females had access to superior facilities, but instead 100% of female athletes had access to adequate facilities. These students were required to carry their

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California Federal District Court Holds District Liable for Title IX Violations, Cont.

equipment around with them during the school day because the lockers were not large enough to store equipment. That was not the case for the male students who had access to the superior facilities.

Scheduling games and practices was also an issue. The Court noted that practice time that is scheduled directly after the end of school is the preferred time and game times in the evening when parents can attend are also preferred. In this case, all of the female sports had to play their games before the males, which led to some being played directly after school when parent attendance would be minimal. In addition, in many cases where there were shared facilities, the female athletes would have to practice later in the afternoon, with the males getting to practice directly after the school day. Based on the Court's contention that some disparities can be offset by providing advantages related to other aspects of the benefits analysis, had the district allowed the females the preferred practice time and left the males with the preferred playing time, there may have been less of an issue. However, the district gave the males all of the preferred times.

The Court also found disparity in the publicity, promotional support and fundraising benefits that females had access to. In each of the areas that were examined, the female athletes were disadvantaged. Thus, the Court held that the district had violated Title IX. The Court required the district to develop a compliance plan that the Court will continue to monitor until full compliance is reached.

How This Affects Your District:

While this case is not binding in Ohio, it does give insight into how courts look at Title IX cases. The main issue this district had was that it was not doing self-evaluations. It is likely this district was not fully aware of how out of compliance it was with Title IX because there was no record that it had ever conducted a Title IX self-evaluation, as is required under the regulations.

The Court made an explicit statement that while one factor may cause the whole balance of factors to tip towards a violation, in most cases a court looks at all of the factors, and if the overall outcome is a negligible difference between the male and female athletic opportunities and benefits, then there will not be a violation. In tying this together with Title IX self-evaluation, your district should examine whether recruiting, facilities, scheduling (practices and games), coaching access, medical services, publicity, and funding all together create a negligible difference between male and female athletics.

One issue that would be relatively easy to implement is the school support of athletics. In the case discussed above, the cheerleading squad and pep band were not present for the female athletics. One way to ensure that the publicity and support piece is met could be to ensure that if there is a pep band for the male basketball team, that the females also have the pep band. The cheerleading squad should not be used only for male sports either. When scheduling games and practices, make sure that if the male teams are able to play at times when parents may attend, the female teams also get that access. If there is a weight room, make sure that the equipment in the weight room can be used by both male and female athletes. Most female sports do not require bulk muscle, so the weight room should have some free weights and other equipment that can be used for strength required in those sports.

Overall, school districts should be careful to monitor the participation opportunities and benefits that both males and females are receiving. If it becomes apparent that one sex is receiving substantially more perks, then there should be changes to the programs to ensure that the disparity is non-existent or at least negligible.

Nationwide Efforts to Change Retirement Plans May Be Problematic

Two recent cases in Arizona and New Hampshire have highlighted issues that may arise when states try to increase employee contributions to retirement plans. Federal district courts in both states held that the increase in contributions was unconstitutional, because the state and state employees had a contract that guaranteed workers would not have to pay higher contributions after they were hired unless they received improved benefits as well. When a contract guarantees certain benefits, those benefits cannot be decreased unless there is an increase in some other benefit. In essence, there has to be an exchange.

This is not an issue that is specific to Arizona and New Hampshire. Ten other states have increased the share current workers have to contribute to retirement plans and most states have at least looked at the issue. In Florida, public employees, through new legislation, are now required to contribute 3% of their pay towards their retirement. Up to this point, Florida public employees have contributed no funds towards retirement plans.

One way that states may be able to implement a higher contribution rate for public employees is by requiring an increased rate for new employees but keeping the existing employees at the current rate. The problem with this is that new employees may not bring in enough funds to fix the problems associated with the rising cost of providing retirement benefits to current employees.

Whether a state can increase employee contributions depends upon the law and courts in each state. In some states, the constitution or statutes explicitly state that employee retirement plans, including contributions, cannot be changed after the first day an employee works. In other states, statutes and case law state that retirement benefits do not start until an employee

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Nationwide Efforts to Change Retirement Plans May Be Problematic, Cont.

retires. Then in other states, the retirement system is allowed to raise or lower retirement contributions depending on what benefits are offered and the financial needs of the retirement system. Arizona and New Hampshire both have explicit laws or case law forbidding the state from changing a contract without giving something in return.

In Ohio statutory language sets out the percent that each public employee will contribute to the retirement system. The current employee contribution rate set by the State Teachers Retirement Board is 10%. Ohio does not sit in the same position, statutorily, as Arizona or New Hampshire. Therefore, the holdings in those cases would probably not control in Ohio. However, the general idea that a contract must be upheld may apply. One suggestion for implementing a plan for higher contributions is through negotiating with the public employee unions. Where states have done that, there have not been legal challenges.

Revised Version of "Whose IDEA Is This?" And Jon Peterson Scholarship Notice

The Office for Exceptional Children ("OEC") is currently revising "*Whose IDEA Is This?*" The revised version should be posted on the OEC website by April 1, 2012. Until that time, districts should continue to use the current version for IEP meetings, but once the revised version is posted it should be used from that point forward.

Also, ODE has posted the FAPE comparison sheet for the Jon Peterson Scholarship on its website. Districts are required to provide this comparison sheet to all parents of students with a disability. Therefore, when your district distributes "*Whose IDEA Is This?*" it would be appropriate to also distribute the Jon Peterson comparison document.

Workers' Compensation: Salary Continuation

Districts, when dealing with an injured worker, often have to make a decision about whether to do salary continuation or have the Bureau of Workers' Compensation ("BWC") pay temporary total benefits. According to O.R.C. § 4123.52, employers may choose to implement salary continuation in lieu of the BWC providing temporary total compensation when an employee is injured. This option provides various benefits to employers, including: cost savings, limited reserve charged to the risk, and reductions in claim litigation.

Salary continuation is when an employer chooses to pay an injured worker's full salary or wages rather than the BWC providing temporary total compensation. Generally, an injured worker is not required to accept salary continuation, unless an employer has a collective bargaining agreement requiring employees to accept salary continuation. However, the employer can choose to stop paying salary continuation at anytime.

If an employer and employee agree to salary continuation, the injured worker must receive a full check at the next scheduled time after the injury occurs. The employer must notify the BWC of its decision to implement salary continuation prior to the BWC making any initial determination decision. A Salary Continuation Agreement (Form C-55) must be submitted for each period of salary continuation that is paid. This period is not a pay period, but the period of disability. The end date of the period of disability should be based on medical documentation and cannot exceed 45 days. Should salary continuation payment need to continue past 45 days, a new C -55 form must be submitted within 5 days of the end date of the current agreement. The C-55 form must be signed by both an agent of the employer and by the injured employee and the purpose is to show that there is an agreement between the parties to use salary continuation instead of temporary total benefits. Employers should note that if the BWC has reached a decision and has ordered temporary total compensation, the employer is no longer allowed to implement a salary continuation plan, unless there is a collective bargaining agreement requiring an employer to use salary continuation.

The main advantage of implementing a salary continuation plan is that it can save employers money. The current BWC rating system collects workers' compensation premiums based upon paid losses. For each dollar that is paid by the BWC, a reserve is assigned to the claim that is a multiple of all paid compensation losses. When the reserve is increased, the premiums that an employer pays will also be increased. Each claim affects the employer's rates for four years. Therefore, an employer may incur less costs long-term if salary continuation is used.

It is important that employers follow all of the rules set forth by the BWC when implementing a salary continuation plan. If not, the employer takes a risk that the BWC will disallow that employer to participate in salary continuation in the future. The main rules to follow are to notify the BWC of your intentions prior to its initial determination, make a full payment to the employee at the end of the first pay period following injury, and notify the BWC within 72 hours when payments have been discontinued for any reason, including the employee's return to work.

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.

March 22, 2012 — *Cyberlaw*

June 14, 2012 — *Special Education Update*

July 12, 2012 — *Education Law Legal Update*

Other Upcoming Presentations

Bill Deters
OSBA on March 23, 2012
Special Education Discipline Process: Obstacles and Opportunities

Gary Stedronsky
OASBO on April 18
Maintaining Property Values Through the Board of Revision Process

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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