Hodges Loizzi Eisenhammer Rodick & Kohn LLP

THE Extra Mile

GOING THE EXTRA MILE SO YOU DON'T HAVE TO

EDUCATION EDITION

March 2014

Minor Deviations from a Section 504 Plan Do Not Violate Section 504--As school districts continue to find more students eligible for services and accommodations under Section 504 of the *Rehabilitation Act of 1973* more litigation regarding Section 504 follows.

The Seventh Circuit Court of Appeals (*which governs Illinois*) recently ruled in favor of a school district finding that the district had only made minor deviations from a student's Section 504 Plan and that these deviations did not constitute a failure to reasonably accommodate the student's disability. Further, the court did not find any evidence that the district had intentionally discriminated against the student.

In *CTL ex rel. Trebatoski v. Ashland Sch. Dist.*, 2014 WL 631135 (7th Cir. Feb. 19, 2014), Charlie L ("Charlie"), a diabetic student, and his parents sued his former school district claiming that it discriminated against him on the basis of his disability. The court found that before Charlie entered kindergarten, his parents worked with the Ashland School District ("district") to develop a 504 Plan to accommodate his disability and enable him to attend

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Consumer Price Index

Percent change for the month of **January 2014,** for the urban wage earners & clerical indices as reported by the Bureau of Labor Statistics.

	All Urban (CPI-U)	Workers (CPI-W)
Chicago Mthly	0.9	1.0
12 Mth	1.2	1.4
St. Louis, 2nd Half 2013		
6 Mth	0.5	0.3
12 Mth	1.3	1.2
U.S. Mthly	0.4	0.4
12 Mth	1.6	1.6

February CPI figures will be released March 14, 2014. For the most recent CPI, visit our website at: www.hlerk.com.

The Extra Mile is intended solely to provide information to the school community. It is neither legal advice nor a substitute for legal counsel. The Extra Mile is intended as advertising but not as a solicitation of an attorney/client relationship.

Reminders & Notes

- Remember your April 1 deadline for reclassification of principals and assistant principals. Contact any of our employment and labor practice group attorneys with your RIF and employee dismissal issues.
- HLERK is proud to announce our newest partners, **Steven Richart** and **Lori Martin,** effective January 1, 2014.
- It's time to update your student handbooks! Send in the enclosed order form to purchase the HLERK model student handbook checklist or contact Lori Martin to request a comprehensive review of your student handbooks.

Policy Requiring Members of Boys' Basketball Team to Have Short Hair Constitutes Sex Discrimination--In *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 13-1757, 2014 WL 685529 (7th Cir. Feb. 24, 2014) the federal appellate court governing Illinois considered a claim brought by Patrick and Melissa Hayden on behalf of their son A.H., challenging a school policy that requires boys who play interscholastic basketball at the public high school in Greensburg, Indiana, to keep their hair cut short. The court found that because the hair-length policy on its face treated boys and girls differently it constituted illegal sex discrimination.

The policy in question was established by the head varsity basketball coach at Greensburg High School. Specifically, it required that each player on the boys' basketball team must have his hair cut above the ears, eyebrows, and collar.

The coach instituted the policy to promote team unity and project a "clean cut" image. No girls' athletic team was subject to a hair-length policy. A.H. attended the high school and was removed from the basketball team for refusing to cut his hair to the prescribed length.

In considering the Haydens' claims, the court acknowledged

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Discrimination Cont. that one's choice of hairstyle is an element of liberty protected by the Fourteenth Amendment; however, the court refused to treat this as a fundamental right.

Conversely, the court found merit in the Haydens' claim that the policy discriminated on the basis of sex. It agreed with the Haydens' claim that if A.H. were a girl, he would not be required to cut his hair in order to play interscholastic basketball at Greensburg.

The defendants argued that the policy was not sex-based discrimination because it only applied to two of the boys' athletic teams. Boys wishing to compete on the football or track teams, for example, would be free to do so without being required to keep their hair cut short.

The defendants claimed, therefore, that the policy did not categorically discriminate against boys. In the court's opinion, however, the fact that other boys playing different sports were not burdened by the requirement was neither here nor there because the equal protection clause protects the individual rather than the group, and the individual plaintiff in this case wished to play basketball, which was covered by the policy.

The court also disagreed with the defendants' alternative contention that the sex discrimination claim failed for lack of proof that any such discrimination was intentional. Instead, the court found that the intent to treat boys differently from girls was evident by the one-sided nature of the policy.

The policy applied only to male athletes, and there was no facially apparent justification, especially given that the coach's stated reason for applying the policy, creating team unity and projecting a positive image, applied equally to girls playing interscholastic basketball. Why, then, the court asked, must only members of the boys team wear their hair short?

The court therefore concluded that the substantial leeway that school officials are given in establishing grooming codes for their students generally and for their interscholastic athletes in particular did not permit them to impose non-equivalent burdens on school athletes based on their sex.

The court also found that the intent to discriminate was attributable to the school district, who had sustained the policy unchanged during this process, and had delegated to the team coaches the express authority to set hair standards for their respective sports.

School districts continue to confront a variety of gender discrimination issues in a wide variety of contexts. Contact Nancy Krent or Pam Simaga with your gender discrimination or Title IX inquiries.

Pension Reform Challenges Consolidated; Case to Move Forward in Sangamon County--As we have noted in the *Extra Mile,* we continue to follow on your behalf the variety of legal challenges to the recently passed "pension reform" legislation.

A Sangamon County judge ruled on March 3 that the five separate lawsuits (to date) challenging last year's pension reform law would be "consolidated" and heard together in a Sangamon County courtroom. The lawsuits allege that the law violates the Illinois Constitution's protections against diminishing pension benefits.

Signed into law on December 5, 2013, Senate Bill 1 (Public Act 98-0599), was designed to address shortfalls to the state's public pension systems. The effective date of the law is June 1, 2014; however, the pending lawsuits may delay its implementation.

In response to the law, various public employee groups, including the Illinois Education Association and the Illinois Federation of Teachers, filed lawsuits challenging the constitutionality of Senate Bill 1. The plaintiffs claim, in part, that the law violates the guarantees provided by Article XII, Section 5 of the Illinois Constitution, which states: "Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired."

We will continue to follow the litigation and provide updates as the case develops.

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504 Cont. public school. The 504 Plan incorporated his doctor's orders regarding how insulin doses and snacks were to be administered at school and also required the district to train three adult staff members at Charlie's school as "Trained Diabetes Personnel." The suit claimed that the district did not follow this Plan and hence discriminated against the student on account of his disability.

Primarily, the court examined the effect of a Section 504 Plan violation. The parents implied that *any* Plan violation was sufficient for a claim of disability discrimination. However, the court pointed out that circuit courts addressing failure-to-implement claims in cases in which IEPs were required under the *Individuals with Disabilities Education Act* had held that minor deviations do not automatically violate the IDEA.

The court further noted that Section 504's education requirement is less exacting than the IDEA's. Therefore, the court concluded, for Section 504 Plan violations to constitute disability discrimination, they must be significant enough to *effectively deny* a disabled child the benefit of a public education. The court did not agree that the violations in this case rose to that level.

Rather, the violations constituted only minor deviations from the Plan and disagreements between the parents and the district over how to interpret the instructions from the student's doctor. Finally, the parents claimed that the district had deliberately discriminated against their son in an effort to drive them out the district. The court did not find evidence to support this contention and likewise dismissed it.

CTL is the first time our federal appellate court has considered this type of claim under Section 504 and represents a major victory for Illinois school districts. Please contact Nancy Krent or Laura Pavlik with your Section 504 issues.

U.S. Department of Education Publishes Guidelines Governing Student Records and School Use of On-line Educational Services--The U.S. Department of Education recently established the Privacy Technical Assistance Center ("PTAC") as a resource for data privacy, confidentiality and security practices related to student-level longitudinal data systems and other uses. Claims of school district violations of student privacy laws due to use of cloud based educational programs continues to grow.

PTAC recently published non-binding guidelines, "Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices" ("Guidelines"), which address privacy and security considerations related to computer software, mobile applications and web-based tools provided by third-parties to a school that students and/or parents access as part of a school activity.

The Guidelines do not contain new regulations but provide an explanation of school districts' responsibilities under the *Family Educational Rights and Privacy Act (*"FERPA") and provide best practices for districts to implement in order to effectively protect student privacy.

The Guidelines explain that FERPA protects against the unauthorized disclosure of personally identifiable information ("PII") from students' education records. Some online educational services use FERPA-protected information.

For instance, it is common for an online system to require that students' names and contact information be provided in order to allow students and parents to log in and access class materials. If a third party provider is given such PII from student records to create student accounts, then FERPA is implicated, with the

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Privacy Continued exception of "metadata" that is stripped of all identifiers.

Metadata is comprised of vast amounts of contextual or transactional data that provides context to other data that is collected. For instance, information about how long a student took to perform an online assignment has greater meaning if the user knows the date and time the student completed that activity, how many attempts the student made, and how long a student's mouse hovered over an item.

The PTAC suggests that school districts evaluate the use of online educational services on a case-by-case basis to determine whether FERPA-protected information is implicated and to ensure that FERPA requirements are met.

If the use of PII is disclosed to a third-party provider, FERPA requires school districts to either obtain consent or guarantee that the arrangement with the provider meets one of FERPA's exceptions to the written consent requirement. There are two FERPA exceptions that allow third-party providers to access PII.

First, disclosures of PII to create user accounts may be accomplished under the directory information exception if the information is not considered harmful or an invasion of privacy if disclosed. However, to disclose information under this exception, school districts must establish a list of the specific elements or categories of what constitutes directory information and provide notice to the students and parents. Additionally, parents may opt out from permitting disclosure.

Alternatively, disclosures of PII to create user accounts may be accomplished under the school official exception. Under this exception, the school district may disclose PII as long as the provider: (1) performs an institutional service or function for which the district would use its own employees; (2) has been determined to meet criteria in the district's annual FERPA notice; (3) is under the direct control of the district with regard to use and maintenance of education records; and (4) uses education records for authorized purposes only.

An authorized purpose does not include marketing new products or targeting individual students with directed advertisements. On the other hand, information properly identified and shared under the directory exception is not protected by FERPA and can be used for these purposes.

Additionally, the Guidelines set forth seven recommended "best practices" for protecting student privacy when using online educational services: (1) maintain awareness of other relevant federal, state, tribal or local laws; (2) be aware of which online educational services are currently being used in your district; (3) have policies and procedures to evaluate and approve proposed online educational services; (4) when possible, use a written contract or legal agreement and include the provisions recommended by PTAC; (5) take the necessary extra steps when accepting Click-Wrap licenses for consumer applications, which occurs in situations where districts cannot negotiate agreements with providers of consumer applications and are faced with a choice to accept the Terms of Service or to not use the application; (6) be transparent with parents and students; and (7) consider whether parental consent may be appropriate, even in instances where FERPA does not require parental consent.

Ultimately, the Guidelines remind school districts of their role in setting policies to protect student privacy which is increasingly gaining importance in light of continuous technological advancements.

The advent of on-line and cloud computing educational programs create challenges for school district compliance with FERPA and ISSRA. Contact Heather Brickman or Lori Martin with your student records inquiries.

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