New Hampshire SchoolLaw Advisory

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In This Issue

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Our mission is to help our clients improve education for all children - through sound advice and advocacy when possible - through skillful litigation when necessary.

What Are Your Obligations to Charter Schools, Anyway?

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Erin Feltes represents schools and municipalities on general and special education issues.

In New Hampshire, charter schools are public schools operated independent of any local school board. Charter schools operate as nonprofit secular organizations under a charter granted by the New Hampshire State Board of Education. Students who attend charter schools are not enrolled in the district where they reside, and local school districts do not receive adequacy aid for such students. Yet, school districts have certain obligations to students enrolled in charter schools, and have additional responsibilities when the charter school is located within the geographical boundaries of the school district. Further, it appears that these obligations are growing with each passing legislative session. This article addresses the most frequently asked questions that we receive about a school district's obligations to charter school students and highlights a number of recent changes in this area of law.

Transportation

Local school districts that have a chartered public school located in their district may be required to provide transportation to *resident* students who attend that charter school. RSA 194-B:2, V states in relevant part that:

> Pupils who reside in the school district in which the chartered public school is located shall be provided transportation to that school by the district on the same terms and conditions as provided for in RSA 189:6 and RSA 189:8 and that transportation is provided to pupils attending other public schools within that district. However, any added costs for such transportation services shall be borne by the chartered public school.

Therefore, if a school district provides transportation to resident students to and from its local public school, it must provide transportation, on

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the same terms and conditions, to charter school students who reside in the district and attend a charter school in the district. Of course, in this scenario the school district has the right to bill the charter school for any additional costs incurred as a result of this transportation. In our experience, many charter schools decline to pay for such transportation, in which case the district would have no obligation to provide it. There is also generally no obligation to transport regular education students to a charter school located outside of the geographical bounds of the district. However, there may be different special education transportation obligations, which are discussed further below.

It should be noted that there is a bill currently pending before the New Hampshire legislature that would amend the transportation statute quoted above. As introduced, this bill proposes to remove the requirement for charter schools to bear the costs of transportation to the charter school.[1] If this bill passes without further amendment, local school districts would be responsible for the costs of transporting resident students to charter schools located in their districts and would have no right of reimbursement from the charter schools.

Special Education

When a child who is eligible for special education is enrolled in a charter school, the child and the child's parents retain all of their rights under federal and state special education laws, including the child's right to be provided with a free and appropriate public education ("FAPE"). A FAPE is provided through the special education and related services that are outlined in the student's Individualized Education Program ("IEP").

Under New Hampshire law, the district where the charter school student resides retains responsibility, including financial responsibility, for ensuring that the student receives the special education and related services outlined in the IEP.[2] This means that local school districts retain *all* of the special education responsibilities for resident students enrolled in charter schools, including entering student data into the New Hampshire Special Education Information System ("NHSEIS"), convening team meetings, inviting charter school staff to team meetings, conducting evaluations, and providing appropriate written notices of meetings and team decisions.

When a child who is eligible for special education is enrolled in a charter school, the local education agency ("LEA") of the district where the child

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resides must convene an IEP team meeting and invite representatives from the charter school to that meeting.[3] At that meeting, the team must determine how to ensure that the child will receive a FAPE in accordance with his or her IEP. Pursuant to RSA 194-B:11, III(b), the child's special education and related services must be provided using any or all of the methods listed below, starting with the least restrictive environment:

1) The resident district may send staff to the chartered public school; or

(2) The resident district may contract with a service provider to provide the services at the chartered public school; or

(3) The resident district may provide the services at the resident district school; or

(4) The resident district may provide the services at the service provider's location; or

(5) The resident district may contract with a chartered public school to provide the services; and

(6) If the child requires transportation to and/or from the chartered public school before, after, or during the school day in order to receive special education and related services as provided in the IEP, the child's resident district shall provide transportation for the child.

It is clear that the school district where the child resides is not *required* to provide special education and related services at the charter school, but it is an available option. The IEP team must decide where the required services will be provided and who will provide them.

The school district where the charter school is located is not responsible for providing special education services to all students with disabilities who attend that charter school. School districts are responsible only for those students who reside in their school district.

The school district where a student resides is also obligated to provide transportation if the child requires transportation in order to receive special education and related services. This could be interpreted to require transportation to the charter school if a student may be receiving special education services at the charter school. Similarly, it could be interpreted to require a district to provide transportation to students between the charter school and the district's buildings, if the district provides any services at its own schools.

Section 504 Plans

Although New Hampshire's charter school statute exempts charter schools from many state requirements, it specifically requires all charter schools to abide by state and federal nondiscrimination laws, which implicitly includes Section 504 of the Rehabilitation Act and the Americans with Disabilities Act ("ADA"). Therefore, the charter school is responsible for all of the procedural aspects of Section 504, including convening 504 meetings, evaluating as deemed appropriate, drafting 504 plans, and providing parents and students with their procedural safeguards. The charter school is also responsible for providing students with necessary accommodations, pursuant to their 504 Plans.

Curricular Courses and Co-Curricular Activities

Historically, local school boards have determined whether charter school students could participate in the school district's courses and activities. Effective March 26, 2016, charter school students will be permitted to access the curricular courses and co-curricular activities offered by the school district where they reside.[4] Just as home school and private school students are permitted to attend classes and participate in extracurricular activities, such as student clubs, drama productions, and athletic teams, charter school students will now also be permitted to do so.[5]

School boards can and should adopt a policy governing charter school student participation in curricular classes and co-curricular activities, provided that the policy is

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not more restrictive than the policies for other resident students. For curricular classes, some key areas the policy may need to address include transportation to and from individual classes, prerequisites, earning of credit, and diplomas. For co-curricular activities some key issues the policy may need to address include any conduct, attendance, and academic requirements.

With respect to athletics, the New Hampshire Interscholastic Athletic Association permits charter school students to "represent the non-public or charter school they attend or the public high school in the district where they reside."[6] In order for a charter school student to participate in athletics in their high school of residence, the charter school student must meet all adopted policies of the local school board, must make such a request in writing to the principal of the local public school, and the principal must certify that the student is eligible to participate.[7]

Charter school students only have a right to participate in the curricular courses and co-curricular activities offered by the school district where they reside; charter school students do not have a right to participate in these programs at the school district where the charter school is located.

Regional Career and Technical Education Programs

In the spring of 2015, the New Hampshire legislature amended the laws on Regional Career and Technical Education ("CTE") programs. The statute governing CTEs sets forth a cost-sharing mechanism for districts that do not have a local CTE program and choose to send students to a CTE program out of district.[8] Under this funding mechanism, the state pays a portion of the CTE tuition and transportation reimbursement, and the student's sending district is "financially responsible for 25 percent of the career and technical education portion of the receiving district's cost per pupil for the prior school year."[9] The sending district is also responsible for paying the transportation costs for such students, with reimbursement rights from the state.

The 2015 amendments clarified the definition of a "sending district" for the purposes of CTE payments. Unsurprisingly, a sending district is defined as "[a] school district where students reside who attend a regional center, regional program, or alternative education program other than within the district itself."[10] However, the definition then goes on to state that "if a student attends a chartered public school, the sending district shall be the school district in which the student resides." Therefore, the law is explicit: The district where a student resides must provide for the tuition and transportation costs discussed above, even if that student attends a charter school. This means that although a charter school student is not enrolled in his or her resident school district and the resident school district receives no adequacy aid for that student, the resident school district is still responsible for the statutory prescribed CTE costs.

Endnotes

1 *See* HB 1272 (2016), http://www.gencourt.state.nh.us/bill_Status/billText.aspx?id=442&txtFormat=html.
2 RSA 194-B:11, III(a).
3 RSA 194-B:11, III(b).
4 Chaptered Law 4 (2016), HB 555, located at: http://www.gencourt.state.nh.us/bill_Status/billText.aspx-?id=130&txtFormat=pdf&v=current
5 *Id.*
6 NHIAA Bylaws, Article I, Section 13
7 *Id.*
8 *See* RSA 188-E:7.
9 RSA 188-E:7, I and II
10 RSA 188-E:2, VII(a).

Meghan Glynn Joins Drummond Woodsum's School Group

Drummond Woodsum is pleased to announce that attorney Meghan S. Glynn joined the firm in January and will be practicing in the School and Education Group. Based in the firm's Portsmouth office, Meghan spent more than four years practicing law in Boston and clerked for the Massachusetts Teachers Association prior to joining the firm.

Meghan assists clients in all aspects of school law, including special education, Section 504, and student discipline, student rights, policy development and implementation, investigations, and annual school district meetings.

She is an honors graduate of The University of New Hampshire and a 2012 graduate of Northeastern University School of Law. She is admitted to practice in New Hampshire and Massachusetts.

Beware Unauthorized Use of Educational Apps

Elek A. Miller

Elek Miller is a member of the School Law Group and works with schools on a variety of legal issues.

Recently, we have been receiving more and more calls from school administrators with questions about how to deal with situations where school staff have decided to use online educational applications ("apps") in their classrooms without checking with any administrator(s) before doing so. Sometimes the staff member is using the app himself. Other times, he is also having students use it. In either event, such use can create a number of legal issues for schools. This article discusses some of the key legal issues that schools face in this area, and outlines several steps that schools can take to help avoid them.

The Problem

Over the past few years countless apps designed for use by school staff (usually teachers) and students have become available. Some of these apps cost money to use, but many are offered for free. And while some of them (perhaps even many of them) may also be useful tools for teachers and students inside and outside the classroom, the old axioms that "you don't get something for nothing," and that "a deal that is too good to be true probably is," apply to many of these apps, especially the free ones.

In exchange for the right to use an app, the user (the staff member in this case) typically must agree to the app's terms of use (sometimes also called the terms of service) and privacy policy. These two documents almost always implicate a school district's legal obligations under state and federal laws. For example, if the app is collecting and using information about students, student privacy laws (and schools obligations under those laws) may be in play. Another example is if an app is collecting information

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about school personnel. In that case, laws related to a school's obligations to maintain the confidentiality of certain personnel record information may be implicated. In fact, it is through the collection and use of these types of data that some apps are able to remain economically viable.

And because the terms of use and privacy policy are essentially contracts that are agreed to simply by using the app or, in some cases, clicking "I agree" when presented with copies of the terms and privacy policy, the staff member is agreeing to bind his or her school district to certain contractual terms that may not be agreeable to the school district. For example, a set of terms of use may include a provision whereby the school district agrees to indemnify the app company for claims for which the school district does not believe it should be liable. They could also include a choice of laws or dispute resolution provision that is not favorable to the school district. Or, they could include inadequate provisions related to uptime, downtime, and/or storage and/or retrieval of district information. Needless to say, the list of possible issues is long.

The problem, which is probably obvious at this point, is that staff members are using apps and/or asking students to use apps when they should not be. By using an app or clicking "I agree" to the terms of use and privacy policy, the staff member may be triggering the school district's legal obligations, and is agreeing to whatever the terms of those documents are, not only on his or her own behalf, but also on behalf of the school district. Unfortunately, staff members all too frequently do this without fully understanding (and sometimes even reading) the terms that they are agreeing to, and/or without consulting with a building administrator or the proper information technology personnel, who are the people with the authority and/or expertise to decide if it makes sense to agree to the use of the app. And even when a staff member does read through the terms in their entirety, they often may not fully appreciate their implications for the school district.

The Solution

There are a number of things schools can do to help avoid situations where staff members are unilaterally deciding to use apps and binding the school department to the terms of such use:

- Consider amending policies and/or procedures addressing employee computer and internet use to make clear that employees may not use, and/or require students to use, online educational services (including apps) without first getting proper approval. Those policies/procedures should also outline the process for seeking approval and who is the ultimate decision-maker on what apps may and may not be used.
- Educate staff on the fact that approval is needed before they start using apps, and how to go about getting that approval.
- Ensure that whoever is responsible for approving use of the apps has the technical aptitude to understand how the app works, the necessary background to understand its educational merits, and the required knowledge to understand if use will trigger the school district's legal obligations.
- Whoever is responsible for approving use of the apps should carefully review the app's terms of use and privacy policy in order to determine if use will trigger the school district's legal obligations. Consultation with legal counsel at this stage in the process can be helpful.
- In those situations when staff do not seek approval before using an app, consider whether employment-related consequences are necessary (especially if use of the app creates a legal issue for the school district).

By following these steps school districts can do a lot to help avoid the potential legal issues that come with unilateral staff use of educational apps. That said, because this is a complex area where technology and the law intersect, school districts are well-served to consult with their legal counsel regarding questions in this area, changes to policies/procedures, and/or the review of application terms of use and privacy policies.

Criminal History Records Check Changes May Be on the Way

Anna B. Cole

Anna Cole provides counseling and litigation services to public and private employers in all aspects of employment law.

Pursuant to RSA 189:13-a, V, SAUs, school districts, chartered public schools, and public academies are prohibited from hiring individuals who have charges pending disposition or who have been convicted of committing or attempting to commit certain specifically enumerated crimes. These crimes include felonious sexual assault, sexual assault, kidnapping, incest, endangering the welfare of a child, indecent exposure, and/or possession, distribution, and/or manufacture of child pornography. Accordingly, schools are required to complete a criminal background check through the New Hampshire State Police and Federal Bureau of Investigation on every selected applicant for employment prior to extending a final offer of employment.

Under the current language of the statute, applicants are required to provide the school with a signed New Hampshire State Police record release form permitting the State Police to run the criminal background check. Once the check is complete, the State Police "examine the list of crimes constituting grounds for non-approval of employment" in that school and "shall report the presence or absence of any such crime" to the school. However, the statute as currently written explicitly prohibits the State Police from releasing a copy of the applicant's criminal record directly to the school. Therefore, under the current statutory scheme, schools only receive a list from the State Police stating which of the specifically enumerated crimes the applicant has been convicted of, convicted of attempting, or has charges pending disposition of, if any, without specific details and without information related to any other crimes or violations the individual may have committed.

In 2015, a bill was introduced in the State Senate that seeks to give schools access to a copy of the criminal record report itself.[1] Having access to the report would not only provide schools with details related to convictions and/or charges related to the offenses enumerated in RSA 189:13-a, V, but would also provide schools with information related to convictions or charges for other crimes that do not statutorily prohibit employment by a New Hampshire school.

The Senate Education Committee voted that the bill ought to pass after making a minor amendment in September of last year. The bill has broad support of school administrators and is currently pending before the Senate Judiciary Committee.

The Take-Away for Schools

Review your policies. If RSA 189:13-a is amended to provide schools with more information about an applicant's criminal background, schools will need to ensure that they have policies in place that will help their administrators utilize that information in a non-discriminatory manner.

Schools cannot treat applicants with the same or similar criminal records differently based on their age, sex, race, color, marital status, physical or mental disability, religion, national origin, or any other protected category. Furthermore, schools cannot use facially neutral policies or procedures regarding criminal records that function to disproportionally exclude members of a protected group, unless the school can show that the policy or procedure is job related and consistent with business necessity. In this context, policies will generally be considered "job related and consistent with business necessity" if: (a) the employer considers the nature and gravity of the crime, the nature of the job sought, and the time lapsed since the crime or completion of the sentence; (b) the employer individually assesses the applicant to ensure that the policy, as applied to that individual, is job related and consistent with business necessity; and, (c) the employer considers whether there is any "less discriminatory practice" that would serve its goals as effectively as the policy. In brief, stay away from blanket policies.

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By taking the time to review policies now, schools can put their administrators in a good position to effectively evaluate additional criminal record information if the bill is amended. Furthermore, strong policies will help administrators now, as applicants often self-disclose prior criminal history during the application process. We are happy to assist schools in updating their policies and in answering questions about the use of criminal history information in the hiring process.

Endnotes

1 SB 152 (2015).

11th Circuit Weighs in on Advertising in Schools

Jeana M. McCormick

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The Eleventh Circuit Court of Appeals recently issued an opinion addressing whether a private company's advertisements in schools were entitled to free speech protection under the First Amendment. The case, *Mech v. School Board of Palm Beach County, Florida*, 806 F.3d 1070 (11th Cir. 2015), dealt with a situation where the school board had approved the display of banners about a private math tutoring service, but removed the banners after learning of an association between the tutoring services and a pornography business.

The question before the court was whether the school board could lawfully remove the banners from its schools. The answer depended on whether banners constituted "private speech" or "government speech." As discussed in more detail below, the court concluded that the banners constituted "government speech" and, thus, were not protected by the First Amendment. Accordingly, the school board could lawfully remove the banners from its schools.

The Facts of the Case

David Mech owned a math tutoring service named "The Happy/Fun Math Tutor" and provided math tutoring services in a number of schools in Palm Beach County Florida. In 2010, Mech inquired about displaying a banner for The Happy/Fun Math Tutor at two middle schools and one high school in Palm Beach County. The school board had a policy on banners that imposed several conditions on the banners that could be displayed, including:

- The principals of each school must use their discretion in selecting and approving partners consistent with the educational mission;
- The banners must be uniform size, color, and font;
- The banners cannot include photographs or large logos;
- The banners must state "[school initials] Partner in Excellence"; and
- The business partner must make a donation of $250-$650.

Mech complied with the policy requirements and the schools displayed banners for The Happy/Fun Math Tutor on their fences. Several parents complained about the banners upon discovering that Mech was a retired porn star and owned a company that formerly produced pornography. After the schools received the parental complaints, and learned that Mech's tutoring business shared a mailing address with his pornography business, they removed the The Happy/Fun Math Tutor banners. The schools explained to Mech that his ownership of both companies and their shared address created a situation that was "inconsistent with the educational mission of the Palm Beach County School Board and the community values."

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The Lawsuit

Mech filed a lawsuit claiming that the school board violated, among other things, his constitutional rights to free speech under the First Amendment when it removed his. The district court granted summary judgment for the school board because the schools did not remove the banners based on their content. The Eleventh Circuit affirmed the district court's decision but on different grounds, holding that the banners were not "government speech" and, therefore, not protected by the Free Speech Clause of the First Amendment.

The Eleventh Circuit's Analysis

It is well established that the Free Speech Clause of the First Amendment restricts government regulation of "private speech" but does not restrict government regulation of "government speech." The Supreme Court of the United States explained that "[a] government entity has the right to 'speak for itself' . . . and to select the views that it wants to express." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468 (2009) (internal citations omitted).

The question that the court addressed in *Mech* was whether the banners constituted "private speech" or "government speech." Although there is not a precise test for determining whether something is "private speech" or "government speech," the court looked at three factors—history, endorsement, and control—when making its determination.

First, the court looked at the history of banners in the schools. There was no evidence about the history of banners in the schools and the school board policy on banners was only a few years old. The lack of history weighed in favor of "private speech" because the court could not conclude that such banners had historically communicated messages from the government.

Second, the court assessed whether observers were reasonably likely to believe that the school had endorsed the message on the banner. The banners were hung on the schools' fences and stated that The Happy/Fun Math Tutor was a "Partner in Excellence" with the school. Based on this evidence, the court concluded that the banners would likely be attributed to the school, which weighed in favor of "government speech."

Third, the court looked at the school's control over the content of the banners. Pursuant to the school board's policy, the school controlled the format of the banners, the information the banners could contain, the size and location of the banners, and required that the banners include the "Partner in Excellence" message. In addition, the principals at each school had to approve every banner before displaying. In light of this information, the court concluded that the school controlled the messages on the banners, which also weighed in favor of "government speech."

After weighing these three factors, the court held that the banners constituted "government speech." Because the banners constituted "government speech," they were not entitled to free speech protection and could be removed.

Conclusion

More and more school units, faced with funding cuts and budget shortfalls, have been looking to alternative sources of funding, including advertising, in order to support their educational mission. And while the decision to allow advertising, whether it is charged for or not, is up to that unit's good discretion, doing so can create a number of legal issues, including free speech concerns that schools must be aware of. As *Mech* suggests, school boards will have the most control over private advertisements in their schools, at least for First Amendment purposes, if they can show that the advertisements are government speech. After the *Mech* case, which is not binding on courts in our First Circuit but which is instructive, we know that school boards can help show that their advertisements constitute government speech by making sure they have control over the advertisements through policies and/or

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procedures that: (1) give school administrators discretion to select advertisements consistent with the educational mission; and (2) include information, formatting and design requirements. By including discretion and control in such policies and/or procedures, schools can more easily satisfy the endorsement and control factors applied by the Eleventh Circuit. However, as mentioned above, there is not a precise test for determining whether something is "private speech" or "government speech," and the First Circuit could consider other factors.

Furthermore, while we are on the topic of advertising in schools, it is important for New Hampshire schools to remember that they cannot place advertisements on school buses, but can place them on school bus garages. And schools that are considering attempting to barter services for advertisements (such as a new gym floor in exchange for the company's logo on the floor, for instance), which may be an enticing proposition, must be sure that they do not circumvent any applicable competitive bidding requirements in their eagerness to get a much-needed item for what seems like a great deal.

As demonstrated by the *Mech* case and these other examples, advertising in schools is a thorny area. If your school is considering displaying private advertisements, please feel free to contact one of our school law attorneys to discuss your policies and procedures, and the facts of your specific situation.

IRS Issues Guidance on Cash in Lieu of Health Insurance and the ACA

Christopher G. Stevenson

Chris Stevenson practices primarily in the areas of tax and employee benefits law.

Schools in New Hampshire have historically provided their employees and their dependents with very generous health insurance benefits. These benefits help attract and retain a qualified work force, but they come at a significant price to the school district. In an attempt to reduce some of the financial burden associated with providing these generous benefits, many schools allow their employees to opt-out of receiving health benefits in exchange for a cash award. The practice is often referred to as offering "cash in lieu" of health insurance. Since the passage of the Affordable Care Act ("ACA"), we have received a lot of calls regarding whether "cash in lieu" is still permitted. Up until very recently, there was no IRS guidance on the issue. However, very recently the IRS released a notice that includes important new restrictions on cash in lieu.[1]

Under the new restrictions, for school districts that are "large employers" and subject to the ACA, certain cash in lieu awards must be included in the full-time employee's cost of coverage for determining if the coverage is "affordable" under the ACA Play or Pay rules.[2] Under the new restrictions, when determining the employee's cost of coverage for purposes of avoiding the so-called ACA "Affordability Penalty," the IRS now requires that the employer count both: (a) the actual out-of-pocket amount the employee would have to pay for the coverage and (b) for certain cash in lieu benefits, the amount of cash in lieu he/she has to forgo in order to elect coverage through the school. In addition, the IRS notice indicates that the employer must include the cash in lieu in the employee's cost of coverage as listed on the IRS Form 1095-C (although this requirement does not apply for the 2015 Form 1095-C).

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For example, if an employee's contract calls for her to pay $100/month for the cheapest single coverage available to her but also provides that she can receive $200/month of cash in lieu if she waives coverage, the new restrictions provide that the employee's cost of coverage for ACA compliance purposes would be $300 (the $100 she would have to pay to get the coverage and the $200 in cash in lieu she would have to give up). If this $300/month is not "affordable" under the ACA rules, the employer would face a $250/month Affordability Penalty if the employee waives coverage and purchases subsidized coverage on the Exchange (in addition to having to pay the employee cash in lieu). The good news is that if the employee uses the cash in lieu benefit to purchase coverage through his spouse's employer and is not on the Exchange, the $250/month Affordability Penalty would not be triggered. The Affordability Penalty is only triggered by a large employer if: (1) the coverage offered to the full-time employee is not "affordable"; and (2) the employee is on the Exchange receiving coverage subsidized by the IRS.

When, and if, the new rules governing cash in lieu will apply to a particular school district differ depending upon whether or not the cash in lieu is "unconditional" (meaning the employee receives payment if she merely waives her benefit, regardless of whether or not she has coverage available elsewhere) or "conditional" (meaning the employee only qualifies for a cash in lieu if he/she provides proof of coverage elsewhere, for example through her spouse's employer). For unconditional cash in lieu programs that were adopted by an employer prior to December 17, 2015 (for example, those that are part of a collective bargaining agreement that took effect prior to this date), the IRS notice indicates that these new rules will not take effect until on or after the IRS issues final regulations covering this issue. There is no way to know for certain when the final regulations will be issued.

What we do know is that prior to issuing final regulations, the IRS will first issue proposed regulations and allow a period of time for public comment, and then issue final regulations. For unconditional cash in lieu programs that are newly adopted by an employer on or after December 17, 2015, the IRS notice indicates that the final regulations will implement the new rules retroactively to the program's start date. For example, if a school district adopts a new, unconditional cash in lieu program effective January 1, 2016, the IRS notice indicates that the final regulations will call for these new rules to apply to the school's program as of its January 1, 2016 start date.

> Very recently the IRS released a notice that includes important new restrictions on cash in lieu.

For opt-out payments that require the employee to provide proof of coverage elsewhere (for example, through a spouse's employer) in order to qualify for the payment, the IRS notice does not clearly indicate when, or even if, the new restrictions will apply. The IRS indicates that they are still considering whether the new rules would apply in this case. This is a silver lining because many cash in lieu benefits require the employee to provide proof of coverage through the spouse's employer in order to receive payment. It is important to note though, that if a cash in lieu benefit is conditioned on the employee receiving coverage elsewhere, the school district should require proof of other *employer-sponsored* group coverage as oppose to coverage through the Exchange or another policy issued directly to the individual (as oppose to through a group health plan). This is important for a couple of reasons. First, and most importantly, there are significant penalties for employers (up to $100 per day, per employee) who reimburse employees for coverage received through the Exchange or elsewhere in the individual market. Second, if a school district conditions cash in lieu benefits on employees providing proof of other employer-sponsored group coverage, even if the school's offer of coverage is considered "unaffordable" under the new rule, the so-called Affordability Penalty will not be triggered because the employee will not be on the Exchange but rather getting insurance through his/her spouse's employer.

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In light of the new IRS notice, school officials should:

1) Determine whether or not your district is a "large employer" that is subject to the ACA Play or Pay rules. If your school district is not a "large employer," it is not required to offer "affordable" coverage under the ACA and these new restrictions on cash in lieu and the affordability calculation will not apply to your district. However, you should still verify that your school district does not reimburse its employees for coverage received through the Exchange, as discussed above;

2) For larger employers, with respect to any cash in lieu programs in effect on December 16, 2015 (whether conditional or unconditional) the new rules will not apply until, at the earliest, whenever the final regulations are issued. There is no need (and schools should not) adjust their 2015 Form 1095-Cs to include any cash in lieu;

3) For school districts that are large employers, determine whether or not any cash in lieu program offered is "conditional" or "unconditional" under the new IRS guidance;

4) For cash in lieu that is unconditional, schools that are large employers should note that once the final regulations have been issued and are effective, schools will have to list the employee's "cost of coverage" on future Form 1095-Cs as both the employee's required contribution for health insurance, plus the amount of any cash in lieu he/she would have to forgo in order to elect coverage. In addition, once the new rules become effective, this may have the effect of causing the offer of coverage to be considered "unaffordable" and trigger Play or Pay penalties to the extent that the employee waives the school district's coverage and instead purchases coverage on the Exchange;

5) For cash in lieu that is conditioned on the employee providing proof of coverage elsewhere, the school district should verify that the proof of coverage is coverage provided through another employer's health plan and not coverage on the Exchange or other individual health insurance policy;

6) For all future cash in lieu arrangements (including those established in collective bargaining agreements), school district should make eligibility conditioned on proof of other employer-sponsored group coverage. It's possible that such conditional programs will be exempted from the new restrictions under the final regulations. Also, as long as the employee receiving the cash in lieu benefit is receiving coverage someplace other than the Exchange, even if the final regulations include rules that result in the coverage being deemed "unaffordable," the employee will not trigger an Affordability Penalty for the school district; and

7) Be sure to carefully consider the collective bargaining implications of these new developments when addressing cash in lieu arrangements in any contracts that you will be bargaining

We'll continue to monitor the ever-changing landscape of the ACA and keep schools informed on all applicable developments.

Endnotes

1 IRS Notice 2015-87.

2 The ACA's Play or Pay rules require any school district that is a "large employer" to offer all full-time employees health insurance that is "affordable" or face significant penalties. Under the ACA a full-time employee's coverage will be deemed "affordable" and avoid triggering ACA penalties if the employee's cost for the cheapest self-only coverage option offered to him is no more than 9.5% (as indexed for inflation) of his/her "monthly rate of pay."

New Hampshire Supreme Court: All Employees Face Individual Liability for Workplace Harassment

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On February 23rd, the New Hampshire Supreme Court issued a decision in a case called *E.E.O.C. v. Fred Fuller Oil Co.* which holds that individual employees can be held personally liable for aiding and abetting workplace discrimination or engaging in retaliatory conduct under New Hampshire's Law Against Discrimination.[1] This decision could have sweeping implications for public schools in New Hampshire, as school officials and district employees can now be held directly liable for aiding and abetting discrimination or engaging in retaliatory conduct in the workplace.

Legal Background

New Hampshire's nondiscrimination statute establishes that it shall be an "unlawful discriminatory practice" for an *employer* with at least six (6) employees to "refus[e] to hire or employ or to bar or discharge from employment . . . or to discriminate against [any] individual in compensation or in terms, conditions or privileges of employment, unless based upon bona fide occupational qualification" if such refusal to hire/employ and/or discrimination is based upon the individual's age, sex, race, creed, color, marital status, familial status, sexual orientation, physical or mental disability, or national origin.[2]

The *Fred Fuller* Decision

In its recent decision in *E.E.O.C. v. Fred Fuller Oil Co.*, the New Hampshire Supreme Court determined that the Law Against Discrimination also prohibits "any *person*, employer, labor organization, employment agency, or public accommodation" (emphasis added) from "[a]iding, abetting, inciting, compelling or coercing another or attempting to aid, abet, incite, compel or coerce another to commit an unlawful discriminatory practice or obstructing or preventing any person from complying with th[e statute] or any order issued under the authority of th[e statute]."

Furthermore, the statute prohibits "any *person* engaged in any activity to which th[e statute] applies" (emphasis added) from retaliating against an individual who opposes workplace discrimination or who participates in any complaint proceeding opposing workplace discrimination.[3] Because the statute defines "person" broadly to include "one or more *individuals*," (emphasis added) as well as a variety of organizational forms, the Court determined that individual employees who aid and abet workplace discrimination, or who retaliate against another employee in the workplace because he or she has engaged in protected conduct, can be held personally liable for an unlawful discriminatory practice under the statute.

While school districts may also be held liable for unlawful discrimination or harassment directed against its employees under federal antidiscrimination laws, those laws do not impose personal liability on alleged harassers, on supervisors and administrative personnel who may have failed to appropriately respond to harassment or discrimination complaints, or on employees at any level who engaged in retaliatory conduct. The New Hampshire Law Against Discrimination was largely intended to parallel these federal laws, while expanding coverage to smaller employers who employ as few as six employees (*e.g.*, Title VII of the Civil Rights Act of 1964 covers employers with 15 or more employees). New Hampshire's law, which was originally enacted in 1992, has always included references to "persons" as parties who may be subject to liability. However, until the *Fred Fuller* decision, it was unclear whether the Legislature intended this reference

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to "persons" to put individuals in an employer's workforce at risk of *personal* liability for aiding and abetting unlawful discrimination or harassment, or for retaliating against coworkers for opposing such conduct. The Court has now affirmatively addressed the issue and determined that individual employees can be held personally liable for their conduct under the law.

Discussion

The *Fred Fuller* decision broadly expands the scope of potential named defendants in a complaint of discrimination or harassment filed under RSA 354-A and in any resulting lawsuit. Although the alleged harasser has always been potentially liable for his or her conduct under other legal theories (such as assault, battery, intentional infliction of emotional distress, invasion of privacy, etc.), the *Fred Fuller* decision establishes that those individuals may also be subject to liability under New Hampshire's Law Against Discrimination. This effectively means that plaintiffs may now seek to hold the alleged harasser liable for a broader array of his or her claimed damages, including his or her lost earnings, attorney's fees, and compensatory damages. Furthermore, the harasser may face administrative fines.

Additionally, and likely of greater import, the *Fred Fuller* decision now opens employees who actively or passively "assist" the harasser to potential liability. For example, the assistant principal who observes or receives an employee complaint of discrimination or harassment, the Human Resources Director responsible for administering the district's anti-discrimination policies, or a superintendent may all face individual liability if a jury were to determine that their actions, or inactions, allowed unlawful harassment or discrimination to occur or continue.

While the *Fred Fuller* decision certainly has the potential to impact school districts enormously, it is important to bear in mind that some district employees may still be immune from suit in certain situations. For example, New Hampshire recognizes the common law doctrine of official immunity, which shields public officials from personal liability for common law torts, such as negligence. Official immunity applies when discretionary decisions, acts, or omissions are made in the scope of performing one's official duties in the course of one's employment. Official immunity will not apply, however, where the decision, act, or omission was made in a wanton or reckless manner. While official immunity has been applied in the context of common law claims, it is unclear whether it would function to bar a claim brought against a public official for violation of a statute, such as the Law Against Discrimination.

Additionally, the state has created statutory immunity for municipal executives under RSA 31:104, which provides that no school executive shall be held liable for civil damages "for any vote, resolution, or decision made by said person acting in his or her official capacity in good faith and within the scope of his or her authority." Thus, while there seem to be a several potential protections for school executives, it is important to note that the *Fred Fuller* decision could impose liability on all employees, such as individual teachers and other district employees, including janitorial staff, cafeteria workers, and paraprofessionals, who "aid and abet" the alleged employment discrimination or who engage in retaliatory conduct in violation of the statute.

As a direct consequence of this decision, it would be prudent for school districts to determine whether they have adequate insurance coverage for discrimination and harassment claims. Districts should further determine whether their insurance policies provide sufficient coverage for individual employees who may now be named as party defendants, keeping in mind that the vast majority of insurance policies deny coverage where a district employee acts intentionally. Moreover, your insurance policy may not cover all district employees; it may only apply to administrators. If that is the case, you may want to consider expanding your insurance policy to mitigate the risk that an employee who is sued in his or her individual capacity is without appropriate coverage.

As always, the best way to avoid liability to is avoid claims. Prudent school administrators should take this opportunity to review their anti-harassment and discrimination efforts. Districts should assure that their

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anti-discrimination policies are legally compliant and provide all employees with an accessible process for reporting misconduct. Districts may also need to intensify their training programs, with particular emphasis on the role of school administrators in the handling of harassment and discrimination complaints. In order to protect the interests of all employees, school districts may need to take steps to ensure a shift in workplace culture to make clear that harassment and discrimination conduct is simply not tolerable to any degree.

Endnotes

1 RSA 354-A *et seq.*
2 RSA 354-A:7; RSA 354-A:2, VII.
3 RSA 354-A:19.

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Don't Miss Out: Upcoming Events

Below is a list of upcoming programs created specifically for school leaders. Covering a variety of topics and offering both in person and online learning opportunities, our goal is to provide easy access to the legal information and resources you need to do your job effectively.

APRIL
5

Back to School: ACA Open Enrollment for Maine and New Hampshire Schools

Tuesday, April 5, 2016
12:00 PM - 1:30 PM
Webinar

Open enrollment presents a great time for school districts to adjust their health benefits in order to limit exposure to penalties and reporting obligations in connection with the ACA. Drummond Woodsum attorney Chris Stevenson will focus on how school districts can avoid ACA penalties and 1095-C reporting for substitute teachers and other variable hour employees by utilizing a "look-back approach."

MAY
4

Finding Order in the Chaos: Navigating the Intersection of Special Education, Juvenile Justice, and Student Residency

Wednesday, May 4, 2016
8:30 AM - 2:30 PM
Concord, NH

New Hampshire law is a jumble of competing and ambiguous provisions regarding which district is responsible for delivering special education, who must pay for services, and who's in charge when parents are divorced or the student is placed by a juvenile court. To make matters worse, cultures collide when juvenile courts join school districts as parties, as each system tries to understand the other.

Drummond Woodsum's special education team unravels this confusion in a clear and practical fashion, helping you make sense of these most difficult issues.