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TABLE OF CONTENTS

Page

School Law News

◆ Equal athletic opportunities for students with Disabilities

On January 25, 2013, the US Department of Education's Office for Civil Rights (OCR) issued a "Dear Colleague Letter" (DCL) which purported to provide "guidance" on schools' responsibilities under Section 504 (of the Rehabilitation Act of 1973) to ensure that students with disabilities have opportunities to participate in athletic activities. This "guidance" generated more confusion than enlightenment.

On December 16, 2013, the US Department of Education's Office for Civil Rights issued a written response to NSBA's May 21, 2013, request for clarification. The response to NSBA's inquiry provides, succinctly, clarification in regard to 1) equal opportunity in athletics, 2) individualized inquiry, 3) FAPE and equal opportunity to participate, and 4) creation of new athletic opportunities. More importantly, it outlines what schools are not required to do. The following are some highlights from the OCR response. A DCL does not promulgate regulations or announce new obligations, but relates to the application, interpretation and enforcement of regulations.

Equal opportunity: The regulations implementing Section 504 require school districts to provide students with disabilities an equal opportunity to participate in and benefit from the district's nonacademic services, including their existing extracurricular athletic activities. This means that students with disabilities must be provided with equal access to those existing athletic activities, but it does not mean that every student with a disability has the right to be on an athletic team and it does not mean that school districts must create separate or different activities just for students with disabilities. A school district must not exclude a student with a disability based on stereotypes and assumptions about the student or students with disabilities, but must instead consider each student individually. Some students with disabilities may be able to participate in an athletic activity without the need for any action by the school district. For other students, in order to ensure equal access, the school district must make an individualized inquiry to determine if reasonable modifications can be made or aids or services provided that would allow those students an equal opportunity for participation. However, providing this equal opportunity does not mean compromising student safety; changing the nature of selective teams (students with disabilities still have to try out like everyone else and legitimately earn their place on the team); giving a student with a disability an unfair advantage over other competitors; or changing essential elements that affect the fundamental nature of the game.

Individualized inquiry: A school district must conduct an individualized inquiry to determine whether reasonable modifications or necessary aids or services would provide a student with a disability with an equal opportunity to participate in an extracurricular activity. This does not necessarily mean that the Section 504 team must convene when a student with a disability wants to take part in extracurricular athletics. An inquiry could be as straightforward as a coach or athletic staff member consulting with the student and his/her parents to determine what reasonable modifications could be provided to give the student an equal opportunity to participate. In other circumstances, an athletic official might be included in the conversation to address adaptations to standard rules or practices in school sports competition. What is called for is "a reasonable, timely, good-faith effort by the individuals with the appropriate knowledge and expertise to determine whether there are reasonable modifications or aids or services that would provide that student with equal access to the particular activity."

(continued on page 2)

FAPE and equal opportunity to participate: The Individualized Education Program (IEP) of a student with a disability may include provisions related to the student's participation in extracurricular activities. Where this is the case, a failure to provide the services set forth in the IEP could constitute noncompliance with Section 504 (of the Rehabilitation Act), as implementation of an IEP under the IDEA is one means of complying with the Section 504 regulations concerning FAPE. However, there is no legal requirement under Section 504 that an IEP address participation in extracurricular athletics or any other extracurricular activity.

Creation of new athletic opportunities: For students who cannot participate in the school district's existing extracurricular athletics program, even with reasonable modification, aids or services, the guidance "urges" schools to create additional opportunities for such students, which could include separate or different opportunities from those already provided. However, a school district is not required to do so. However, if a school district voluntarily wishes to provide such separate activities, those must be supported equally as compared with the school district's other athletic activities.

The complete OCR response may be viewed by clicking here. The original guidance can be accessed here.

-Charlotte K. Bates

Sources: *NSBA* and *US Department of Education Office for Civil Rights*

◆ Student speech: An update on the Third Circuit's decision in B.H. v. Easton Area School District

NSBA, the Pennsylvania School Boards Association, AASA and a number of other education associations have filed *amicus* briefs urging US Supreme Court review of Third Circuit's "I (Heart) Boobies" decision. The US Court of Appeals for the Third Circuit had ruled that a Pennsylvania school district's ban on displays of a cancer awareness bracelet inscribed with the caption "I (Heart) Boobies" violated students' First Amendment free speech rights.

The Court had concluded that the ban could not be justified under either the *Tinker* (substantial disruption) standard or the *Bethel* (vulgar, lewd, profane or plainly offensive speech) standard. The Easton Area School District has filed a petition for *certiorari* asking the US Supreme Court to review the decision. The briefs argue, among other points, that the Third Circuit has introduced a new standard that would leave school official subject to litigation and restricts their ability to maintain harassment-free school environments. The NSBA brief urges the Supreme Court to recognize the authority of school officials to regulate student speech during the school day if such speech disrupts the school environment or interferes with the responsibility of schools to teach civil discourse as an inherent democratic value and to protect the rights and sensibilities of other students. It also argues that the ruling misreads Supreme Court precedent, which has recognized that school officials have the authority to determine what is appropriate speech in schools and the authority to limit student expression that is contrary to their educational mission (most recently in *Morse v. Frederick*). Whether or not the Supreme Court grants *certiorari*, this case is important as it relates to the authority of schools to regulate student speech.

- NSBA Legal Clips, various dates

◆ 7th Circuit upholds Board's firing of guidance counselor for publishing explicit and controversial "relationship advice"

This case is significant first, because it weighs interest in free speech in matters of public concerns against the school district's interest in promoting effective and efficient public services and, secondly, because it is so strongly supportive of school boards. In this case, the 7th Circuit Court of Appeals ruled that Rich Township (IL) High School District 227 did not violate a school guidance counselor's First Amendment rights when it fired him for publishing a graphic "adult" book on male-female relationships.

Bryan Craig, the author/school guidance counselor referenced his employment at the school, his counseling of students and his coaching of girls' basketball as qualifications for the "advice" he was giving in this book. He stated that he wrote the book on his own time. The Superintendent recommended, and the Board approved, his termination on the grounds that 1) the book caused substantial disruption, concern and distrust in the school community; 2) he violated the Board's conduct policy in creating an intimidating, hostile or offensive educational environment; and 3) failed to comport himself in accordance with his professional obligations as a public teacher. Craig claimed he was terminated in retaliation for his speech and that the district had violated his First Amendment rights.

The lower court had held that the book did not relate to a matter of public concern and dismissed the claim; Craig appealed. Unlike the lower court, the 7th Circuit court found that the guidance counselor's speech did relate to a matter of public concern, but still affirmed the district court's dismissal of the employee's retaliation claim on the ground that the school district's interest in restricting his speech outweighed his First Amendment interests. The 7th Circuit applied the *Pickering* analysis: Under *Pickering* (*Pickering v. Board of Education of Township High School Dist. 205*), a public employee's termination based on the exercise of free expression is unconstitutional if

(continued on page 3)

7th Circuit upholds

(continued from page 2)

two criteria are satisfied: 1) the expression relates to a matter of public concern and 2) the employee's interest in commenting on matters of public concern outweighs the public employer's interest in promoting the efficiency of the public services it performs through its employees. The 7th Circuit said that the parts of the book that dealt with Craig's own sexual exploits were not a matter of public concern, but taken as a whole, the book addressed a subject (adult relationship dynamics) that interests a significant segment of the public and therefor was a matter of public concern. However, the Court held that Craig's claim of retaliation was properly dismissed because the District's interests in promoting effective and efficient public service outweighed Craig's First Amendment interest in free speech. By basing its decision on this second prong of *Pickering*, the decision supports the argument that school boards can (and perhaps should) discipline employees whose speech negatively impacts the delivery of school services even when the speech occurs off campus and qualifies as First Amendment speech on a matter of public concern. In Maine law terms, such speech/conduct could render an employee unfit to teach/unprofitable to the schools.

-NSBA Legal Clips, 1/9/14

◆ FERPA ruling on Board member sharing student information based on personal observation

A school board member, while at board meeting, mentioned that the parent of a student in his class, who was also a board member, wrote a negative email about the lack of bathrooms available for the student on a field trip. The student's name and situation were revealed. The parent of that other board member complained to the Family Privacy Compliance Office (FPCO) (of the Office of Civil Rights). The FPCO declined to take action, stating that the disclosure of personally identifiable information about a student by a school official (this category includes board members) did not run afoul of FERPA because the information was not derived from the student's educational record. FERPA does not protect the confidentiality of information in general, so if a school official discloses information about a student that is a result of the official's personal knowledge or observation, then the information would not be protected under FERPA. The takeaway point is that even though this was not considered a FERPA violation, school board members need to respect the privacy rights of students and be cautious about intentionally or unintentionally revealing information about students.

-*FERPA Bulletin*, November 2013

◆ Protecting Cloud Data: Tips for School Districts

School leaders need to consider where they store their data, why they are collecting data and how to keep it private. At a recent seminar held by the Consortium for School Networking, the Center for Digital Education offered the following suggestions:

First, communicate what data the district is collecting and why. School districts should maintain a page on their website that outlines what data they collect, who has access to it and why it's being collected. This serves the interests of transparency and building trust with the community. If the community does not see the value of collecting data, they will tend to react negatively.

Second, find out what data is needed. School districts often collect data that is not valuable because no one uses it. The more data that is collected, the more risk there is of disclosure.

Third, make data and cloud decisions based on district values. Superintendents and school boards should make data and cloud decisions, not teachers. Although many teachers have good intentions when they sign their students up for no-charge websites, they are putting student data in the hands of a third party without the district's knowledge. Any apps or services should go through a procurement review before they are employed. Third party providers do not own the student data, and they act at the school district's direction. There are provisions in FERPA regulations that apply to disclosure to (and by) third parties.

Fourth, assess your record-keeping practices and clean them up. School districts should take the time to analyze their data collection practices and processes before moving anything to the cloud. This analysis could help identify and address problems that have escaped attention.

Fifth, once such problems have been addressed but before moving data to the cloud, school districts should construct a record that shows what data the district has and where such data is located. If districts don't take an inventory of the records they have, they will have a hard time finding them later when they need them.

-*Center for Digital Education*, 11/13/13

◆ Student due process: Player's loss of credits Key to viable due process claim

The recent 8th Circuit Court of Appeals decision in *Bloodman v. Kimbrell* will be of interest to school districts that allow students to use participation in athletics to earn the required health and physical education credits for graduation or to use such participation to earn elective

(continued on page 4)

Student due process:

(continued from page 3)

credits (at least until the full standards/proficiency-based diploma kicks in).

The 8th Circuit ruled that a Pulaski, Arkansas student's due process rights were not violated when he lost his spot on the high school basketball team, but his due process rights may have been violated by the District's reassigning him to study hall from the elective athletic class of basketball, as it caused when state law creates a justifiable expectation or entitlement. The Court cited the Arkansas Supreme Court, which has held that there is no constitutional right to play sports. However, the transfer and loss of credit toward graduation created a more complex issue. The transfers allegedly violated school policies prohibiting reassignment to a class after eight weeks of a semester have elapsed. In sending the case back to the lower court, the 8th Circuit noted that the lower court had dismissed the complaint without considering whether the policy created a justifiable expectation that the son would not be so transferred and reassigned, for purposes of determining whether a property interest protected under the Due Process Clause was at stake.

-*School Law Briefings*, November 2013

◆ Reasonable accommodation under the ADA–Can an employee make an employer provide a specific accommodation?

The 3rd US District Court of Appeals has affirmed a District Court decision that denied a teacher's motion to alter or amend judgment on her claims under Section 504 and ADA Title II against her employer school district. The court ruled that an employee cannot make an employer provide a specific accommodation if another reasonable accommodation is provided. In this case, the school district's offer of elevator access to a teacher who could not take the stairs was sufficient for the Court to find that the District had provided a reasonable accommodation. The teacher contended that she should have been assigned to a room on the ground floor of an administrative position. The Court said that a reasonable juror could have found that by offering elevator access, the District had fulfilled its duty under the ADA and had no obligation to offer the additional requested accommodations.

-*School Law Briefings*, January 2013

◆ OCR (Office of Civil Rights) says Michigan school district failed to properly investigate sexual assault allegations - district accepts costly resolution agreement

The US Department of Education's Office for Civil Rights (OCR) has cited the Forest Hills School District in Grand Rapids Michigan for failing to follow up on two separate sexual harassment and assault claims lodged against a student athlete.

The OCR found that the District failed to investigate most of the claims by one of the students and her parents, who said the girl was repeatedly harassed in school as retaliation after reporting in 2010 that she had been sexually assaulted in a soundproof band room by a student athlete. The alleged assault was reported to a teacher the next day and the attacker was later convicted as a juvenile of a misdemeanor assault and battery. The OCR report describes how the 15 year old girl was shoved in school hallways, bullied online and taunted at school sporting events. She dropped out of her after-school sports and eventually left the school. The OCR investigation determined that the District's procedures for responding to sex discrimination were not effective and did not comply with Title IX, which is supposed to prevent students from discrimination based on their gender. How the District responded – or failed to respond – to the assault allegations, including the interim measures the school took after the girl's allegations were made (including keeping the suspect in the same class as the accuser for more than two weeks before removing him) were key points in the decision. The end result was a costly and detailed resolution agreement. This case serves as a reminder that school administrators need to take seriously and thoroughly investigate allegations of sexual harassment and bullying, identify the victim's needs and take appropriate interim measures to prevent further harassment in both in-school and after-school activities.

-*NSBA Legal Clips*