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THE Extra Mile

GOING THE EXTRA MILE SO YOU DON'T HAVE TO

EDUCATION EDITION

April 2015

Discrimination on the Basis of Transgender Status Prohibited-- The Department of Justice (DOJ) and Department of Education (ED) recently filed a "statement of interest" asserting that discrimination on the basis of transgender status is prohibited under federal law.

In the case of *Tooley v. Van Buren Public Schools*, the plaintiff, a student who was a female at birth, but whose gender identity is male, alleged that various defendants, including his public school district, discriminated against him in violation of *Title IX of the Education Amendments of 1972* (Title IX), *Title IV of the Civil Rights Act of 1964* (Title IV), and the *Equal Protection Clause of the Fourteenth Amendment*.

The plaintiff alleged that his school denied him access to the boys' restroom, instead requiring him to use a staff *women's* restroom located next to the cafeteria, and that when his mother informed staff that a student began bullying him after seeing him exit this restroom, she was told her son was being "overly sensitive." The plaintiff also asserted that this

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Consumer Price Index

Percent change for the month of **February 2015,** for the urban wage earners and clerical indices as reported by the Bureau of Labor Statistics.

	All Urban (CPI-U)	Workers (CPI-W)
Chicago Mthly	0.0	0.0
12 Mth	-0.2	-0.8
St. Louis, 2nd Half 2014		
6 Mth	-0.2	-0.3
12 Mth	0.7	0.4
U.S. Mthly	0.4	0.5
12 Mth	0.0	-0.6

March CPI figures will be released April 20, 2015. 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

- **As of April 1, school districts are required by P.A. 98-930 to post on their websites a mechanism (such as a uniform single email address or a list of individual e-mail addresses), for members of the public to electronically communicate with board members. A hyperlink to this information must be easily accessible from the district's homepage.**

- **HLERK has updated and revised our model Student Handbook Checklist. Send in the attached order form to purchase your copy of this vital document today!**

Appellate Court Upholds RIFs Under SB7 Despite Allegedly Incomplete Evaluations--The Illinois Appellate Court recently upheld a school district's actions in dismissing teachers pursuant to a reduction in force under SB7 against the plaintiffs' claims that the district had not properly completed their evaluations.

The case, successfully defended by **Stan Eisenhammer** and **Jeff Goelitz,** is one of the first appellate court decisions upholding RIF's under SB7. In the August 2014 *Extra Mile,* we reported on the trial court ruling upholding the RIFs.

In *Holmes v. Board of Education of Belvidere Community School District No. 100*, 2015 IL App (2d) 140731-U, an unpublished (*i.e.,* official, but not binding precedent) opinion, tenured teachers unsuccessfully challenged their dismissals due to reduction in force by disputing the underlying evaluation that led to their dismissal.

The key in the case was that the allegedly incomplete component of the evaluation, under the District's Evaluation Plan, could not have changed the overall rating for the teachers. The court recognized that even if the component were completed the teachers still would have received low ratings and still would have ended up in Group 2 of the Sequence of

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RIFs Cont. Honorable Dismissal List. As a result, any alleged procedural violation of the evaluation process did not lead to their honorable dismissal, and the district was not required to complete a step that—in the court's words—would have been "pointless."

Although the district prevailed in the case, it highlights the significance of the evaluation process on RIFs under SB 7. As evaluations have become the driving force for RIF dismissals, the establishment of an Evaluation Plan for your district and compliance with that plan are now more important than ever.

Contact any of our "RIF Team" attorneys with your employee dismissal and reduction-in-force inquiries or Stan or Jeff with questions regarding the impact of the Belvidere ruling on your school district.

Transgender Cont. same student later called him a fag and threatened to rape him, the latter of which resulted in the plaintiff running away so fast he fell and broke his arm.

The plaintiff also alleged that school personnel addressed him as "Olivia," his name assigned at birth, and referred to him using female pronouns despite his consistent presentation of his male gender identity and his mother's requests that he be addressed using his preferred name and male pronouns. Further, the plaintiff claimed that school staff "outed" him as transgender to other students and parents of other students who then ostracized him.

DOJ/ED asserts that although "transgender" is not an explicit suspect classification, the relevant suspect classification in this case is sex, which includes gender, gender identity, transgender status, and nonconformity to sex stereotypes. Additionally, the DOJ/ED asserts that plaintiffs *may* rely on evidence of sex stereotyping to establish discrimination on the basis of sex and that courts must apply "heightened scrutiny" when analyzing a school district's defense of any sex discrimination actions, a level of analysis that can be burdensome for a school district to overcome.

The DOJ/ED also urges courts to closely analyze any argument by the school that restroom separation is done for the purpose of "safety," as such safety concerns may be speculative, and many transgender students across the country safely use restrooms according to their gender identity.

School districts throughout our state continue to address transgender issues. For more information regarding transgender issues in schools, please contact Nancy Krent or Michelle Todd.

New Regulations Impact Maintenance of School Records--On February 9, amendments went into effect for the Downstate Local Records Commission, which oversees public records retention outside of Cook County. On February 11, similar amendments went into effect for the Local Records Commission of Cook County. The amendments are intended to reflect current technological best practices and also reduce the waiting period prior to the disposal of public records from 60 to 30 days.

School districts must seek permission to dispose of public records by filing a *Records Disposal Certificate* with the applicable Local Records Commission listing all records targeted for disposal in advance of doing so. As before, disposal of such records may only proceed after a copy of that certificate has been reviewed and approved by the chairman of the applicable Local Records Commission and returned to the agency requesting disposal.

The amendments also contain comprehensive specifications concerning digital reproduction, storage and

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Records Cont. management of electronic records. Of note, the new rules now specify there should be a minimum of two backup copies of all electronic records preserved for the length of scheduled retention. Relatedly, we understand that some districts have been told by officials from the Local Records Commission that they must now keep all video or electronic recordings for a mandatory 30-day retention period. However, the rules do not explicitly state this requirement.

The rules continue to allow "non-record material" to be destroyed at any time, such as transitory messages of short-term value. The rules give examples of such transitory materials, including e-mails, instant messaging (IM), text messaging (SMS), or paper correspondence containing reminders to employees about scheduled meetings or appointments; most telephone messages (whether in paper, voicemail or other electronic form); announcements of office events such as holiday parties or group lunches; and recipient copies of announcements of agency-sponsored events. However, the rules provide that whenever there is doubt that certain items are non-record materials, the district should consider them to be records until their status is determined.

School district IT administrators should carefully review these rules to ensure that their systems are in compliance with the new electronic records maintenance requirements. The rules and guidance are available online at:

https://www.cyberdriveillinois.com/departments/archives/records_management/home.html.

If you have any questions regarding retention of records, please contact Steve Richart or Heather Brickman.

Federal Court in Chicago Upholds Assistant Principal Suspension and Nonrenewal Against Claim of Retaliation and Sex Discrimination--A Chicago federal district court has ruled that a former assistant principal of Community Consolidated School District No. 15, who had been suspended and her contract nonrenewed, failed to produce any evidence supporting her claims of First Amendment retaliation and sex discrimination, and entered judgment in favor of the school district defendants.

In *Wong v. Board of Education of Community Consolidated School District et al.* (Case No. 2011-cv-07357, N.D.Ill. 2014), successfully defended by **Vanessa Clohessy** and **Kerry Burnet**, the plaintiff, a former assistant principal, was suspended with pay for the remainder of the school year and her contract was nonrenewed because of her unauthorized distribution of sensitive survey results.

Plaintiff filed suit claiming: (1) First Amendment retaliation for reporting concerns about a prior supervising principal's drinking habits during the previous school year; (2) sex discrimination under Title VII based on her suspension and nonrenewal; (3) association discrimination under the *Americans with Disabilities Act* ("ADA") based on her husband's alleged disability; and (4) a due process claim based on a deprivation of plaintiff's occupational liberty interest.

Regarding plaintiff's First Amendment retaliation claim, the court found that while plaintiff's speech was on a matter of public concern, no reasonable jury could have found that her speech was a motivating factor in her suspension and contract nonrenewal. In so holding, the court emphasized that "a federal court is not the super-personnel department for every employer."

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Suspension Cont. Next, the court entered summary judgment for the defendants on plaintiff's Title VII sex discrimination claim because plaintiff provided no evidence that she was treated less favorably than a similarly situated male employee. The court rejected plaintiff's proposed comparator because he had more authority as a principal and he had tenure, while plaintiff was an assistant principal and did not have tenure.

The court also rejected plaintiff's associational discrimination claim under the ADA because plaintiff "put forth no evidence from which a reasonable jury could conclude that" the superintendent or board of education were even aware of her husband's alleged disability. Plaintiff's due process claim failed because her suspension was not stigmatizing as a matter of law and she put forth no evidence that the allegedly stigmatizing information was published, other than in her personnel file. Finally, plaintiff's claim failed because she put forth no evidence from which a reasonable jury could conclude that she suffered tangible loss of other employment opportunities as a result of the defendants' actions.

Please contact Vanessa Clohessy with questions regarding this decision or your employment discrimination inquiries.

Providing a Calculator During Testing is an Unreasonable Accommodation for Student with a Specific Learning Disability--The requested accommodation of a calculator for a student with a specific learning disability is not "reasonable" nor required under federal law according to the federal district court in Chicago. The court further denied the parent's motion for injunctive relief.

In the case of *K.P. v. City of Chicago School District #299,* the school district provided an IEP for K.P. that allowed for the use of a calculator as a classroom mathematics accommodation with the explicit limitation that it be an "allowable non-standard accommodation."

K.P. participated in a district-wide math assessment administered for the purpose of determining entrance into a competitive high school. While the assessment's creator had specifically provided that identified calculators were to be considered a "nonstandard accommodation" that could result in the invalidation of a student's results, they did not preclude districts from making non-standard accommodations during assessments should an IEP require it. They did note, however, that with the use of non-standard accommodations, the validity of the student's score would be weakened.

The district court considered several factors in coming to its determination. To begin, the court found there was a fundamental unfairness to nondisabled students who would likely encounter errors as a result of having to do mental calculations. Additionally, the court viewed there to be a strong likelihood that the test scores would be invalidated due to use of the calculator.

Contact Michelle Todd with your student accommodation inquiries.