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The Education Works

EDUCATION NEWS FROM SOUTHSIDE WORKS

Maiello Brungo & Maiello

ATTORNEYS AT LAW

Focus on Special Education Breakdown of an IEP: Whose Fault Is It?

Children with disabilities are guaranteed access to a free appropriate public education ("FAPE") once they reach three years of age (before three, children with disabilities have access to state early intervention services designed specifically for infant and toddler development). Each eligible child's access to a FAPE is uniquely designed by an Individualized Educational Program ("IEP"). Laws such as the *Individuals with Disabilities Education Improvement Act* ("IDEIA") encourage collaboration between parents and schools when crafting an IEP. Parents are included as IEP team members, can examine their child's records, and are guaranteed prior written notice if the school needs to make changes to an IEP.

But what happens when a parent exceeds the level of participation envisioned by the IDEIA and implementation of the IEP breaks down?

A recent case, *G.K. v. Montgomery Cnty. Intermediate Unit*, deals with this very question. Diagnosed with an autism disability, G.K. received early intervention services from the state as a toddler and transitioned to services provided by the Montgomery County Intermediate Unit with age. G.K.'s parents (particularly, G.K.'s mother) frequently complained about the services sponsored by the Montgomery County Intermediate Unit. Over time, collaboration between G.K.'s parents and the Montgomery County Intermediate Unit, as well as the individual therapy providers, grew increasingly hostile: two service providers in a row canceled services rather than continue dealing with G.K.'s parents.

The parents' demands for specific therapy and intrusive behavior into day-to-day operations interfered with the IEP's implementation. There were several month-long gaps in G.K.'s service. G.K.'s parents eventually brought a complaint to a Pennsylvania Special Education Hearing Officer, who found that any issues regarding the execution of G.K.'s IEP were due to the parents' behavior. The Eastern District Court of Pennsylvania later affirmed the hearing officer's findings, noting that parents are encouraged to participate in IEP development but can't control the process.

Moreover, the Court identified additional disruptions by G.K.'s parents that interfered with therapy services and IEP implementation: threatening language, fraud accusations, and attacks on staff professionalism and credentials. Such disruptions moved far beyond the level of parental participation contemplated by the IDEIA.

This recent court decision doesn't change the fact that parents are allowed (and encouraged) to collaborate on their child's IEP and to serve as a strong advocate for their child. But it does show that ultimate control over an IEP's implementation rests with the school district. Parents can't compel a school district to provide a specific program for their child. If a parent's inappropriate conduct interferes with the district's ability to implement the child's IEP, a court may find that fault rests with the parent – and not the district.

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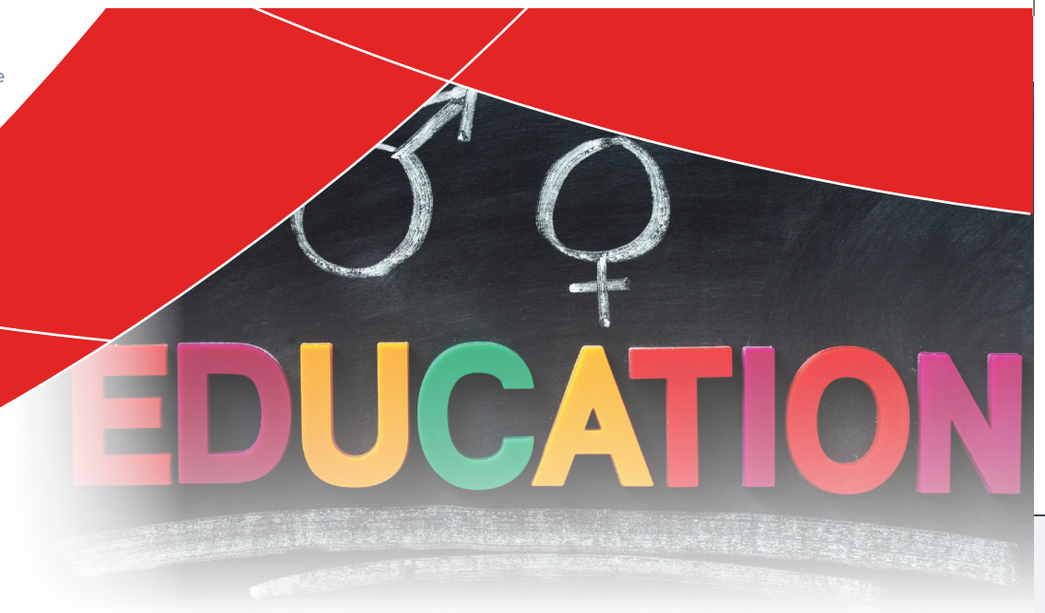
School administrators should be aware of the momentum towards a broader understanding of gender-based anti-discrimination laws and should ensure that their school policies adequately protect all students from discrimination, harassment and bullying.



Transgender Issues: Is Your District Prepared?

Freedom from discrimination based on sex is a right. However, when a person whose gender identity, gender expression, or behavior does not conform to that typically associated with the sex to which they were assigned at birth, respecting this right can become complicated, especially in a school setting.

This issue is problematic because it places school boards in a position of balancing the newly developing rights of transgender students against the established rights of other students and parents.

Some of the Key Issues that Districts Face

ACCESS TO BATHROOMS

The first category, access to bathroom facilities, is one of the most common concerns raised by school staff. Districts are increasingly faced with requests for access to bathroom facilities that align with a student's actual or perceived gender identity. Currently in Pennsylvania, transgender students do not have the legal right to use the bathroom of the opposite biological sex. However, this may soon change because the law is still developing in this area. In some District's, teachers and parents have been able to work together to make the best determination for the student. Nevertheless, some parents of non-transgender students may object to this determination on the basis that their own child's privacy is being invaded. In resolving these issues, advocacy groups have recommended reaching a "safe and non-stigmatizing alternative" that alleviates the discomfort of affected students and their parents. Proposed alternative solutions include: separate changing schedules, adding a partition or curtain, or giving the student the choice of using a private bathroom.

ATHLETIC PROGRAMS

A District's decision to either allow or prohibit a student from participating in gender-segregated athletic programs based on the student's actual or perceived gender identity may also present a contentious issue. For example, in 2014 the Minnesota State High School League postponed issuing a transgender-inclusive athletic policy due to opposition from a local special interest group. The policy was expected to pass in October of 2014 until a full-page advertisement appeared in the Minnesota Star Tribune decrying the "end" of girls' sports. The policy was eventually released in December; however, it requires that students provide some measure of "proof" of the student's "sincerely held gender-related identity." Similarly, in early 2014 the Virginia High School League, which oversees athletic programs at 313 public high schools in Virginia, unanimously approved a new policy governing the inclusion of transgender athletes in school sports programs. In order to participate, the student must have undergone sex reassignment surgery and hormonal therapy to "minimize gender-related advantages in sports competition."

FERPA

Finally, some schools have voiced concern over student records, privacy, and relevant Family Educational Rights and Privacy Act (FERPA) requirements. Under FERPA, current and former students may request that their student records be amended if the records are "inaccurate, misleading, or in violation of the student's rights of privacy." Thus, under federal law, a transgender student may seek to amend his or her student records so that the gender listed corresponds to the student's current gender identity. However, these requests are not always granted because FERPA ultimately leaves it to the school district to "decide whether to amend the records as requested within a reasonable time after [the district] receives the request." Due to this statutory discretion, civil rights organizations have urged schools to develop policies that respect the privacy rights of transgender students by accommodating these FERPA requests. They argue that districts that refuse to grant these requests may open themselves to Title IX discrimination investigations by U.S. Department of Education given the Department's recent guidelines on student rights. As a result, districts may be unsure of the proper course of action. Unfortunately, the means to navigate these concerns, as well as any issues of liability, will remain unclear until Congress is able to revisit federal statutes, and, in particular, Title IX. Furthermore, despite recent federal agency interpretations, state protection from discrimination can vary from state to state depending on the actions of state legislatures and local school districts.

School administrators should be aware of the momentum towards a broader understanding of gender-based anti-discrimination laws and should ensure that their school policies adequately protect all students from discrimination, harassment and bullying. Please contact MBM if you have any questions about understanding the gender-based anti-discrimination laws and/or need assistance with reviewing your policies to ensure that they correctly address potential transgender issues.

Overtime: What should employers know?

The Fair Labor Standards Act (FLSA) is a federal law that requires employers to pay certain employees minimum wage and overtime for all hours worked in excess of 40 in a single workweek regardless of whether they are paid an hourly rate or on a salary basis.

However, certain employees are exempt from these requirements if they are employed as bona fide executive, administrative, or professional employees receiving no less than $455 per week, or outside sales employees.

EXECUTIVE EMPLOYEE

The employee's primary duty is managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise. The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent and have the authority to hire or fire other employees, or effectively recommend such action.

ADMINISTRATIVE EMPLOYEE

The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers. The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

PROFESSIONAL EMPLOYEE

A "learned" professional employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment. The advanced knowledge must be in a field of science or learning and is customarily acquired by a prolonged course of specialized intellectual instruction. A "creative" professional employee's primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

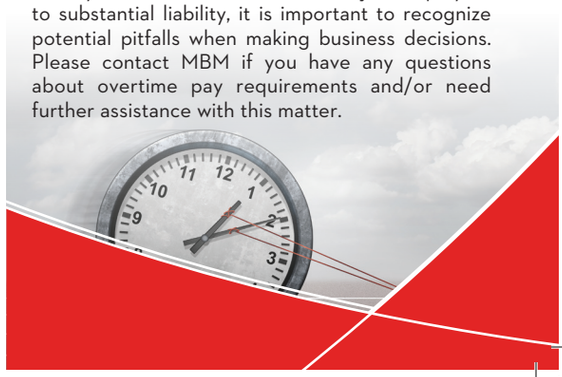
OUTSIDE SALES EMPLOYEES

The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer. The employee must be customarily and regularly engaged away from the employer's place of business.

If the job falls under any of the four categories described above, or qualifies as a highly compensated employee (earning over $100,000 annually), the employee is not covered by the Act.

Currently, the white collar minimum wage requirement is $455 per week ($23,660 per year). If an employee's salary does not meet this threshold, an employer is required to pay them overtime regardless of their job category. However, the U.S. Department of Labor (U.S. DOL) is in the process of amending FLSA to update the wage thresholds to take inflation into account since the last update in 2004. The U.S. DOL is proposing that the white collar minimum wage requirement be raised to $921.00 per week, or $47,892.00 annually and the highly compensated employee level be raised to $122,148.00 annually. The Final Rule announcements are expected in early 2016 and will apply to calendar tax year 2016 and beyond.

Employees filing an FLSA claim can seek unpaid overtime wages going as far back as three years. The FLSA allows employees to recover twice their actual damages as "liquidated damages." Moreover, an employee's overtime rate is calculated at 1.5 times the regular hourly rate. The FLSA also allows the employee to recover attorneys' fees and costs, which can substantially exceed the amount of the employee's total claim and allow similarly situated employees to opt into another employee's FLSA claim and potentially multiply the employer's liability. Because FLSA claims can subject employers to substantial liability, it is important to recognize potential pitfalls when making business decisions. Please contact MBM if you have any questions about overtime pay requirements and/or need further assistance with this matter.



Same-Sex Marriage- What Every School District Should Consider

In June 2015, the US Supreme Court issued its long-awaited opinion in *Obergefell v Hodges*, declaring that bans on same-sex marriages are unconstitutional and legalizing same-sex marriage in every state. In a 5-4 opinion, Justice Anthony Kennedy wrote "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and the Equal Protection Clauses... couples of the same sex may not be deprived of that right and that liberty." In light of this decision, school districts across the Commonwealth should review their policies and benefit coverages as they pertain to employee families. This article will touch briefly on some of the areas requiring attention.

FMLA LEAVE

Under the Family and Medical Leave Act (FMLA), school districts with more than 50 employees must give eligible employees unpaid leave to "care for a spouse, son, daughter, or parent who has a serious health condition." In the FMLA context, the US Department of Labor previously defined spouse as "a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including 'common law' marriage and same-sex marriage." With the *Obergefell* decision, state laws limiting same-sex marriage are no longer applicable and a spouse is to be defined in accordance with federal law and must be treated as such for FMLA purposes. This may require School Districts to amend existing FMLA policies or reconsider the application of contract terms.

BEREAVEMENT AND OTHER LEAVE

School districts which provide bereavement leave for the death of a spouse or an in-law relative should consider updating their policies to reflect same-sex spouses and their family members. Supervisors who administer those policies should also be made aware of these revisions. Any other leaves which reference family affiliations must be updated in light of the *Obergefell* decision. Many of these leaves are also included in collective bargaining agreements. Contract terms should be reviewed to determine if revisions are needed to bring them into compliance with the *Obergefell* ruling. This will require entering into appropriate memorandums of understanding with the local unions.

DOMESTIC PARTNER ISSUES

If your school district offered benefits to same-sex domestic partners, you may decide to now eliminate that category of benefits. By doing so, unmarried opposite-sex couples could also be affected. While *Obergefell* eliminates the uncertainty as to who qualifies as a spouse, it complicates the domestic partner issue. School districts offering domestic partner coverage must rethink who qualifies as an eligible domestic partner. School districts considering elimination of domestic partner benefits need to consider whether equal protection issues may arise if a school district covers same-sex domestic partners but not opposite-sex domestic partners.

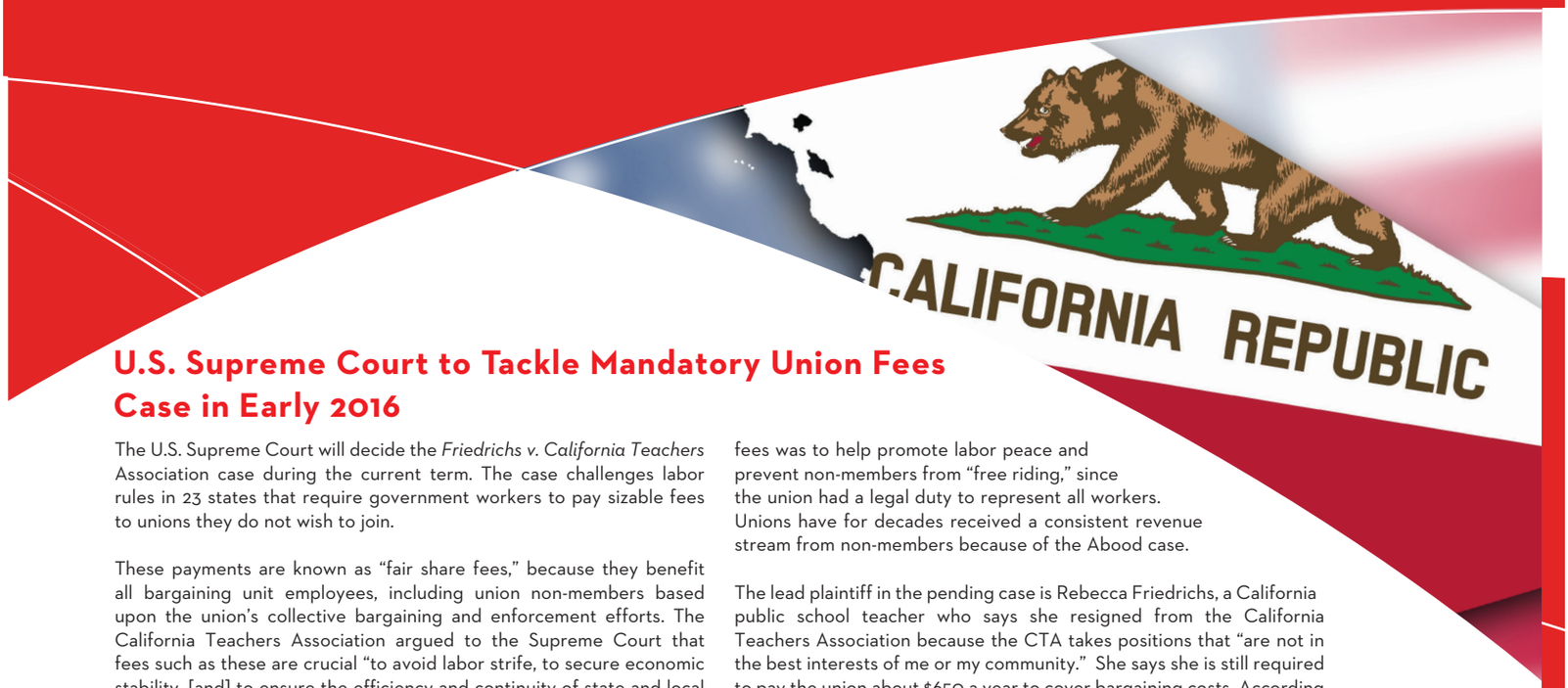
POTENTIAL DISCRIMINATION CLAIMS

22 states and Washington, D.C. recognize a right of action for discrimination based on sexual orientation and gender identity. However, Pennsylvania is not currently included among those states. Further, although federal legislation has been introduced in the past seeking to prohibit sexual orientation discrimination, current federal laws do not explicitly recognize sexual orientation as grounds for a discrimination claim.

Federal courts that have addressed the issue are split on whether sexual orientation or gender identity discrimination is prohibited under Title VII's ban on sex discrimination. A number of federal district courts have recognized sexual orientation discrimination as illegal sex-based discrimination. However, the Federal Third Circuit Court, which includes Pennsylvania, in its 2001 decision in *Bibby v Phila. Coca Cola Bottling Co.* has expressly declined to recognize sexual orientation-based adverse employment actions as a potential form of sex discrimination.

The *Obergefell* decision will likely trigger additional litigation asserting claims of discrimination based on sexual orientation. Although the Supreme Court has not considered whether sexual orientation falls under the purview of sex-based discrimination, the trend in Supreme Court decisions has been to extend recognition of rights to same-sex couples. Therefore, it is likely the Court will recognize sexual orientation as a potential basis for sex discrimination. It is also possible that the Legislature will act first to recognize sexual orientation as a stand-alone protected category.

Rather than becoming the first case to litigate the issue, the safest practice for school districts is to avoid treating any employee differently based on sexual orientation.



U.S. Supreme Court to Tackle Mandatory Union Fees Case in Early 2016

The U.S. Supreme Court will decide the *Friedrichs v. California Teachers* Association case during the current term. The case challenges labor rules in 23 states that require government workers to pay sizable fees to unions they do not wish to join.

These payments are known as "fair share fees," because they benefit all bargaining unit employees, including union non-members based upon the union's collective bargaining and enforcement efforts. The California Teachers Association argued to the Supreme Court that fees such as these are crucial "to avoid labor strife, to secure economic stability, [and] to ensure the efficiency and continuity of state and local governments."

In 1977, the U.S. Supreme Court ruled in *Abood v. Detroit* Board of Education that a Michigan law which required teachers to pay the union's "agency fee," even if they were opposed to the union, was constitutional. The Supreme Court's rationale in 1977 for allowing the fees was to help promote labor peace and prevent non-members from "free riding," since the union had a legal duty to represent all workers. Unions have for decades received a consistent revenue stream from non-members because of the Abood case.

The lead plaintiff in the pending case is Rebecca Friedrichs, a California public school teacher who says she resigned from the California Teachers Association because the CTA takes positions that "are not in the best interests of me or my community." She says she is still required to pay the union about $650 a year to cover bargaining costs. According to labor leaders and other experts, a ruling in favor of the teachers challenging the fees could drain the finances of all unions representing teachers, firefighters and other government workers. Watch for MBM updates regarding the outcome of this case and the potential impact that it may have on Districts.

To speak with any of our attorneys, call 412.242.4400

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