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EDUCATION NEWS

CYBER-LEARNING'S IMPACT ON THE WORKFORCE

Your school district falls into one of two categories: either you are already implementing cyber-education in some form or you will be implementing cyber-education in the next few years. In response to the increasing popularity of cyber schools and students' demand for greater educational choices and flexibility, every school district must confront how to incorporate cyber-education into its traditional curriculum. While school districts have implemented different cyber-education models, each has an impact on the school district's existing teaching staff. School districts should give early consideration to labor issues that may arise upon implementing cyber-education before they become significant.

The Pennsylvania Public Employee Relations Act (PERA) defines the obligations of public employers, such as school districts, regarding negotiation with teacher bargaining units. With cyber-education, two different sections of PERA come into play. One section requires school districts to bargain with teacher unions over "wages, hours and other terms and conditions of employment." On the other hand, another section states that an employer is not required to bargain over matters involving managerial policy, including "utilization of technology." This provision does require that employers participate in a meet and discuss process over those matters which have an impact on the terms and conditions of employment.

The question for school districts and labor unions alike is where does the introduction of cyber-education fall on that continuum; is it a matter which must always be bargained, a matter which need never be bargained or a matter which must be addressed through meet and discuss? There are two cases decided by the Pennsylvania Labor Relations Board (PLRB) which provide conflicting guidance on these issues and underscore the need for school districts to engage in advance planning.

The Rochester School District purchased an online health program called "Brain Honey" from the Beaver County IU and implemented the program in the school year following the furlough of several teachers. The online program provided all health instruction to the District's students in an online format, with an assigned health teacher present in the classroom but only to monitor the students to ensure they were making progress. The teacher did not perform any instruction, evaluation or grading. The teachers' union filed an unfair labor practice arguing that the Brain Honey program represented an unlawful diversion of bargaining unit work. The PLRB's Hearing Examiner disagreed, however, and found that the program was a lawful implementation of technology. While employers are not permitted to use technology as a pretext to remove bargaining unit work, the Hearing Examiner found that the introduction of the online health program completely changed the manner in which health courses were taught to students. This changed the essential function of the job of teaching health and did not represent a diversion of bargaining unit work.

On its face, the PLRB's August 26, 2010 Rochester decision represents a broad grant of discretion to school entities to implement cyber-education, provided that the implementation represents a change in the functions of teaching. However, in a June 21, 2011 decision, the PLRB muddied the waters. An unfair labor charge was filed after the Tredyffrin-Easttown School District implemented a pilot program to permit high school students the opportunity to take Latin I and II, German I and Visual Basic courses through an online provider. The courses could be taken before, after or during normal school hours and were "taught" by an instructor employed by the third-party provider. While the online course grades were not included on report cards or counted toward a student's GPA, the credits were counted toward graduation requirements. The school district's teachers were not involved in any capacity in providing the online instruction, and even the lab monitoring was performed by an Assistant Principal.

In response to the unfair labor practice filed by the District's teachers, the PLRB found that there had been an unlawful diversion of bargaining unit work. The PLRB noted that the courses offered online had been previously taught by the District's teachers, and actual instruction was now being provided by the third-party provider's instructors. In this regard, the PLRB distinguished this arrangement from the Rochester School District's use of the Brain Honey health program. Teachers were still used to monitor the classrooms

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in Rochester although the essential functions of the job of teaching health had been changed. In comparison, the online arrangement adopted by Tredyffrin-Easttown shifted the responsibility for teaching from the District's teachers to the third party provider. The complete exclusion of the District's teachers from the function of teaching the online courses led to a finding that bargaining unit work had been diverted.

Reading the cases together, the PLRB appears willing to view the significant changes brought about by cyber-education as part of an employer's right to utilize technology, but with the expectation that teachers will continue to play some role. At the very least, technology cannot be used to simply replace a district's teaching staff with a third party provider. To that end, school districts implementing or planning cyber-education should structure the cyber-education in such a manner that it changes the essential function of teaching a class while still preserving a role for the current teachers in the instruction. These are admittedly complex questions.

The safest course to follow is to meet and discuss with the teachers' union at the outset to attempt to reach some understanding as to the application of cyber-education and its impact on instruction and teaching conditions. In some instances, teachers' unions may be satisfied with an assurance that positions will not be eliminated. In other instances, the union may attempt to micromanage the district's implementation of technology. While reaching agreement on these issues may be contentious, such an agreement through meet and discuss outweighs the uncertainty of appearing before the PLRB.

ESI SPOLIATION SANCTIONS – STEPS TO PROTECT YOUR DISTRICT

School districts are constantly bombarded by litigation involving federal constitutional rights or protections, whether First Amendment student free speech issues or employee discrimination claims based on age, sex or race. Although discrimination claims are filed preliminarily with the Equal Employment Opportunity Commission (EEOC) or the Pennsylvania Human Relations Commission (PHRC), they sometimes result in federal litigation. As federal litigation, these claims are governed by the Federal Rules of Civil Procedure, and most importantly, the discovery rules regarding electronically stored information (ESI). ESI encompasses all electronically-stored information/documentation, but in most cases, involve the preservation of email. Even if a district successfully defends against the discrimination claims, the failure to properly preserve and produce ESI could spawn spoliation claims which take on a life of their own and expose school districts to liability. Therefore, it is important to understand the school district's responsibility in preserving ESI and limiting their exposure to spoliation sanctions.

What is spoliation? Spoliation is the destruction or significant alteration of evidence or the failure to preserve property for another's use as evidence. How does this apply to ESI/email? Basically, once a school district is on notice of a potential lawsuit, the district must preserve all potentially relevant documents and ESI/email. Courts have held that notice of a potential lawsuit is not when the lawsuit is actually filed but arises at a much earlier time when the district first becomes aware of the potential that a lawsuit could develop. For example, in discrimination claims, this may occur when notice that an EEOC or PHRC claim of discrimination is received.

The most important step a school district can take to prevent charges of ESI/email spoliation is to adopt a document retention/destruction policy. In adopting such a policy, consideration must be given to school district operations and document retention requirements governed by both state and federal law. With regard to email, the district's computer and electronic infrastructure capabilities and needs must be considered, including the need to conserve electronic storage space based upon email volume and the normal use and storage capabilities of the district computer servers. An effective policy should address the following:

- Establish an appropriate and workable retention schedule for paper and ESI;
- Establish district-wide best practices tailored to district needs by identifying the records that must be retained based on legal or regulatory requirements;
- Address the retention of email and other communications, such as instant messaging and voicemail;
- Address other forms of electronically stored information that are created in the ordinary course of business;
- Develop appropriate use policies which establish and promote the appropriate use of the district's email accounts; and
- Train employees to manage and retain business records created or received in the ordinary course of business.

However, adoption of a document retention/destruction policy is not sufficient alone. It is just as important for the district staff to consistently follow and implement the policy by neither destroying documents and ESI/email prematurely nor retaining them beyond their useful life. Proper implementation of the document retention/destruction policy is a key factor in determining whether documents have been destroyed in bad faith.

Even if a proper document retention/destruction policy is adopted and properly implemented, it must include a "litigation hold" provision. Basically, once a school district reasonably anticipates litiga-

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TEACHERS & STUDENTS ONLINE & OUT OF CONTROL - FREE SPEECH IN THE INTERNET AGE

Within the last few months, several court decisions and other developments have occurred which impact the internet free speech rights of students and teachers and attempt to address the effect that speech has on school operations. While courts may be offering clarity on a number of points, in other areas, the law is still far from settled.

In a web-only article, we'll explore recent internet free speech case summaries and propose preventive measures your district may consider to head off such claims. For the full article, please visit the Newsletter tab under the Resource heading of our website www.mbm-law.net.

tion, it must suspend its routine document retention/destruction policy and implement a litigation hold to ensure the preservation of relevant ESI/email documentation. District officials/employees who are directly involved in the subject matter of the litigation must not destroy relevant ESI/email that might be useful to the person who has filed the lawsuit. While there is no duty to keep or retain every document in its possession, there is a duty to preserve what is known or reasonably should be known to be relevant in the claims or defenses in the litigation. Documents should also be retained which could lead to the discovery of admissible evidence, are reasonably likely to be requested during discovery and/or are the subject of a pending discovery request. Depending upon system limitations, it may be necessary to immediately preserve an image of all electronic data of relevant parties as soon as the potential for litigation arises. The fairly nominal cost to preserve electronic data far outweighs the potential sanctions which could be imposed for spoliation of the ESI/email.

Possible spoliation sanctions include a negative inference against the school district on the claims being raised, the striking of the district's defenses, the mandatory admission of alleged facts which could establish the claim against the district, payment of the opposing party's attorney fees, contempt or fines against the school district. Depending upon the type of sanction imposed, the lawsuit could be lost where otherwise the school district could have prevailed. For these reasons, a proactive approach to adopt and implement document retention/destruction policies and properly implementing a litigation hold to preserve ESI/email is vitally important to protect a school district's interests. If your district does not have these protections in place, steps should immediately be taken to guard against future ESI/email spoliation sanctions.

FOCUS ON SPECIAL EDUCATION

WHEN DOGS GO TO SCHOOL – SERVICE ANIMALS IN THE CLASSROOM

In the Fall 2010 edition of MBM Education News, we reported on the final Department of Justice (DOJ) regulations which at that time had only recently been released by the DOJ on July 23, 2010. The regulations regarding service animals for students with disabilities became effective on March 15, 2011. As with any new regulation, ongoing implementation issues continue to raise questions and concerns.

While the new regulations regarding "service animals" limit the definition to service "dogs," they further specify that "the work or tasks performed by a service animal [dog] must be directly related to the individual's disability" and that "an animal's presence and the provision of emotional support, well-being, comfort or companionship do not constitute work or tasks for the purposes of this definition." Making this determination at times can be difficult. According to the DOJ, "doing work" is broader than "performing tasks" as doing work includes "activities that do not appear to involve physical action." However, the DOJ cautioned against "comfort" sort of work, emphasizing "that unless the animal is individually trained to do something that qualifies as work or a task, the animal is a pet or support animal and does not qualify for coverage as a service animal." The key to making this determination, according to the DOJ, is "recognition and response." While a "pet … may be able to discern that the handler is in distress, … it is what the animal is trained to do in response to this awareness that distinguishes a service animal from an observant pet or support animal."

Clearly, the new general rule regarding the presence of service animals in schools is that it must be permitted. However, there are two exceptions to this general rule which are (1) when the animal is not house broken; or (2) when the animal is out of control and the handler is unable to control the animal. While these are the exceptions, the only inquiries permitted under the new rule are to question whether the animal is required because of a disability and what work or task the animal has been trained to perform. A school district cannot require documentation such as proof that the animal has been certified, trained or licensed as a service animal.

A significant difficulty in implementing the new service animal regulations is that there is no provision to exclude a service animal which is a direct threat in the educational setting. The regulations only generally provide that "in determining whether an individual [with a service animal] poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain: the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices or procedures or the provision of auxiliary aides or services will mitigate the risk." The Appendix to the regulations states that a direct threat to the health or safety of others is one that cannot be eliminated by reasonable modifications. However, the DOJ declined to provide specific examples, but rather left each determination to the discretion of the particular school district.

When an animal is introduced into a closed classroom environment, a common threat that could arise relates to allergies. Depending on the severity, allergies can be an impairment which may rise to a disabling condition. Therefore, if any student or staff member, assigned to a classroom which includes a service animal, suffers an allergic reaction to the animal, a school district must be prepared to have the person with custody and control of the animal remove the animal to a different location designated by the building principal until an alternative plan is developed with appropriate district staff. This may require the IEP or Section 504 Team to meet as soon as possible. All alternatives must be considered, including the possible reassignment of the person having custody and control of the animal to a different classroom. Similarly, if allergies impact transportation services, an alternate transportation plan may also be necessary.

As with most new regulations, while several areas of concern have been addressed regarding service animals, implementation of the new regulations has identified other issues.

Implementation will, in all likelihood, continue to result in other issues as school districts are confronted with increasing requests for service animals.

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