

School Law Matters

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Newsletter of the Law Firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.
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Dear Clients and Friends,

As you can see, we have changed the look of our Firm's newsletter "School Law Matters". We hope that this new electronic format will make it easier for our clients and friends to access these monthly updates (as well as the websites cited in them) and to forward them to their colleagues who could benefit from the information. Please contact us with your comments and/or suggestions about this new look.

Sincerely,

Benjamin J. Ferrara (bjferrara@ferrarafirm.com)

315-437-7600

Ferrara, Fiorenza Law Firm Recovers \$29,000,000 in Sales Tax Revenue for Monroe County Schools

Over the past two years, Law Firm Partners Dennis Barrett and Joseph Shields represented all 24 school districts located in and adjacent to Monroe County in a successful effort to recover \$29,000,000 in sales tax money which Monroe County attempted to take from the School Districts.

Monroe County had argued successfully at the trial court level that the Tax Law allowed it to use the School Districts sales tax to pay its rising Medicaid expenses.

In March 2008, the Appellate Division Fourth Department declared that our interpretation of the law was correct and the 24 School Districts were entitled to their full share of sales tax. This past month, the County and School Districts entered into a settlement agreement under which the School Districts will receive their entire share of the sales tax repaid over time with interest and all of the School Districts' legal fees will be reimbursed by the County.

We are extremely pleased with the outcome of this matter.

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Americans with Disabilities Act (ADA) Expanded

On September 25, 2008, President Bush signed the ADA Amendments Act of 2008 (ADAAA) into law. The new law is purportedly designed to restore the "intent and protections of the Americans with Disabilities Act (ADA) of 1990." The most significant changes to the ADA involve the definition of a "disability" and how courts are meant to interpret it. The practical effect of these changes will be to make the ADA closer to the New York State Human Rights Law in terms of its scope and coverage. It also may impact how courts define disability for students in the context of Section 504 of the Rehabilitation Act.

Under the new law, which becomes effective January 1, 2009, a "disability" will still be defined as:

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment (42 U.S.C. §12102.)

However, the new law will include an extensive list of the tasks and functions which constitute "major life activities." Specifically, these activities include physical tasks such as walking, standing, and lifting; mental tasks such as learning, reading, and thinking; and the operation of major bodily functions, such as immune system functions, cell growth, and reproductive functions.

In addition, the ADAAA added a broad definition of "being regarded as having such an impairment". According to the new law:

An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity.* (Emphasis added.)

When a court applies this modified definition to cases in the future, it must construe the term as follows: (1) the term "disability" must be construed in favor of "broad coverage" of individuals under the Act; (2) an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability; (3) an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active; and (4) the determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of specified mitigating measures (such as medications, prosthetics, etc.).

This new definition also may change how Section 504 of the Rehabilitation Act is applied to students. Since there is not much case law determining what constitutes a disability for students under Section 504, the U. S. Department of Education's Office of Civil Rights and the courts have borrowed from the ADA's definition in the past. These ADA amendments, therefore, may be interpreted to similarly include reading as a major life



Firm Welcomes Newest Partner

The Ferrara, Fiorenza Law Firm is very pleased to welcome our newest partner Eric J. Wilson, Esq. Mr.

Wilson graduated cum laude from Marist College in 1988 and received his law degree cum laude from Albany Law School in 1991 where he was a member of the Albany Law Review and Justinian Society. Prior to joining the Law Firm, Mr. Wilson was the Director of Personnel and Labor Relations for the Onondaga Cortland Madison BOCES and previously was the Staff Attorney for the Syracuse City School District. Mr. Wilson is a member of the New York State Bar Association, the Onondaga County Bar Association, the New York State Association of School Attorneys, the New York State Association of School Personnel Administrators and Management Advocates for School Labor Affairs. Mr. Wilson's practice concentrates in the areas of Public Sector

activity and to require school districts to examine whether the student's physical or mental impairment would substantially limit a major life activity if the student did not utilize mitigating measures such as medication.

The new law also redefines who is protected by the ADA. Under the old law, only a "qualified individual with a disability" was protected. The new law removes the phrase "with a disability", expanding the law's protections to "qualified individuals". The new definition of "qualified individuals" will read as follows:

The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

This change was primarily intended to overturn the U.S. Supreme Court decision in *Toyota Motor Mfg. Ky Inc. v. Williams*, 534 U.S. 184 (2002). In that case, the Court held that a person with carpal tunnel syndrome is only covered by the ADA if her impairments affect central activities of daily living and not just her ability to perform a class of tasks on the job. In that case, Ms. Williams worked using vibrating pneumatic tools on an assembly-line. Over time, she developed carpal tunnel syndrome in both wrists, and back and neck pain. As an accommodation, Toyota moved her to a less physically demanding job. But when her job responsibilities were expanded and her pain recurred, the company refused to return her to her previous tasks. Ms. Williams brought suit under the ADA. Ruling in favor of Toyota, the Court noted:

"When addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her particular job ...The impairment's impact must also be permanent or long term."

The Court found that repetitive work with arms extended at shoulder height (as Ms. Williams was required to do for the paint inspections on car bodies) was not an important part of most people's daily lives. Tasks such as brushing your teeth, face washing, bathing, fixing breakfast and doing laundry are manual tasks which are central to daily living. Since Ms. Williams could still perform these tasks, she was not a "qualified individual with a disability" and therefore not entitled to protection under the Act.

Under the new law, Ms. Williams would have been considered a "qualified individual" as long as she could have performed the "essential functions of the job either with or without a reasonable accommodation." In other words, if the Court were to determine that repetitive work with arms extended at shoulder height was not an essential function of her job, she would have been protected against adverse employment actions on the "basis of disability" despite the fact that her impairment may not have significantly impacted a major life activity.

For employers in New York, this change will have little practical effect given the fact that the New York State Executive Law (also known as the "Human Rights law") has always had a much broader definition of "disability." Under the Human Rights Law, "disability" is defined as "a physical, mental or medical impairment... which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or

laboratory diagnostic techniques ..." New York's highest court has explained the breadth of New York's definition as follows:

The statute provides that disabilities are not limited to physical or mental impairments, but may also include "medical" impairments. In addition, to qualify as a disability, the condition may manifest itself in one of two ways: (1) by preventing the exercise of a normal bodily function or (2) by being "demonstrable by medically accepted clinical or laboratory diagnostic techniques" (Executive Law §§ 292[20] [now 21]). Fairly read, the statute covers a range of conditions varying in degree from those involving the loss of a bodily function to those which are merely diagnosable medical anomalies which impair bodily integrity and thus may lead to more serious conditions in the future. Disabilities, particularly those resulting from disease, often develop gradually and, under the statutory definition, an employer cannot deny employment simply because the condition has been detected before it has actually begun to produce deleterious effects. *State Division of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213 (1985) (emphasis added).

Thus, the broader definition - and construction - of the term "disability" under the ADA will be similar to how it is defined under the Human Rights Law. Consequently, the new law will have little practical effect on employers located in New York. However, employees will have the opportunity to bring their ADA lawsuits in federal court and possibly recover attorneys fees if they prevail. By law, such fee awards are not available in Human Rights Law cases.

Districts should review their policies and procedures to confirm that they are consistent with the requirements of the new ADA as well as the New York State Human Rights Law. If you need assistance in reviewing and/or revising your District's policies/regulations in this regard, please contact our office at 315-437-7600.

District NOT Liable for Off-Campus Student Car Accident

An Appellate Court recently held that a school district was not liable for the deaths of two students who were killed in an automobile accident off school premises during a lunch break.

In October 2004, three students from the LaFayette Central School District were killed in an automobile accident when the car in which they were riding in (off campus during lunch) went off the road and hit some trees. The car was being driven by another LaFayette student, who eventually pled guilty to the charge of criminally negligent homicide. Authorities stated that the student lost control of the car while speeding over a bump in an attempt to "get air" under the car.

The families of two of the students filed lawsuits against the student driver, his parents, the Town where the accident occurred and the LaFayette School District. The families contended that a newly-instituted program at LaFayette High School which permitted seniors to leave campus during their lunch periods with parental permission was "ill conceived". Court papers indicated that the two students submitted falsified permission slips to leave campus the day of the

accident.

In August 2007, a State Supreme Court justice denied the District's motion for summary judgment and refused to dismiss the complaint. The judge concluded that a jury should address the question of whether the District was negligent in notifying parents about the program and in failing to have a policy or regulation in place to verify the validity of parental permission slips.

On appeal, the Appellate Division, Fourth Department reversed the lower court and dismissed the lawsuit against the School District, stating at the outset that "[I]t is well established that a student who leaves school grounds is not entitled to the protection of the school district (citations omitted), and that is the case herein." The Court stated that the contention of the plaintiffs that the students left campus without parental permission, even if true, would not subject the District to liability. The Court also stated that under the circumstances of the case, the District owed no duty either to the students or their parents to prevent the students from leaving the school campus in an automobile. In addition, the Court held that there was no evidence to indicate that District officials knew that the student who was driving that day was an incompetent driver. In the Court's view, this was a tragic accident which was not foreseeable in the normal course of events and for which the District had no responsibility. (*Davis v. Marzo*, ___AD 3rd ___, 2008 WL 4446625, 10/3/08)

While the Appellate Court decision is helpful to districts generally, in order to defend future liability claims, districts may wish to consider permission slip policies which require parents to personally deliver these slips to the appropriate district office to avoid future allegations of forgeries.

Before Denying Student Transportation Because of Distance Make Sure You Measured Correctly

The Commissioner of Education has held on numerous occasions that establishing student transportation routes and measuring distances are within the discretion of a board of education and that school district actions involving these decisions will not be set aside unless the district has been arbitrary or unreasonable. Two recent decisions illustrate when the Commissioner will overturn actions to deny student transportation due to distance.

In the first case, *Appeal of Sanguine*, 48 Ed. Dept. Rep. ___, Dec. No. 15830 (8/26/08), the distance between the student's family home and the private school the family wished their children to attend was 14.7 miles. Education Law Section 3635 requires public schools to grant requests to transport students within their district to private schools up to 15 miles from their homes. Despite the measurement being less than 15 miles, the District denied the family's request for transportation because its transportation/safety supervisor considered the parents' suggested route less safe. Specifically, parent's route required the use of "back roads". Since the District's proposed "safer" route was more than 15 miles the transportation request was denied. The transportation/safety director also determined that the parent's suggested route was less efficient than the District's route because it involved more travel time, fuel consumption and wear and tear on District vehicles.

In their appeal to the Commissioner, the family contended that the distance should be measured using the nearest available route from their home to the private school. The District argued that the distance should be measured using the route that was safer and more time/fuel efficient. In his decision, the Commissioner stated that because Education Law Section 3635(1)(a) explicitly provides that distance be measured by the "nearest available route" from home to school, the District's position was unreasonable. Accordingly, the Commissioner ordered the District to provide the requested

transportation.

The Commissioner addressed a similar issue two months later in a case involving this same school district with regard to transporting a student with a disability. Under Education Law Section 4402(4)(d), a board of education must provide transportation up to a distance of 50 miles to and from a non-public school which a student with a disability attends when certain requirements, which were not at issue in the case, were met. Since Section 4402(4)(d) does not specifically address how to measure distance for transportation eligibility purposes, the Commissioner applied the measurement standard found in Education Law Section 3635(1)(a) namely, the "nearest available route" between home and school.

In this case, the student's family submitted driving directions from two different Internet websites that indicated that the distance from their home to the private school was 49.4 miles. The District again argued that the distance should be measured using the safer, more time/fuel efficient route which was greater than 50 miles. As in the previous case, the Commissioner rejected the District's argument and ordered the District to provide the requested transportation (*Appeal of a Student With a Disability*, 48 Ed. Dept. Rep. _____, Dec. No. 15844, 10/28/08).

Districts are still free, of course, to use the most time and fuel efficient methods of providing transportation to their students, including using interstate highways. However, as these recent decisions illustrate, they must still measure distance for purposes of determining transportation eligibility using the nearest available route.

About the Firm

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. provides comprehensive legal representation and counseling exclusively to public and private sector employers in the areas of school law, employment law and labor relations.

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