

School Law Matters

December 2009



Newsletter of the Law Firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.
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Medicaid Compliance Program Update

Following up on last month's article involving Medicaid Compliance Programs, additional guidance and information has been issued by the Office of the Medicaid Inspector General ("OMIG") as well as the State Education Department regarding how Districts are to comply with these new mandates.

As an initial matter, the OMIG has extended the filing date for the electronic mandatory provider compliance certificate. The new deadline is now December 31, 2009. Districts and BOCES that bill Medicaid must certify that they have Compliance Programs in place by that date.

From our perspective, the best practice is for all Districts and/or BOCES that bill for Medicaid reimbursement, regardless of the amount, to enact Compliance Programs to protect the organization and its officials from allegations of false claims and/or improper practices. The OMIG expects to begin next year conducting audits of school districts to ensure compliance programs are in place. In addition, pursuant to a proposed settlement agreement between the State Education Department and the Federal Government involving Medicaid overpayments, all school board members in Districts or BOCES that bill Medicaid for school-supported health services are required to have at least one hour of training on Medicaid compliance rules. We are awaiting guidance as to who is actually qualified to provide this training to Board members.

Districts and BOCES must also be aware of the Medicaid Disqualified Individuals List which is reviewable at the Office of Medicaid Inspector

Upcoming Training Opportunities

Our Firm's attorneys will be presenting both in-person and webinar training sessions for superintendents, administrators and school board members on the following dates:

December 8, 2009

8 AM - 10 AM

[Buffalo School Law Briefing](#)
Center for Tomorrow Building
at University of Buffalo,
Amherst, NY

December 16, 2009

8 AM - 10 AM

[Albany School Law Briefing](#)
660 Albany-Shaker Road
Albany, NY

December 17, 2009

Noon - 1:30 PM

[Alternative Revenue Sources for School District Webinar](#)

General website. The Federal government will not pay Medicaid funds for any items or services furnished, ordered or prescribed by an excluded individual or entity. The exclusion applies to the listed person and anyone who employs or contracts with the excluded person. For example, a school district that retains the services of a speech pathologist who is on the exclusion list, cannot subsequently bill Medicaid for any services provided by that disqualified individual. This is an area which is fraught with pitfalls. Contracts with service providers should be reviewed and revised to include assurances of Medicaid billing eligibility. Districts and BOCES must also take steps to review whether any of their own employees are on the exclusion list.

Additional guidance as to who should serve as a Compliance Officer was recently provided by the OMIG. It has been recommended the Compliance Officer be someone other than the person who directly supervises the service providers. The OMIG recommended that Districts use an individual involved in the business process of the organization, who can ensure the compliance and self audit procedures are followed. It was also the opinion of the OMIG that the Compliance Officer should not be an individual hired outside of the District or BOCES, but should be an individual "in-house" who is known to the staff and available to any employee who may want to disclose inappropriate practices.

Once again, this area continues to develop and we will continue to take steps to update our clients and friends as additional guidance becomes available. If you have any questions please contact Colleen W. Heinrich, Esq. at 315-437-7600.

Happy Holidays and the First Amendment

Our Constitution's famed First Amendment aims at protecting from adverse government action certain fundamental rights of the citizens. Of these protected freedoms, the right to speak freely, the right to practice your religion freely and right to be free from government-established religion are particularly relevant in public schools at the time of major religious celebrations, perhaps none more so than at Christmas time. Holiday concerts and displays can lead to contention. Google the words "holiday celebration public school law" and you will turn up 1,550,000 hits. It is, indeed, an active topic.

Legal decisions involving holiday presentations come from the Commissioner of Education and courts ranging from the lowest to the U. S. Supreme Court. The issues can vex the most patient and tolerant school administrator, because the underlying subject matter - "my religion" - can be so devoutly held and believed. The issues also touch directly on the parental drive to teach their children their own beliefs and, sometimes, to protect them from the beliefs of others. Parents fear that their 'young and impressionable' children may be improperly influenced about religion while at school.

From a school attorney's perspective, it is not a surprise to see the First Amendment involved in these issues; freedom of speech includes the freedom to hear others speak, and the freedom to teach and to be taught. Religious freedom includes the freedom to practice my religion and to be free from religion imposed - or "established" - by the government (and public schools are 'the government').

In the school setting, these issues can arise in both the instructional

January 21, 2010

Noon - 1:30 PM

Student Discipline Webinar

For more information and to register for these programs, go to our firm [website](#) or Delacroix Consulting Group's website at www.delacroixconsulting.com or click on the links above. You will also be receiving additional information on these programs in the next few weeks.

Threshold for Competitive Bidding of Public Work Contracts Raised

On November 12, 2009, the Governor signed into law an amendment to Section 103 of the New York General Municipal which raises the threshold for competitive bidding of public work contracts from \$20,000 to \$35,000. The new law did not, however, modify the threshold for bidding purchases; that threshold remains at \$10,000.

The amendment took effect immediately.

New ADA Regulations Proposed

On September 23, 2009, the Equal Employment Opportunity Commission (EEOC) published proposed new regulations under the Americans with Disabilities Act (ADA). These regulations are intended to provide guidance for enforcement of the ADA Amendments Act of 2008 (ADAAA), which became effective January 1,

context and the employment context. For instance, if a Winter Concert includes singing Christmas carols which mention Christ, objections may be raised by parents of non-Christian faiths or of no faith and they can be raised by the music teacher if the teacher's faith prohibits singing carols.

In the employment context, the answer is relatively straightforward: under the Federal Title VII of the Civil Rights Act and the applicable EEOC guidance, an employee's religious beliefs must be given "reasonable accommodation" as long as the essential functions of the job are performed. This sometimes can be achieved in the holiday concert/celebration setting by shifting the duty to employees who do not have the religious objection, or by modifying the program for that teacher somewhat.

In the student/parent instructional context, the issue can be more complex, dealing with what one court has called the "hazy contours" of the First Amendment's religion clauses. School districts have been the subject of public or even legal attack for changing the name of the "Christmas Concert" to "Winter Concert"; on the other hand one district lost a legal attack when it changed "Winter Concert" back to "Christmas Concert" on the ground that it was a majority-Christian community.

The courts have made clear that schools may teach about religion and its cultural significance, and may use religious symbols and religious songs in teaching about religion, but that they may not carry out religious instruction and may not favor or denigrate one religion over another. As long as the school maintains a neutral position on religion and is tolerant of all views, including the non-religious view as well as the multitude of religions, it will likely not cross over the constitutional limits. In addition, a strong sensitivity to the nature and attitudes of the school community (including the minority as well as majority members of that community) may help avoid unnecessary litigation. For instance, avoid excessive reference to religion or religious symbols; if any religious symbol is used in a holiday display, or any religious song is used in a holiday concert, balance the presentation or concert with representative material from other religions and from a purely secular viewpoint. Particularly if these items are accompanied with an age-appropriate educational message, an explanation of the cultural meaning of the religious and non-religious material, the school will be forwarding its educational mission without violating its constitutional obligations.

Happy Holidays!

Managing Expectations in Collective Bargaining

This is the time of year that Business Officials start developing next year's budgets and Superintendents start discussing collective bargaining goals with Boards of Education. This year is, however, different from previous years. While December has almost always been a month of bleak fiscal forecasts from Albany, this is the first time in almost two decades that mid-year cuts to education aid loom as a very real possibility.

Predictably, discussions in executive session involving collective bargaining goals are somber and often start with demands for give backs and concessions from the union in the current school year. The expectations of most Board members are that unions must agree to health care concessions and little or no increase in compensation.

2009. As noted in our December 2008 newsletter, the ADA was intended to counteract Supreme Court decisions that had narrowly defined the term "disability" under the Law. Specifically, the ADA states that its purpose is "to reinstate a broad scope of protection" of the ADA by expanding the definition of the term "disability."

To have a "disability" protected by the ADA, an individual must be "substantially limited" in performing a "major life activity" as compared to most people in the general population. Prior to the ADA, courts held that an impairment had to prevent, or significantly or severely restrict, the individual in performing a major life activity to be considered "substantially limiting."

These tests of substantial limitation were deemed by Congress to be too demanding. Accordingly, under the ADA and the proposed EEOC regulations, a determination of whether an individual is experiencing a substantial limitation in performing a major life activity is now "a common-sense assessment based on comparing an individual's ability to perform a specific major life activity (which could be a major bodily function) with that of most people in the general population."

This change was primarily intended to overturn the U.S. Supreme Court decision

Boards throughout the state are justifiably concerned about reductions in state aid and the looming expiration of Federal Stimulus money.

Some of the unions representing non-instructional employees seem to have an appreciation for the current fiscal realities. These unions often represent public employees in state, county, city, town and village contexts that have already been hit hard by the economy and have not had the same benefits of Federal Stimulus money that school districts have enjoyed. Expectations from these unions seem to be more reasonable as a result of their recent experience with local government negotiations.

Unfortunately, the expectations of some unions representing instructional and non-instructional employees remain inconsistent with existing fiscal realities. Compensation increases in the neighborhood of four per cent have come to be perceived as an entitlement by some employees. Indeed, there are teachers with fifteen or more years of experience that have never received anything less than a four per cent salary increase. While it is hard to believe that anyone is untouched by the current economic crisis, school district employees have, to date, remained relatively unscathed.

How do we have meaningful collective bargaining negotiations when the expectations of the parties are so disparate? How do we develop meaningful economic proposals when revenue for both the 2009-2010 and 2010-2011 school years remain in doubt?

Many districts have taken the lead in creating realistic expectations for upcoming collective bargaining by forming committees or task forces designed to explore cost savings. The committees include representatives from all the bargaining units as well as administrators and, in some cases, Board members. The topics explored by these committees may be limited to health insurance or broadened to include areas of energy conservation or even absenteeism. The purpose of the committee is not to renegotiate existing collective bargaining agreements, but rather to share information that can assist in informed negotiations at the proper time.

The real benefit of the committee is the development of realistic expectations. The committee can create a culture of cost savings and represent a genuine effort on the part of the district to involve organized labor in cost containment measures in a manner that is not perceived as an assault on their wages and benefits.

Certainly, the administrative effort and time associated with this model is not inconsequential. However, the time invested now may shorten the time at the negotiating table and may result in far more reasonable expectations for the immediate future.

If you have any questions or need assistance in this regard, please contact us.

in *Toyota Motor Mfg. Ky Inc. v. Williams*, 534 U.S. 184 (2002). In that case, the Court held that an employee with carpal tunnel syndrome is only protected by the ADA if her impairments **prevent** her from performing simple activities of daily living. Under the ADAAA and the proposed regulations, courts will no longer determine whether an individual is covered by the Law based on his/her **inability** to perform basic life functions, but whether they have **difficulty** doing so in comparison to the general population.

The ADAAA provides a non-exhaustive list of examples of "major life activities", including: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. Three of these examples - sitting, reaching, and interacting with others - are not specifically included in the ADAAA's non-exhaustive list of major life activities, but are included in the proposed EEOC regulation.

This new law and proposed regulations will also 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 and regulations, therefore, similarly include reading as a major life activity and to require school districts to examine whether the student's physical or mental impairment would substantially limit a major life activity of the student.

Districts should review their policies and procedures to confirm that they are consistent with the requirements of the new ADA and the proposed regulations. 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.