

# LEGALINSIGHTS

FOR SCHOOL DISTRICTS

OTTOWSEN BRITZ KELLY COOPER & GILBERT, LTD.

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## General Assembly passes Performance Evaluation Reform Act of 2010

by Maureen Anichini Lemon

On January 15, 2010, the Illinois General Assembly passed the Performance Evaluation Reform Act of 2010 ("the Act"). A primary outcome of the Act is to tie teacher and principal performance ratings to student growth. A primary motivator behind the Act is the belief that many existing school district performance evaluation systems fail to adequately distinguish between effective and ineffective teachers and principals. This belief is supported by the following statistic: of approximately 41,000 teacher evaluations performed over a 5 year period in 3 of the largest Illinois school districts, 92.6% of the teachers were rated "superior" or "excellent," 7% were rated "satisfactory," and only 0.4% were rated "unsatisfactory." A driving force behind the timing of the Act's passage was Illinois' desire to position itself to apply for a federal Race to the Top grant. Although Illinois did not receive a grant in Phase I of that program, the state will file an application in Phase II of that grant program later this spring.

The Act amends who can evaluate teachers and principals and the training required to become a qualified evaluator. Any evaluator undertaking an evaluation after September 1, 2012 must first successfully complete a pre-qualification program provided or approved by the Illinois State Board of Education ("ISBE"). Evaluators are no

longer required to be administrators. Rather, to be qualified as an evaluator, an individual must (1) be pre-qualified, (2) participate in inservice training provided or approved by ISBE prior to undertaking an evaluation, and (3) participate in such inservice training at least once during each certificate renewal cycle. This allows teachers to evaluate their peers. If the evaluating teacher is a member of a collective bargaining unit, the school district and the union must agree to that individual's evaluating other bargaining unit members.

Regarding evaluations, by September 1, 2012, all school districts must evaluate non-tenured teachers at least once each school year and tenured teachers at least once every two school years. Before September 1, 2012, school districts may continue to use a 3 tier rating system (excellent / satisfactory / unsatisfactory), or move to a 4 tier rating system (excellent / proficient / needs improvement / unsatisfactory) to rate tenured teachers. After September 1, 2012, all school districts must use only the 4 tier system (excellent / proficient / needs improvement / unsatisfactory) to rate tenured teachers.

The Act establishes a new support initiative for tenured teachers who are

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## School district is not liable for former teacher's post- employment sexual abuse

by Timothy J. Hoppa

The Seventh Circuit Court of Appeals recently held that a school district is not liable for a former teacher's abuse of students at a subsequent employing school district. The court addressed this issue in *Jane Doe-2, et al., v. McLean County Unit District No. 5 Board of Directors, et al.*, when it ruled that the defendant school district was not legally responsible under Title IX and Illinois tort law theories of liability.

The abuser, Jon White, was an elementary school teacher from 2002 to 2005 in the McLean County Unit District No. 5 ("the District"). During his employment with the District, White allegedly had engaged in numerous acts of sexual abuse of several female students, including hugging and holding students on his lap, having them massage him and wrap their legs around him, showing them sexually suggestive photographs, and commenting on their sexual attractiveness.

In April 2005, the District ended its employment relationship with White; however, he was not terminated. Instead, the District and White entered into a severance agreement. Shortly after leaving the District, another school district employed White and requested the District to verify his

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## FERPA: Recent decisions

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by Joseph Miller III

The Family Education Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232(j) is a federal law that protects the privacy of student education records. The law applies to all schools that receive funds from the United States Department of Education. Under the law, a school cannot deny parents the right to inspect, review, amend or consent to the disclosure of their child’s education records. When the student turns 18, the rights transfer to the student. The following recent decisions clarify what is protected under FERPA and what actions schools must take to protect a student’s records.

***Washoe County School District***  
**(Nevada State Educational Agency**  
**April 2, 2009)**

The Nevada Department of Education (“NDOE”) issued an opinion regarding the release and maintenance of e-mails. In this instance, the parents of a special education student suffering from autism filed a complaint with the NDOE when the school district failed to produce many of the e-mails between them and school officials. The parents had requested a copy of their child’s complete educational file in preparation for an IEP and noted that many of their e-

mail exchanges with school staff were missing. The school district responded that its server deleted any e-mail messages older than 60 days.

The NDOE determined that the school district had violated FERPA by not providing the e-mails to the parents. The NDOE noted that the school district has a duty to notify the parents prior to removing the e-mails. Additionally, the NDOE found that the school district’s notification must inform the parents that the content of the e-mails

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## Performance Evaluation Reform Act of 2010

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rated as “needs improvement.” Within 30 school days after such an evaluation rating, the evaluator must, in consultation with the teacher, create a ‘professional development plan’ to address the areas that need improvement and specify any supports that the school district will provide to address those areas of need. The Act does not address what happens if the teacher continues to ‘need improvement’ except to require that the teacher be evaluated at least once in the following school year.

Tenured teachers rated as “unsatisfactory” will still be placed on a 90 school day remediation plan, unless a shorter time is specified in the applicable collective bargaining agreement. A mid-point and final evaluation by an evaluator will occur during and at the end of the remediation period. A teacher who fails to complete a remediation plan with a rating equal to or better than ‘satisfactory’ or ‘proficient’ shall be dismissed. Tenured teachers who receive a “needs improvement” or “unsatisfactory” rating must be evaluated at least

once in the school year following the receipt of such a rating. If they receive a rating equal to or better than a ‘satisfactory’ or ‘proficient’ rating in the school year following a rating of ‘needs improvement’ or ‘unsatisfactory,’ they shall be reinstated to the regular evaluation schedule.

Certain provisions of the Act have different implementation dates for different school districts throughout the state: Chicago Public Schools (September 1, 2012 for 300 schools, all other schools by September 1, 2013); school districts that receive a Race to the Top Grant or School Improvement Grant (the date specified in the grant); school districts among the lowest performing 20% of remaining school districts (September 1, 2015); and all remaining school districts in the state (September 1, 2016).

Each school district shall, by its applicable implementation date, “in good faith cooperation with its teachers or, where applicable, the exclusive bargaining representatives of its teachers, incor-

porate the use of data and indicators on student growth as a significant factor in rating teaching performance, into its evaluation plan for all teachers.” To accomplish this, each school district must establish a joint committee composed of equal representation selected by the school district and its teachers/union. If, within 180 days of the committee’s first meeting, the committee does not reach agreement on the plan, each school district outside of Chicago shall be required to use a model evaluation plan developed by ISBE. By contrast, Chicago Public Schools may implement its last best proposal and need not implement ISBE’s model evaluation plan if its joint committee cannot agree on the plan.

The Act makes several changes to principal evaluation plans. Principals must be evaluated by March 1, as opposed to the current February 1 date. On or after September 1, 2012, the plan must use the same 4 tier system

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## FERPA: Recent decisions

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were no longer necessary for the education of their child. The NDOE noted that the school district could have avoided a FERPA violation by developing a clear and concise policy regarding the management of educational e-mails. Similarly, Illinois school districts would be advised to develop strong policies on maintaining educational e-mails.

### **Pine-Richland (PA) School District (Office for Civil Rights Eastern Division June 19, 2009)**

In *Pine-Richland (PA) School District* (Office for Civil Rights, Eastern Division June 19, 2009), a recent decision by the United States Department of Education's Office for Civil Rights ("OCR") also clarifies how FERPA protects a student's health information. Student suffered severe allergic reactions to milk and egg products. The District developed a Section 504 plan to address Student's allergies. Student's parents filed an OCR complaint when a school nurse required Student to explain her food allergies to a classroom. Specifically, the OCR complaint alleged that the school district treated Student differently because of her disability by forcing her to disclose her confidential health information. The school nurse admitted that she had required the student to speak about her condition to the class, which she believed was a part of the 504 plan. Upon review, OCR ordered the school district not to disclose Student's health condition in the future without express authorization from the Student's parents.

As the landscape of student records evolves to include electronic documents and outside health records, school personnel must develop and diligently follow implemented policies to insure compliance under the law. ■

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## School district liability

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employment record and experience. The District responded to the request, but did not include in its response reports of White's prior sexual abuse or harassment.

Once employed with the new school district, White began to sexually abuse his new female students there. In February of 2007, White was arrested and subsequently pled guilty to aggravated criminal sexual abuse of ten students.

The plaintiff, one of White's victims at his new school district, sued the McLean District. Although she was never a McLean District student, she asserted claims under both Title IX and Illinois common law against the District. In her claims, she alleged that the District knew of White's sexual abuse and allowed him to resign quietly and obtain new employment rather than publicly terminate him. According to allegations by the plaintiff, at the time the District approved the severance agreement, officials were aware of White's history of sexual abuse and had received numerous complaints from students and parents. The plaintiff alleged that school officials created and entered into a severance agreement with White to intentionally conceal his history of sexual harassment.

She also asserted that the District violated its obligation under the Illinois Abused and Neglected Child Reporting Abuse Act (ANCRA) (325 ILCS 5/4) by failing to report White's sexual abuse to the proper authorities. Under this theory, she alleged the District's failure to report White allowed him to obtain different employment, where he continued to sexually abuse children, including the plaintiff. The Central District of Illinois Federal District Court dismissed all of her complaints for failure to state a claim.

The plaintiff then filed an appeal with the Seventh Circuit Court. In exam-

ining the case, the court first addressed the issue of Title IX liability. Title IX of the Education Amendments of 1972 allows a student who suffers sexual harassment by a teacher to recover damages against her school district, but only if the school district acts with "deliberate indifference" to the harassment. A school district cannot be liable for its indifference to harassment if the school district lacks the authority to prevent the harassment in the first place. The court concluded that the District lacked requisite control over White's harassment of the plaintiff because it occurred during his employment with another school district. The court reasoned that White was no longer working for the District when the harassment occurred. Therefore, the District lacked (1) supervisory authority over White, and (2) the necessary substantial control element for Title IX liability.

In addition, the plaintiff claimed the District acted with "deliberate indifference" to the harassment by allowing White to resign quietly. The court, however, did not find liability here either. Once again, the court found that without the substantial control element present, the District lacked any authority to take remedial action and, therefore, was not liable for "deliberate indifference" regarding the sexual harassment of the plaintiff.

In examining the plaintiff's tort claim, the court found her claim defective for the same reasons as her Title IX claim. Because White was no longer an employee at the time of the assault, the District no longer controlled him and, therefore, had no duty to act to protect the plaintiff. Nonetheless, the court considered whether mere knowledge of prior sexual abuse allegations and a potential for future abuse could create liability for a school district. The court held that this knowledge alone does not create a duty on the part of a school district to act. The court also rejected the plaintiff's claim under ANCRA,

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## Performance Evaluation Act of 2010

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used to rate teachers to rate principals: excellent / proficient / needs improvement / unsatisfactory. Additionally, after that date, principals must be evaluated at least once every school year. Prior to September 1, 2012, principal evaluations must be in writing and must (1) consider the principal's specific duties, responsibilities, management and competence; (2) specify the principal's strengths and weaknesses, with supporting reasons; and (3) align with research-based standards established by ISBE. On or after September 1, 2012, the principal's evaluation must also "provide for the use of data and indicators on student growth as a significant factor in rating performance."

With respect to ISBE, the Act mandates that ISBE develop and implement a data collection and evaluation assessment and support system. These actions must be taken by September 1, 2011 if Illinois receives a Race to the Top grant, or by September 1, 2012 if Illinois is not a grant recipient. ISBE is expected to create procedures by which school districts must submit data and information on teacher and principal performance evaluations and evaluation plans. To the extent that ISBE does not timely fulfill its requirements under the Act, and/or

does not receive adequate and sustainable federal or state funding, the implementation dates set forth in the Act will be postponed.

Once the implementation dates are in effect, school districts will be prohibited from seeking a waiver or modification of a mandate regarding the requirements for (i) student performance data to be a significant factor in teacher or principal evaluations or (ii) for teachers and principals to be rated using the 4 categories of 'excellent,' 'proficient,' 'needs improvement,' or 'unsatisfactory.' On the applicable implementation date, any previously authorized waiver or modification from such requirements will automatically end.

Finally, the Act clarifies that the performance evaluations of public school teachers, principals, and superintendents are exempt from disclosure and cannot be accessed with a Freedom of Information Act request.

If you have any questions regarding your school district's obligations under the Illinois Performance Evaluation Reform Act of 2010, please contact Maureen Anichini Lemon at 630-682-0085. ■

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following previous rulings that rejected a private right of action.

The court did chastise the District for quietly removing a teacher with a suspected history of sexual abuse and knowingly allowing reemployment. However, the court held that failure to disclose the misconduct of a former employee does not create liability unless there is a special relationship between the plaintiff and the former employer. In this case, the District had no relationship much less a 'special' relationship with the plaintiff.

Although the District did prevail in this case, the court stated that nothing in its decision should lead a school to believe it can quietly shuffle abusive teachers to other districts and be free from liability. This cautionary note is consistent with the new reporting requirement contained in Section 10-21.9 (e-5) of the Illinois School Code. Effective August 13, 2009, each school district superintendent must notify in writing the State Superintendent of Education and the regional superintendent of schools whenever a certified employee is dismissed or resigns after a complaint of child abuse or neglect has been made against the employee under ANCRA.

If you have any questions regarding your reporting obligations, please contact Tim Hoppa, Maureen Anichini Lemon or any other attorney with whom you have worked. ■

### SAVE THE DATE Wednesday, September 22, 2010

Ninth Annual OBKC&G, Ltd. School Law Conference  
Hilton Lisle / Naperville

Ottosen Britz Kelly Cooper & Gilbert, Ltd.'s newsletter, *Legal Insights for School Districts*, is issued periodically to keep clients and other interested parties informed of legal developments that may affect or otherwise be of interest to its readers. Due to the general nature of its contents, the comments herein do not constitute legal advice and should not be regarded as a substitute for detailed advice regarding a specific set of facts. Questions regarding any items should be directed to:

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