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SCARIANO, HIMES AND PETRARCA

A T T O R N E Y S A T L A W • C H A R T E R E D

SCHOOL LAW REVIEW

New Teacher Evaluation Process

By Jessica M. Bargnes

Governor Quinn recently signed Senate Bill 315 into law as Public Act 96-861 (the "Act"). The Act amends the *School Code* to make significant changes to the teacher and principal evaluation processes. This article summarizes only the changes in the evaluation process effectuated by the Act.

The Act also amends the *School Code* to add Section 5/24A-7.1, which specifically prohibits disclosure of teacher, principal and superintendent evaluations to the public. For more information on the FOIA implications of the Act, please see our e-Blackboard of January 13, 2010 which can be

accessed on our website at www.edlawyer.com.

The primary purpose of this bill was to assist the State in attaining Race to the Top funding. While Illinois was not awarded Race to the Top funding in the first round, it will be filing for funds in the second round of the Race to the Top Competition.

TEACHER EVALUATION PLAN

The Act amends Section 24A-4 of the *School Code* to provide that each school district must incorporate the use of data and indicators on student growth as a factor in the teacher evaluation process. In doing so, each district must make a good faith effort to work with its teachers' union through a joint committee comprised of individuals chosen by the administration and the union for purposes of developing a new evaluation plan.

The evaluation plan must specifically describe how student growth data and indicators will be used as part of the evaluation standards, how assessments or other indicators of student performance will be used in measuring student growth, the weight each indicator will bear on the evaluation process, and any other criteria that will be used in the evaluation plan. At a minimum, the standards of the evaluation plan must meet those



standards and requirements for student growth to be established by the Illinois State Board of Education ("ISBE"). If a plan is not developed within 180 days of the school district's first joint committee meeting, the committee must implement the model evaluation plan established by ISBE.

The new evaluation plan requirements must be implemented in accordance with the following implementation schedule:

- For all school districts except Chicago Public Schools that receive Race to the Top or School Improvement Grants, the implementation deadline is that set forth in the grant.
- For those schools in the lowest performing 20% of schools statewide, the implementation deadline is September 1, 2015.
- For all other districts, the implementation deadline is September 1, 2016.
- If ISBE fails to meet its responsibilities under the Act and does not receive adequate federal, State, or other funds, the implementation deadline will be postponed by the number

May 2010

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of calendar days required by ISBE to fulfill those responsibilities.

TEACHER RATING SYSTEM

The Act establishes a new rating system for teacher evaluations. Prior to September 1, 2012, teachers must be rated by using either the current rating system of “excellent,” “satisfactory,” or “unsatisfactory,” or the new rating system of “excellent,” “proficient,” “needs improvement,” or “unsatisfactory.” After September 1, 2012, all school districts must use the new rating system of “excellent,” “proficient,” “needs improvement,” or “unsatisfactory.”

“unsatisfactory,” he or she must be placed on a remediation plan for 90 school days (unless the governing collective bargaining agreement provides for a shorter duration). A teacher on a remediation plan must be evaluated at the mid-point and at the end of the remediation period, and each evaluation must assess the teacher’s performance since the last evaluation and the teacher’s overall performance. Written copies of these evaluations must be provided to the teacher within 10 school days of the date of the evaluation; and,

participate in training approved by ISBE prior to undertaking any evaluations and current evaluators must participate in training approved by ISBE at least once during each certificate renewal cycle. However, an exception exists permitting first-year principals to evaluate teachers prior to receiving training. Evaluators may be administrators or other individuals, provided that, if the other individuals are in the bargaining unit, the district and the union agree to the use of those individuals as evaluators. For evaluations completed after September 1, 2013, evaluators must successfully complete a pre-qualification program established by ISBE. The pre-qualification program must involve rigorous training and an independent observer’s determination that the evaluator’s ratings properly align to the requirements established by ISBE.

BARGAINING IMPLICATIONS

The Act provides that the decision to use data and indicators on student growth as a significant factor in rating teacher performance is not a mandatory subject of bargaining under the Illinois Educational Labor Relations Act. However, we expect requests to bargain the impact of using data in teacher evaluations as the implementation deadline approaches.

PRINCIPAL EVALUATIONS

The Act modifies the *School Code* with regard to principal evaluations. Effective immediately, principals in one-

New Evaluation Plan Requirements

For those schools in the lowest performing 20% of schools statewide, the implementation deadline is September 1, 2015.

For all other districts, the implementation deadline is September 1, 2016.

By no later than September 1, 2012:

- If a teacher is evaluated and deemed either “unsatisfactory” or “needs improvement,” that teacher must be evaluated at least once in the school year following the receipt of that rating;
- If the teacher is rated “needs improvement,” a plan must be developed within 30 days of the evaluation to address that teacher’s deficiencies;
- If the teacher is rated

- When the teacher attains a rating of “proficient” or “excellent” in the school year following a rating of “unsatisfactory” or “needs improvement,” he or she must be returned to the standard district evaluation plan schedule.

EVALUATORS

The Act also sets forth new requirements for evaluators that are effective immediately. Specifically, new evaluators must

the T-shirts in question did not fall into any of the prohibited categories – a fact conceded by the school district – the district’s policy was an unconstitutional regulation of the student’s freedom of speech. The school district, however, argued that its dress code policy was viewpoint and content-neutral and, therefore, did not violate the student’s right to free speech under the First Amendment.

The Fifth Circuit ultimately ruled in favor of the District finding that its policy was content-neutral. Relying on an earlier US Supreme Court case, the court noted that a uniform policy will pass constitutional scrutiny if:

- 1) it furthers an important or substantial government interest;

- 2) the interest is unrelated to the suppression of student expression; and
- 3) the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest.

The Fifth Circuit then determined that the District’s policy does indeed meet the above criteria in that:

- 1) its stated interests of providing a safe and orderly learning environment, increasing the focus on instruction and encouraging professional dress are all sufficient government interests; and
- 2) the dress code “does not

restrict student dress outside of school and provides them with some means [pins, buttons, wristbands, etc.] to communicate their speech during school.”

This new decision by the Fifth Circuit supports the view that if the district has a content-neutral dress code its ban can include political speech on students’ clothing, provided that the students have alternative means to express their political views. However, if a district’s policy is not content-neutral, then the district can restrict student political speech only if it materially interferes with or disrupts the school’s operation, is otherwise sexually explicit, indecent or lewd, or promotes illegal drug use.

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This newsletter is prepared by Scariano, Himes and Petrarca, Chtd., to provide general information on issues of interest to our readers. This publication is not intended to provide legal advice for a particular situation or to create an attorney-client relationship. We would be pleased to provide such legal assistance as you require on topics addressed in this publication, as well as with regard to any other legal inquiries you may have on these and other subjects. State and federal law require that this document be designated as advertising material.

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Providing service animal accommodations poses certain complications for districts, including accommodating students with allergies, asthma and breathing disorders; shedding and animal waste products; animal disobedience; and potential animal care issues. Districts should ensure that all

service animals meet the requirements of any city or county ordinances, including vaccination and licensure requirements.

Districts should also pay particular attention to students with extreme allergies and sensitivities. Such students may

have a disabling condition that requires an accommodation to be free from allergens. In this instance, districts may need to consider using classroom air filters to eliminate animal dander and scheduling classes and transportation to separate these students from the service animals.

Student Dress Code Update

By A. Lynn Himes and Paul Ciastko

On January 11, 2010, the U.S. Supreme Court declined to take up an appeal in the case of *Palmer v. Waxahachie Independent School District* involving a student challenge to a school district's dress code that prohibits most messages on student shirts, including political slogans. The Supreme Court's refusal to hear the matter leaves standing a decision by the U.S. Court of Appeals for the 5th Circuit, which ruled a school district's student dress code did not violate Students' First Amendment free speech rights by prohibiting shirts with printed messages, but containing an exception for logos smaller than two inches by two inches and "campus principal-approved [District] sponsored curricular clubs and organizations, athletic teams, or school 'spirit' collared shirts or t-shirts."

The *Waxahachie* case arose from an incident in 2007 when a student showed up at school wearing a T-shirt with the words "San Diego" printed on it. The school's assistant principal told the student that the shirt violated the district's student dress code which prohibited shirts with printed messages. The student then called his parents who brought him a "John Edwards for President" T-shirt to wear instead. The student also sought permission to wear another shirt with "Freedom of Speech" printed on the front and the text of the First Amendment on the back. The student's requests were denied. The student then turned to the principal and ultimately the district's superintendent, both of whom sided with the assistant principals' determination that the shirts were not permitted by the dress code policy.

The student and his parents then sued the school district alleging that the dress code violated the student's right of freedom of speech. The family argued that the district's policy was in conflict with the 1969 landmark Supreme Court precedent, *Tinker v. Des Moines Independent Community School District*, in which the U.S. Supreme Court famously stated that public school students do not "shed their constitutional rights to freedom of speech at the schoolhouse gate." In *Tinker*, the justices ruled that a public school district could not bar students from wearing black armbands to school to protest the Vietnam War, and that schools can restrict student speech only if it materially interferes with or disrupts the school's operation.

Since the *Tinker* decision, the Supreme Court has revisited the issue of student speech in several other cases, holding that school regulation of student speech can also be justified if the speech is: 1) sexually explicit, indecent or lewd; 2) school-sponsored; or 3) promoting illegal drug use. Based on *Tinker* and its progeny, the plaintiffs in *Waxahachie* argued that because

If the district has a content-neutral dress code its ban can include political speech on students' clothing, provided that the students have alternative means to express their political views.

year contracts must be evaluated at least once per school year prior to March 1 (rather than February 1). Principals in multi-year contracts must be evaluated in the last year of their contract prior to March 1 (rather than February 1). Failure to evaluate by March 1 results in an automatic one-year renewal of the principal's contract.

Beginning September 1, 2012, all principals must be evaluated annually using the new rating system: "excellent," "proficient," "needs improvement," and "unsatisfactory". Also beginning September 1, 2012, principal evaluations must provide for the

use of data and indicators on student growth as a significant factor in rating performance.

CONCLUSION

This article is a summary of the Act, and addresses only those changes in the evaluation process posed by the Act. Certain aspects of the evaluation process (i.e., consulting teachers) are unchanged by the Act. Further, the Act imposes a number of requirements on ISBE with regard to creating a model evaluation plan, creating evaluation templates, and collecting evaluation data from school districts.

Scariano, Himes and Petrarca will monitor ISBE's actions taken pursuant to the Act, and will keep you posted as to any further requirements that it may impose upon school districts.

Please do not hesitate to contact an attorney at Scariano, Himes and Petrarca, Chtd., if you have any questions regarding the evaluation process.

SAVE THE DATE

Friday, June 11, 2010
8:00 a.m – 12:30 p.m

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3RD ANNUAL ADMINISTRATORS' WORKSHOP

For additional information or to register to attend, visit our website at www.edlawyer.com.

The Signature Room at Seven Bridges
Woodridge, Illinois

Responding to Employment Reference Inquiries

By Kimberly Payne

Given the staggering unemployment rates in a struggling economy, employers have a greater pool of job candidates from which to choose and are being more discerning in their hiring practices. Employers regularly conduct reference checks, especially when deciding whether to hire applicants for professional, executive, technical and administrative positions. Consequently, school districts are often asked by prospective employers to reveal work-related information about current or former district employees, such as how well the candidate interacts with colleagues, students and others; employee strengths, weaknesses, attendance, work habits, and job duties; whether the district would recommend the applicant for the position for which he or she is interviewing; whether the district would rehire the candidate; and, the circumstances of the former employee's separation from the district. How should districts respond to such inquiries?

Initially, if asked to give a reference, a district administrator should review the district's policies and procedures, to see if the issue is addressed therein. The board of education's policies and procedures should, at the very least, state that the superintendent or his or her designee is to oversee the process for responding to employment references. It is recommended that only one administrator be designated as the person responsible for

providing responses to inquires about current or former employees. This will ensure that each reply is consistent with others and that the district is aware of its content. The district must decide whether it wishes to give frank, and possibly negative, responses concerning a former employee's job performance, or follow a more conservative approach by simply confirming dates of employment, position, and salary.

The more an administrator strays from the conventional "name, rank and serial number" approach, the more a district may expose itself to liability. Giving negative references can result in claims for defamation and tortious interference with contractual relations. Giving positive references or failing to give certain information to a potential employer about a former employee could also be problematic: For example, a district might be sued for negligence or misrepresentation for failing to warn a potential employer about a dangerous employee who later inflicted harm on a student, co-worker or third party. Potential liability for these actions, however, is tempered by the "good faith immunity" section of the *Employment Record Disclosure Act*, which specifically provides that an employer or its authorized agent is immune from civil liability for disclosing truthful information or information that it believed in good faith was true and correct in response to an employment reference inquiry.

Under the *Employment Record Disclosure Act*, a presumption exists that the employer or agent was acting in good faith and, thus, is immune from civil liability for disclosing the information.

A school administrator responding to a reference request must also comply with the provisions of two important Illinois statutes. First, the *Abused and Neglected Child Reporting Act* requires a superintendent to notify a requesting district that the applicant is or was the subject of a Department of Children and Family Services ("DCFS") report, when all of the following circumstances are present: (1) The hiring district asks the superintendent of the former district for "information concerning the job performance or qualifications" of the employee; (2) the applicant is or was the subject of a DCFS report filed by an employee of the former district; and, (3) DCFS has not informed the superintendent of the former district that the charges are or were unfounded. In addition, the former district must notify the applicant that if he or she intends to apply for a position at another district, the superintendent will notify that district of the existence of such a report.

Second, under the *Personnel Record Review Act*, an employer must give a current or former employee written notice prior to disclosing evidence of a disciplinary action or providing a disciplinary report or letter to a

potential employer. However, employees can waive the right to such notice in their employment applications. Any disciplinary records more than four years old cannot be released to a potential employer.

In conclusion, despite the "good faith immunity" provisions of the

Employment Record Disclosure Act, it is recommended that districts take a minimalist approach when answering a request for references, by merely confirming the employee's dates of employment, job title and salary while making any statutory disclosures required by the *Abused and Neglected Child*

Reporting Act. Districts that follow this simple advice should have few concerns. For additional information on responding to employment reference inquiries, consult an attorney at Scariano, Himes and Petrarca, Chtd.

Service Animals in Schools

By Trisha Olson

When a district receives a request for a service animal accommodation, it is important to review the student's IEP or Section 504 plan to determine whether the student requires the accommodation and if that accommodation is appropriate. *Illinois School Code* Section 14-6.02 states that service animals must be permitted to accompany students at all school functions, whether in or outside the classroom.

Service animals have traditionally been associated with mobility services for students who require hearing or vision assistance. Service animals may be appropriate for students with other disabling conditions, however, such as diabetes, epilepsy, autism, depression, and ADHD. For example, students with autism may use dogs as calming influences and mobility guides. Animals have also been trained to detect seizures and monitor students' blood sugar; the latter is accomplished when the animal detects a unique odor that a person gives off when their blood sugar is too high or low.



Service animals are distinguished from therapy animals and pets in that they are individually trained to provide assistance to an individual with a disability. However, the *IDEA* and the *ADA* do not establish training, licensing or certification requirements for service animals. The *Illinois School Code* merely provides that the service animal must be individually trained to perform tasks for the benefit of a student with a disability, but does not require specific training, licensing or certification.

In addition, no federal or State statute limits the type of animal that may qualify as a service animal. The *School Code*

specifies that "animals such as guide dogs, signal dogs and any other animal" with individual training may be service animals. In other words, it is possible that school districts will encounter requests for accommodations in the form of capuchin monkeys or miniature horses.

Districts should develop policies and procedures for accommodating students with service animals and training school staff members to properly manage the animals. The policies and procedures should address practical matters, such as providing the animal with food and water and how mistreatment by students will be handled.