

SmithAmundsen School Law

K-12 ALERT

Back to School Issues

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With the start of a new school year looming, we always suggest our clients pay attention to issues that can be problematic during this time. Below we have identified a few of those issues. If you have questions or need help with any of these issues or others, please contact Ron Stadler at rstadler@salawus.com or 414.847.6148.

Special Education

Special education is an area where attention to detail is always critical. A procedural violation under the Individuals with Disabilities Education Act can deny an appropriate education, so schools must always make sure they follow proper procedures. Here are some of the top mis-steps we see:

■ Have You Made Good on Last Year's Promises

Often times, we handle situations where special education students have had a rough time at the end of the school year, and in response a special ed director, IEP coordinator, or IEP team has made a promise to change some aspect of the child's IEP or program. Now is the time to stop and review those situations. If you advised parents that you would add a related service, modify a program, change the frequency of a service, evaluate some other area of need, etc., make sure you have done that. If the child needed that revision in order to succeed, and you acknowledged the need, your failure to provide that revision could lead to a claim that the student has been denied FAPE.

■ Functional Behavioral Assessments and Behavior Intervention Plans

As you move into the school year you will notice those children who begin to experience behavioral problems. Just because a student displays behavioral challenges in the classroom does not mean he requires a functional behavioral assessment. But, if you have exhausted strategies typically used in the classroom to address problem behavior and the student is still misbehaving, you should consider conducting an FBA.

Here is when to consider when moving toward completing an FBA:

- Educational interruptions. The student's behavior interrupts learning, his own or others. Conduct an FBA if your team determines the child's behavior interferes with learning in the classroom. FBAs should be used any time the behavior of the student significantly interferes with the student's learning or that of his peers despite the consistent use of behavioral interventions developed from less formal behavioral assessments.
- Problem behavior that is unexplainable. The purpose of the FBA is to ascertain the cause of a student's problem behavior. Hopefully the FBA will help determine the student's motivation for acting out and will offer strategies to address the behavior.
- Disciplinary offenses. The student commits a disciplinary offense resulting in a change in placement. A student with a disability who is being removed from his current placement for behavior not determined to be a manifestation of his disability also must "receive, as appropriate, a functional behavioral assessment behavioral intervention services and modifications that are designed to address the behavior violation so it does not recur." 34 CFR 300.530 (d)(2).

■ Child Find Obligations

It is important for school districts to convey to staff members its policies on referring a child for an initial evaluation. Districts where employees fail to refer students or provide incorrect information in regard to the referral process risk incurring liability for child find violations. A district can be found to have violated the IDEA's child find requirements by failing to timely initiate a referral and conduct an evaluation.

Your district can avoid a similar fate by taking these steps:

- **Ensure that staff members understand and comply with policies and procedures.** Teachers are in the best position to assist districts in meeting their child find obligations. Districts should provide regular training to assist teachers in spotting behaviors that indicate a possible need for evaluation. They should also make sure teachers are well-versed in district policy or know where to go for further clarification.
- **Develop policies that comport with IDEA.** Districts should not have policies that preclude referrals for

evaluation until a student is a certain age or grade. Child find is an ongoing obligation to identify, locate, and evaluate all children with disabilities residing within the jurisdiction. A request for an initial evaluation to determine whether a student is a child with a disability can be made by the parent or district.

- **Communicate policies to parents.** Districts should ensure that teachers do not misinform parents about evaluation policies. Miscommunications may unnecessarily delay an evaluation, leading to a denial of FAPE and potential financial liability. Teachers who are uncertain of district policy should refer parents to an administrator.

General Education

■ Athletic Codes/Co-Curricular Codes

For most districts fall practice for sports has already begun. Far too often students are asked to sign off on Athletic or Co-curricular codes that have not been reviewed in years. When was your's last updated? Does your code reflect current legal requirements? Does it impose penalties in a fair, consistent manner that comports with due process? Far too often school districts do not review their codes until there is a disciplinary action pending, and then it is too late to clean up outdated, vague, or problematic language. Now is the time to make sure your's is up to date.

■ Cyber Bullying

The internet brings wonderful educational opportunities to schools, but it also brings with it the opportunity for "cyber bullying." Facebook, Twitter, MySpace, and other Web sites can allow students to bully one another without even coming to school.

In Wisconsin, all school districts are now required by the Department of Public Instruction to adopt a bullying policy by August 15, 2010. The school board must adopt a policy, and is required to distribute the policy annually to all pupils enrolled in the school district and to their parents or guardians. Many districts have incorporated "cyber bullying" in their new policies, making the posting of misleading or fake photographs of students or staff members on Web sites a violation of the policy.

If your district has not yet developed a bullying policy, the start of the school year is a prime time to implement a new policy and educate your students.

Employment

■ Fair Labor Standards Act; Exempt versus Non Exempt.

The start of a new school year is often a time of change. New positions may have been created, new employees have been added, old positions may have eliminated, and in today's trying economic times we often find that positions have been consolidated. One issue that is often overlooked is whether these positions are exempt from the overtime requirements of the Fair Labor Standards Act. All too often districts assume that if they pay an employee a salary, the employee is exempt. Unfortunately, being paid on a salary basis is only one part of the "exempt" employee test, and even those paid on a salary basis can be entitled to overtime unless they are truly "exempt."

In order to be exempt an employee must meet one of the specific FLSA tests:

EXECUTIVE - To be considered for being classified as an EXEMPT executive employee, an employee must be paid a weekly salary of \$455 or above; have duties which consist of management of a company or customarily recognized department or subdivision; regularly supervise and direct two or more employees; and must have authority to hire or fire other employees or suggestions as to such are given particular weight.

ADMINISTRATIVE - To be considered for being classified as an EXEMPT administrative employee, an employee must be paid a weekly salary of \$455 or above; the employee's primary duty is to perform office or non-manual work related to the management policies or general business operations of the employer or the employer's customers; and perform duties that require the exercise of discretion and independent judgment. As defined in 29 CFR 541.207 (a) this implies that the employee has the authority or power to make an independent choice, free from immediate direction or supervision, with respect to matters of significance.

PROFESSIONAL - To be considered for being classified as an EXEMPT professional employee, an employee must be paid a weekly salary of \$455 or above; have duties requiring advanced or very specialized education and training and require the exercise of discretion and judgment, or; consist of work requiring invention, imagination, or talent in a recognized field of artistic or creative endeavor.

If your district has positions that are treated as "exempt," you should review the actual duties of that position to ensure you can meet one of the exemption tests. If you are not paying overtime to an employee that is not truly "exempt" you could be liable for back pay and penalties.

