MASB
MICHIGAN ASSOCIATION OF SCHOOL BOARDS

Fall 2016

Council News

Michigan Council of School Attorneys

President's Letter

David A. Comsa

Deputy Superintendent and General Counsel, Ann Arbor Public Schools

It is my pleasure to welcome members of the Michigan Council of School Attorneys to the 2016-2017 school year. As I reviewed our current Directory of Members I was truly impressed with the expertise, talent and diversity of our members who are dedicated attorneys providing practical advice on legal issues and questions of school law to Boards and Districts across the State.

You are at the cutting edge addressing issues of equal access for LGBT students given the recent State Board of Education guidance and the judicial activity in this area. One can only wonder what legislation will pass during legislative lame duck impacting schools.

In addition, the recent spate of "Dear Colleague" letters on behavior supports for students with disabilities response to intervention, FAPE, Title IX and school resource officers will surely produce a multitude of issues requiring your expertise for your school clients.

Many of you will present at or attend our conference this November in Detroit, which many school board members and superintendents have rated one of their favorite sections of the MASB Annual Leadership Conference.

Thank you for allowing me to serve as your President and be part of such a valuable professional organization. Please do not hesitate to reach out to me or any of our Board of Directors with your questions, comments, suggestions or concerns.

Have a productive 2016-2017 school year,

David A. Comsa

Deputy Superintendent and General Counsel
Ann Arbor Public Schools

Are Athletic Coaches Exempt From the New FLSA Overtime Regulations?

Brad Banasik, Michigan Association of School Boards

This question and many more will be answered at the 2016 Michigan Council of School Attorneys Fall Conference, scheduled for Nov. 10, 2016 at the Detroit Marriott at the Renaissance Center. In addition to an opening presentation that will discuss the Department of Labor's new regulations that define and delimit the overtime exemptions under the Fair Labor Standards Act, the conference will include guidance on the following issues:

- How will the new evaluation requirements for superintendents and administrators affect their contracts?
- What are the latest legal pitfalls that school officials need to be aware of to comply with the Open Meetings and Freedom of Information Acts?
- How are the courts deciding cases that must balance religious speech protected by the First Amendment with a school district's constitutional obligation to comply with the Establishment Clause of the First Amendment?
- What does the Americans With Disabilities Act require in regard to school district websites and accessibility?
- Have there been any recent legal changes that will affect student discipline decisions and procedures?

Please see MASB's website, www.masb.org/alc, for details on registering for the conference.

Coaches and the FLSA

The FLSA generally requires that employees be paid at least the federal minimum wage for all hours worked and overtime pay at a rate of at least one-and-a-half times their regular rate of pay for any hours they work beyond 40 hours in a work week.

However, the FLSA and its implementing regulations exempt "any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed."[1] Thus, teachers are not subject to the salary and overtime requirements of the FLSA.

If teachers are exempt from these requirements, are athletic coaches also excluded from the FLSA's minimum wage and overtime provisions? In 2009, the Department of Labor issued Opinion Letter FLSA 2009-10 that was written in response to a school district's request for guidance on the application of the FLSA to community members who coach athletic teams for a public school. It determined "[c]oaches qualify for the [teacher] exemption if their *primary* duty is teaching and imparting knowledge to students in an educational establishment" as an athletic coach. So, if a coach's duties primarily include manual labor, supervising team members during trips to and from games, or scouting other teams, the coach is not considered a teacher and will be subject to the FLSA's minimum wage and overtime pay requirements.

The Opinion referred to the FLSA regulations, which clarify that "faculty members who are engaged as teachers but also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams… are engaged in teaching. Such activities are a recognized part of the schools' responsibility in contributing to the educational development of the student."[2]

The Opinion also noted that there is no minimum certification or academic degree required under the regulations for the teacher exemption, so coaches may still be covered by the exemption even if they are not certified and qualified to teach in a school district.

Ultimately, the Opinion concluded, because the FLSA imposes no minimum wage or overtime pay requirements for teachers, a school may pay its coaches as it deems appropriate, assuming that the coaches are not also employed by the school district in a different, nonexempt capacity and, thus, their *primary* duties are not related to teaching.

The Opinion, however, was withdrawn by the DOL for further consideration, because it was apparently never mailed to the school district after it was signed. Thus, this letter may not be relied upon as a statement of agency policy. It is possible that a different conclusion may be reached if the Opinion is ever reissued.

Recently, the DOL published *Guidance for Higher Education Institutions on Paying Overtime Under the Fair Labor Standards Act* (May 18, 2016), which adopted the withdrawn Opinion's conclusion that athletic coaches employed by higher education institutions may qualify for the teacher exemption. The guidance provides the following examples of when a coach may or may not be exempt from the FLSA:

"[A]ssistant athletic instructors who spend more than half of their time instructing student-athletes about physical health, teamwork, and safety likely qualify as exempt

See Athletic Coaches, continued on Page 3

Athletic Coaches, continued from Page 2

teachers. In contrast, assistant coaches, for example, who spend less than a quarter of their time instructing students and most of their time in unrelated activities are unlikely to have a primary duty of teaching."

While the 2016 DOL guidance is directed to higher education institutions, it certainly provides an indication that the DOL is unlikely to issue an opinion that is contrary to Opinion Letter FLSA 2009-10 in regard to high school athletic coaches. However, school administrators and their attorneys should continue to monitor DOL guidance for further clarification on how the FLSA applies to coaches to ensure compliance with minimum wage and overtime requirements. The most up-to-date guidance from the DOL can be found at www.dol.gov/WHD/opinion/opinion.htm.

[1] 29 C.F.R. § 541.303(a).
[2] 29 C.F.R. § 541.303(b).

Effective Practices for Service Contract Management

Jeremy S. Motz, Clark Hill PLC

Over the last several years, school districts in Michigan have increased the use of third-party service providers to deliver various noninstructional services, such as custodial, transportation, food service, grounds and facility maintenance services to name a few. When school districts undertake the process to secure a contracted service provider, school districts primarily focus on the procurement stages, spending significant time defining the scope of work, ensuring that the proper procurement process is utilized, as well as evaluating vendors, their proposals and potential cost savings. While these steps are critical to ensure the contract is awarded to the vendor best suited to meet the needs and expectations of the school district, unfortunately, it is not the end of the road; it is just the beginning of the contractual relationship with the selected vendor, which must be properly formed and managed.

In order for a school district to develop a relationship with the selected vendor that ensures the services received are in line with the expectations of the school district, and those services benefit and enhance the school district's overall operations, both the vendor and contract with that vendor must be properly established and managed. In order for a school district to effectively manage the vendor contract, the expectations for the services and vendor must be established, the contract and the vendor's performance thereunder must be diligently monitored, and the school district must establish and maintain effective channels of communication with the vendor.

Setting Expectations

Vendor expectations are driven by the terms and conditions of the contract. Establishing a clearly defined scope of work and service level expectations in the contract are critical for the school district to enforce it expectations of the vendor. The groundwork for the scope of work and service level expectations is first laid in the procurement documents, and as such, utilizing properly drafted procurement documents is an initial key to success. However, once a selected vendor is identified, the contract with that vendor ties all of the expectations together to create the relationship with the vendor. In addition to the general terms and conditions, the school district should ensure that the following issues are addressed in the contract so that both the school district and the vendor understand the expectations for the services. A few issues school districts should focus on include:

How often are the various service components provided? If the school district expects a service to be done daily or weekly, for example, the contract should identify these service level requirements.

What are the expected staffing and coverage levels? If the school district expects four custodians to be staffed at the high school, for example, these staffing expectations should be detailed in the contract. Additionally, if the school district expects those four custodians at the high school to be staffed over specified shifts to ensure there is adequate coverage throughout the entire day, these shift expectations should also be detailed in the contract.

What is included in the contract price? The contract must detail what is included in the contract price and what will be an additional charge.

What are the remedies for deficient performance? It is prudent to detail the remedies that the school district may employ if the vendor is deficient in the delivery of the services.

The key to setting the expectations for your contract is that one size does not fit all, and there is often more than one way to skin the cat. While all school districts have similar

See Effective Practices, continued on Page 4

Effective Practices, continued from Page 3

underlying requirements, each school district has nuances to its operation that require contract terms to be tailored for its particular needs.

Monitoring the Contract

Once the contract is in place, continuous evaluation and monitoring of the services and contract ensure the vendor's performance meets the requirements and expectations of the contract. While contract management often includes several functions, school districts that are effective in contract management employ an active management model that incorporates monitoring through different levels of administration. While it is prudent for a school district to designate one administrator to oversee the contract, many levels of administration should be involved to ensure the contract terms and conditions are adhered to by the vendor. While many areas may be monitored depending upon the type of service, it is prudent for school districts to focus on the core areas when monitoring the contract.

Understand the general terms and conditions of the contract. While contracts often contain lengthy provisions that can challenge even the most diligent person's attention span, understanding those provisions and specifications enables the school district to hold the vendor accountable. If the person charged with managing the contract was not actively involved in the negotiation of the contract, ensuring they understand the requirements and expectations will enable the school district to effectively manage the contract.

Monitor the staffing levels and coverage expectations. If the contract requires services to be performed at certain intervals, staffing to be provided at certain levels or that the vendor staff have specific qualifications, it is prudent that the school district administrator overseeing the contract understand and enforce these expectations. While it is important to note that third-party vendors are not immune from staff turnover, it is also important that school districts enforce the expectations of the contract so that it does not have a detrimental impact of the school district's educational operations. If the contract provides the school district with certain remedies for deficient performance of the services, enforcing these often enables the school district to effectively resolve vendor deficiencies quickly.

Focus on equipment. Whether it is a transportation services contract or a custodial services contract, focusing on how equipment is secured, repaired and replaced is key to the overall success of the services. In a custodial services contract, for example, if the school district will make its equipment available for the vendor to utilize, attention must be focused on how the equipment is maintained and repaired, and who is responsible for those costs.

Review the invoice. When it comes time to pay a vendor's invoice, this is when utilization of multilevel review of the services is most effective. When the business office receives the vendor's invoice, it is prudent that they obtain feedback from the appropriate personnel to ensure the school district received the services as required under the contract for that invoice period. For example, the business office needs to rely on the operations department regarding performance of, or deficiencies in, the services, who in turn needs feedback from the building-level administrators to ensure that the vendor is providing the services with the specific staffing allocations set forth in the contract. Involving all levels who interact with the services allows the school district to effectively review each invoice and ensure payment is made in accordance with the terms and conditions of the contract.

Effective Communication

While effective internal communication is key to enable the school district to monitor the contract, maintaining effective channels of communication with the vendor is key to ensuring all parties remain on the same page relative to the performance of the services. This is of particular importance during the transition phase of the services. Even with a detailed contract and scope of services, as the vendor delivers the services, it is inevitable that the contract may not lay out all of the exact nuances of the expectations. Moreover, as all school districts know, the day-to-day issues that come up in schools often require services to be flexible so that the needs of the school district are met. Maintaining ongoing communication allows for both the school district and the vendor to appropriately react to unique challenges when they arise.

Maintaining quality communication with the vendor is most important when performance expectations are not met. If the school district communicates performance deficiencies to the vendor in a timely manner and works with them to establish a plan to correct them, it often leads to quicker resolutions and fewer breakdowns in the services. One strategy that is often effective in maintaining ongoing communication between the school district and the vendor is the use of periodic quality control reviews. It is important to establish these reviews at the beginning of the contractual relationship and continue them throughout the contract. Involving all stakeholders who utilize the services provides the best feedback for these reviews. For example, although general building reviews are helpful to ensure the custodial services are completed when required, feedback from building-level administrators is often the

See Effective Practices, continued on Page 5

Effective Practices, continued from Page 4

most effective tool to ensure the vendor is being responsive in providing the services.

Summary

While third-party service contracts can provide many benefits to the school districts utilizing them, once the contract is awarded and executed, the contract cannot run on autopilot. School districts must actively manage the contract and the vendor relationship to ensure the school district is receiving the services as expected. While third-party service contracts may present certain challenges, if the contracts are effectively managed, the contracted services can be an enhancement to the school district's overall delivery of education to its students.

Law-Related Education

Darin Day, Director of Outreach, State Bar of Michigan

Opportunities abound for Michigan attorneys to team up with schools and teachers to engage students in active citizenship and a deeper understanding of their role in our representative democracy, the rule of law, and the power of diversity and inclusion. To this end, the State Bar of Michigan Law-Related Education and Public Outreach Committee provides extensive **resources** on its website, including grade-specific curriculum materials, how-to guides and links to informative statewide and national websites.

Perhaps the best-known programs of this kind are **Law Day** and **Constitution Day**. Celebrated in May each year, the 2017 Law Day theme will be *The 14th Amendment: Transforming American Democracy*. President Dwight D. Eisenhower established the first Law Day in 1958. In 1961, Congress passed a joint resolution designating May 1 as the official date. Every president since has issued a Law Day proclamation on May 1, celebrating the nation's commitment to freedom under the rule of law.

Recent Law Day themes include *Miranda: More Than Words* (2016), *Magna Carta: Symbol of Freedom Under Law* (2015) and *American Democracy: Why Every Vote Matters* (2014). Law Day activities range from coloring contests for our youngest students to full-blown mock trials. On **Constitution Day**, observed Sept. 17 each year in honor of the signing of the Constitution on that date in 1787, schools across the nation place special teaching emphasis on constitutional history, principles and themes, including lawyers leading Constitution Day lessons in hundreds of Michigan classrooms. The State Bar has designed **this page**, full of resources and lesson plans, to help local bar associations, individual lawyers and teachers develop a variety of exciting classroom activities for Constitution Day.

Another avenue to become involved in law-related education is the State Bar's **Michigan Legal Milestones program**. This recurring celebration, held in partnership with local bar associations, recognizes significant legal cases and personalities in Michigan's history, and uses bronze plaques, placed at featured sites, to relate their historical significance. For example, on June 21, 2016, the 40th Michigan Legal Milestone was dedicated in conjunction with the Kalamazoo County Bar Association to commemorate the "The Kalamazoo Case: Establishing High School for All." In 1874, Justice Thomas M. Cooley penned a milestone unanimous opinion holding that neither the state constitution nor any legislation limited the scope of public education to primary schools. By 1890, there were 278 high schools in Michigan. The Kalamazoo Case changed the landscape of public education in Michigan and served as a landmark for educational reform across the United States. A class trip to one of Michigan's 40 Legal Milestones, which can be found **from Adrian to Negaunee**, is a terrific way to engage students in the rich history of law in Michigan.

Finally, for a truly substantive adventure in law-related education, the **State Bar** and the Michigan Center for Civic Education cosponsor annual **mock trial programs**, with themes inspired by historic events, legal issues of contemporary interest, school or classroom situations, or simply entertaining hypothetical fact patterns. Mock trials are designed to reenact much of what we see in actual trial courts. Students take on the roles of attorneys and witnesses, and compete against each other in real courtrooms in front of real judges and lawyers.
Volunteers are always needed to support these fascinating, fun and highly educational programs. For more information, please contact your local bar association or Darin Day, Director of Outreach, State Bar of Michigan, at dday@mail.michbar.org or 517.346.6330.

Maximum Leave Policies and Employee Statutory Protections

Margaret (Meg) Hackett & Piotr M. Matusiak, Thrun Law Firm, P.C.

The Americans With Disabilities Act[1] and the Family and Medical Leave Act[2] protect employees with disabilities and serious health conditions from adverse employment actions related to those disabilities or conditions. Additional protections beyond the scope of this article may be afforded by the Worker's Disability Compensation Act[3] for work-related injuries. While an employer is not prohibited by the ADA or the FMLA from adopting a maximum leave policy that terminates employment upon expiration of a defined leave period, care must be taken when implementing such a Maximum Leave Policy to avoid (1) interfering with an employee's exercise of statutory rights protected by the ADA or FMLA; or (2) retaliating or discriminating against an employee for exercising those rights.

The ADA and Maximum Leave Policies

The ADA prohibits an employer from discriminating against a "qualified individual" with a "disability."[4] A "qualified individual" is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position."[5] A "disability" is defined by the ADA as (1) "a physical or mental impairment that substantially limits one or more major life activities;" (2) "a record of such an impairment;" or (3) "being regarded as having such an impairment."[6] Discrimination for purposes of the ADA includes failing to make a reasonable accommodation, which may include "job restructuring, part-time or modified work schedules, . . .[or] appropriate adjustment or modifications of. . .policies. . ." including a Maximum Leave Policy.[7]

The United States Sixth Circuit Court of Appeals, whose decisions are controlling in Michigan, recognizes leave as a reasonable accommodation.[8] But, the burden is on the employee with a disability to propose an accommodation and to prove that the accommodation is reasonable.[9] The ADA does not require an employer to make an accommodation for an employee with a disability if the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business" of the employer.[10]

Determining whether application of a Maximum Leave Policy would run afoul of the ADA is challenging because the ADA does not define a "reasonable accommodation" or "undue hardship" in terms of a set number of leave days, and the Sixth Circuit has declined to adopt a bright line rule defining a maximum duration of leave that can constitute a reasonable accommodation under the ADA. Although the Sixth Circuit holds that leave exceeding a year and a half is unlikely to be a "reasonable accommodation," the Sixth Circuit continues to review all leave under the reasonableness standard.[11]

If leave exceeding an employer's Maximum Leave Policy is determined to be a reasonable accommodation that does not impose an undue hardship on the employer, then the ADA requires that an employer modify its Maximum Leave Policy upon request to grant extended leave to a qualified person with a disability.[12]

A decision issued by the Sixth Circuit this summer illustrates the tension between Maximum Leave Policies and the ADA.[13] In *Wheat*, an employee requested and received multiple extensions of a leave of absence for persistent pain in the employee's shoulder, which the employee injured while working as a school custodian.[14] With each extension, the school district informed the employee that her leave was subject to the "two (2) successive years" leave limitation in the collective bargaining agreement.[15] More than two years and seven months after Wheat first took a leave of absence, she sent the district a letter saying she was returning to work, was "disabled" and would "need [an] accommodation."[16] The district promptly notified Wheat that her employment was terminated, citing the two-year leave limitation in the collective bargaining agreement. Wheat sued the district, claiming in part that the district failed to provide her with a "reasonable accommodation" by not making an exception to the two-year leave limitation.[17] The Sixth Circuit dismissed Wheat's claim, reasoning that she could not prevail on her "reasonable accommodation" claim because she never requested a specific reasonable accommodation within the two-year leave limitation period. But, if Wheat had timely requested an exception to or modification of the district's two-year leave policy as a "reasonable accommodation" for her disability, the district would have been required under the ADA to determine whether the extended leave was a "reasonable accommodation" not resulting in an undue hardship.

For a sampling of extended leave requests that would constitute an undue hardship on an employer, see *EEOC Maximum Leave Guidance, supra.*[18]

See Leave Policies, continued on Page 7

Leave Policies, continued from Page 6

The FMLA and Maximum Leave Policies

Different analysis is required to ensure that application of a Maximum Leave Policy to an eligible employee under the FMLA neither interferes with an employee's exercise of statutory rights protected by the FMLA, nor retaliates or discriminates against an employee for exercising those rights.

The FMLA entitles an "eligible employee" to 12 work weeks of unpaid leave during any 12-month period because of (1) the birth or adoption of a child; (2) a serious health condition; (3) the need to care for a family member with a serious health condition; or (4) a qualifying exigency.[18] An "eligible employee" under the FMLA is an employee who has been employed for at least 12 months and who has performed at least 1,250 hours of service during the previous 12-month period.[19] Although an employee generally is required to notify an employer that the requested leave is FMLA-qualifying leave, "the employer is required to inquire further to obtain the necessary details of the leave to be taken in order to ascertain whether the requested leave qualifies as FMLA leave."[20]

The FMLA provides that it is "unlawful for any employer to interfere with, restrain, or deny" an employee's rights under the FMLA.[21] This prohibition includes taking adverse employment actions against an employee because of that employee taking FMLA leave.[22] An employer must have "a legitimate reason unrelated to the exercise of FMLA rights" for taking adverse employment action.[23] For this reason, the Sixth Circuit has held that FMLA leave cannot be counted against a no-fault attendance policy. The same rationale may be held to apply to Maximum Leave Policies. But, once an employee exceeds 12 work weeks of FMLA leave, "additional leave in the twelve-month period is not protected by the FMLA, and termination of the employee [under a Maximum Leave Policy or no-fault attendance policy for non-FMLA-qualified leave] will not violate the FMLA."[24]

As with the ADA, care must be taken under the FMLA to ascertain whether an employee is an "eligible employee" under the FMLA, and whether that employee's absences are FMLA-protected, before counting those absences under a no-fault attendance policy or Maximum Leave Policy.[25]

Conclusion

While an employer is not prohibited by the ADA or the FMLA from adopting a Maximum Leave Policy that terminates employment upon expiration of a defined leave period, care must be taken when implementing such a Maximum Leave Policy to avoid (1) interfering with an employee's exercise of statutory rights protected by the ADA or FMLA; or (2) retaliating or discriminating against an employee for exercising those rights. This may require modification of a Maximum Leave Policy as a reasonable accommodation under the ADA for a qualified person with a disability. This also may require that a Maximum Leave Policy be limited for FMLA-eligible employees to periods of additional leave that are not protected by the FMLA.

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[1] 42 U.S.C. § 12101 (2012) *et seq.*

[2] 29 U.S.C. § 2601 (2012) *et seq.*

[3] M.C.L. § 418.101 *et seq.*

[4] 42 U.S.C. § 12112(a)(2012).

[5] *Id.* at § 12111(8).

[6] *Id.* at § 12102(1)(A)-(C).

[7] *Id.* at § 12111(9)(B), § 12112(b)(5)(A).

[8] See *Cehrs v. Ne. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 782 (6th Cir., 1998).

[9] *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 202 (6th Cir., 2010).

[10] See 42 U.S.C. § 12112(b)(5)(A); see also *Employer-Provided Leave and the Americans With Disabilities Act,* EEOC (May 9, 2016) [hereinafter *EEOC Maximum Leave Guidance*], www.eeoc.gov/eeoc/publications/ada-leave.cfm (listing circumstances that would constitute an undue hardship on an employer in the context of a request for a reasonable accommodation).

[11] See *Walsh v. United Parcel Serv.*, 201 F.3d 718, 727 (6th Cir., 2000) ("[I]t would be very unlikely for a request for medical leave exceeding a year and a half in length to be reasonable. However, we must still address the particular accommodation that plaintiff requested.").

[12] See *EEOC Maximum Leave Guidance, supra* ("The ADA requires that employers make exceptions to their policies, including leave policies, in order to provide a reasonable accommodation."); see also *Cehrs*, 155 F.3d at 782 ("If an employer cannot show that an accommodation unduly burdens it, then there is no reason to deny the employee the accommodation.").

[13] See *Wheat v. Columbus Bd. of Educ.*, 644 F. App'x 427 (6th Cir., 2016).

[14] *Id.* at 428.

[15] *Id.* at 428-29.

[16] *Id.* at 429.

[17] *Id.* at 430.

[18] 29 U.S.C. § 2612(a)(1)(A)-(E)(2012).

[19] *Id.* at § 2611(2)(A).

[20] *Whitaker v. Bosch Sys. Div. of Robert Bosch Corp.*, 180 F. Supp. 2d 922, 926 (W.D. Mich. 2001).

[21] 29 U.S.C. § 2615(a)(1).

[22] 29 C.F.R. § 825.220(c)(2015).

[23] See *Edgar v. JAC Products, Inc.*, 443 F.3d 501, 508 (6th Cir., 2006).

[24] *Coker v. McFaul*, 247 F. App'x 609, 620 (6th Cir., 2007) (internal quotations and citation omitted).

[25] Compare *Culpepper v. BlueCross BlueShield of Tenn., Inc.*, 321 F. App'x 491, 495-96 (6th Cir., 2009) (upholding application of a no-fault attendance policy to an employee who claimed, but was determined not entitled to, FMLA leave) with *Taylor v. Invacare Corp.*, 64 F. App'x 516, 521 (6th Cir., 2003) (holding that application of a no-fault attendance policy to FMLA-protected leave violated the FMLA).