SCHOOL Superintendent's INSIDER®

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Avoid ADA violations with policy on handling accommodation requests

If your district is like many, you're facing an increasing number of employee requests for reasonable accommodations under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. If you don't have a procedure for identifying valid claims and resolving them, you could face a discrimination complaint — or an expensive lawsuit.

You don't have to grant every request, said **Robert Zorn**, superintendent of **The Poland** (Ohio) **Schools**. But you must evaluate each case individually to make sure the employee does, in fact, have a disability and is "otherwise qualified," and that the accommodation is reasonable, added **Allan Osborne**, principal of **Snug Harbor School** in Quincy, Mass. To help you handle requests and train supervisors to comply with the ADA, a Model Policy on page 5 takes the guesswork out of determining what is a reasonable accommodation, Zorn said.

Make sure administrators know the rules

All principals and other supervisors should know that when an employee requests a reasonable accommodation for a physical or mental disability, this triggers an obligation under the ADA and Section 504. Requests do not have to be in writing or use any specific language.

The law requires that your district engage in an "interactive process" with the employee to determine whether or not you can grant the accommodation. If you don't do this, you could face a lawsuit and trial.

Example: A Pennsylvania school district secretary with bipolar disorder had a manic episode and required hospitalization. Her son called the personnel office to notify the principal that she would require accommodations. But upon the secretary's return to work, the principal never spoke to her about the accommodations and began documenting her errors. The problems escalated, and the district terminated her. The secretary sued for discrimination. A federal appeals court refused to dismiss the secretary's case, finding that the district should have reviewed the son's request for accommodations [*Taylor v. Phoenixville Sch. Dist.*].

Assign responsibility for evaluating requests

Appoint a trained district administrator to evaluate reasonable accommodation requests and to respond to questions from employees with disabilities. This may be an assistant superintendent or another administrator.

(See **ACCOMMODATIONS** on page 4)

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TRAPS TO AVOID

Don't rely on vague policy for waiving facility usage fees

Don't waive fees for certain outside groups to use facilities and not for others without ensuring that your criteria are detailed and fair. It may be tempting to waive fees for PTAs and other groups that are working to improve your schools, but take care. Review your policies on facility usage and the circumstances under which fees are charged, said **Maree Sneed**, an attorney with **Hogan & Hartson** in Washington. In addition, make sure your school administrators know that they don't have unlimited discretion to waive fees.

Unclear fee waiver policy violates First Amendment

A South Carolina district's facility use policy stated it could waive usage fees for "school organizations and other entities." Also, according to the policy, the district could waive fees "in the district's best interest." The district had granted usage fee waivers to scouting groups, the **YMCA**, local political parties, and an orchestra club. A religious group applied for a fee waiver to use an elementary school facility under the policy's "best interest" prong. The district denied the waiver, and the group sued, alleging First Amendment violations.

The **4th U.S. Circuit Court of Appeals** ruled in favor of the religious group. The court noted that districts may not discriminate against religious perspectives, and administrators may not have "unfettered discretion" to regulate speech. Rather, policies must provide sufficient criteria to prevent districts from burdening certain speech based on disagreement with the viewpoint. The "best interest" prong of the waiver policy granted administrators "an apparent carte blanche" regarding fee waivers and speech. The court also was troubled by the failure to define the term "school organization" within the policy. Because principals could designate a group as a "school organization" by choosing to sponsor it, the policy potentially allowed principals to discriminate on the basis of content or viewpoint in determining whether a group was eligible for a usage fee waiver *[Child Evangelism Fellowship of South Carolina v. Anderson Sch. Dist. Five].*

Districts, especially those in states within the 4th Circuit (Maryland, Virginia, West Virginia, North Carolina and South Carolina), should review fee policies and practices for outside groups. Ensure that your policy provides concrete, well-defined and neutral guidelines for assessing fees or awarding waivers, Sneed said. Also make sure that you don't single out religious groups for fees. ■

Insider Resources

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■ *Child Evangelism Fellowship of South Carolina v. Anderson Sch. Dist. Five*, 106 LRP 71528, No. 06-1819 (4th Cir. 12/15/06).

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TECHNOLOGY

Supreme Court adds digital data to rules governing discovery

It's a superintendent's nightmare: You're hit with a big lawsuit and are buried in requests for documents, including e-mails, as part of the discovery process.

If the lawsuit against you is a civil suit heard in federal court, the process is governed by rules from the **U.S. Supreme Court**, and until now those rules didn't address how to handle discovery of electronically stored data. But that changed on Dec. 1, 2006, when amendments to the Federal Rules of Civil Procedure covering electronic discovery went into effect.

Electronic information has been part of the discovery process for some time. In fact, many state and federal courts mandate it. But the new rules provide clarification and make e-discovery a requirement in federal litigation. That means your district may need to take a good look at the system in place to store and retrieve electronic data.

"The overall goal of the rules is to provide better guidance as to how electronically stored information is to be handled in federal litigation," said **Kevin Brady**, assistant professor in the Department of Educational Leadership and Policy Studies at **North Carolina State University** in Raleigh. While it's still too early to determine whether the rules will meet that goal, here are highlights of six critical issues the rules address:

1. Expanding the definition of what's 'discoverable.' The federal rules of discovery now contain the phrase "electronically stored information," but don't make the mistake of interpreting that narrowly. "It covers everything in digital form," Brady said, "all e-mails (even personal ones), digital photographs, cell phone messages, spreadsheets, databases, audio files, even instant messaging."

That means you can't self-select what you'll keep, he said. "You have to keep a record of everything." The rules don't spell out how long you have to store the information. But you certainly can't delete e-mails or other electronically stored information that are relevant to a pending or expected lawsuit.

2. Providing information sooner, rather than later. The new rules stipulate that you have to submit information early in the discovery process. "If you have knowledge of relevant information, you have to submit it in a timely matter," Brady said. Before the new rules, there was ambiguity. That meant that a request for electronically stored information was sometimes met with "we're trying," Brady said. But waiting to provide information until the trial makes the process more expensive. "Getting it early can minimize litigation costs," he said.

3. Formatting requested information. The party that requests information can designate the form in which it wants the electronic information to be produced, Brady said. "If I'm requesting e-mails from you, I can say I want it in PDF or [**Microsoft**] Word format," he said.

However, that doesn't mean you're bound to comply, or that the requesting party has to stipulate the format. A district might say that it doesn't have the technical expertise to change a format, Brady said. "And the rule just gives the requesting party the right to ask," he said.

4. Relief due to an undue burden. You don't have to provide electronic information if it's from a source that's not reasonably accessible and imposes an undue burden or cost. But you have to show the court that's the reason you're not providing information. "Before, you could just say no, and you might have gotten away with it," Brady said. "Now, the court says, 'show me.'"

5. Getting information back. If you inadvertently send the other side something that is beyond what was required, you can ask that the information be returned or destroyed. "For example, if you were asked to provide e-mails for a specific date and then discovered that a spreadsheet attachment that wasn't related to the case had been sent, you can make a formal request for its return or destruction," Brady explained.

6. Safe harbor and good faith. This rule could be one of the most controversial components of the e-discovery laws, Brady said. "It says that, except for exceptional circumstances, courts cannot impose sanctions for a failure to provide electronically stored information lost as a matter of routine operations," he said. It's an acknowledgment that technology doesn't always perform as expected, he added.

The law is clear, however, that there must be a good-faith operation to provide the information, Brady said. So districts found to be acting improperly could find themselves in trouble with the court. ■

Insider Resources

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Report of the Judicial Conference, Committee on Rules of Practice and Procedure: *www.uscourts.gov/rules/Reports/ST09-2006.pdf.*

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ACCOMMODATIONS (continued from page 1)

In many districts, this individual is called the human rights officer.

The advantages of having an employee who is trained and ready to deal with accommodation requests go far beyond resolving claims. "When your staff evaluate all requests fairly and approve them when they're warranted, employee morale goes up, as employees perceive the administrators as caring," Zorn observed.

Tips for evaluating accommodation requests

Here are some guidelines for your principals and other supervisors, based on a recent case law on what constitutes a reasonable accommodation.

✔ OK to order physical or mental examination.

When a Michigan superintendent ordered a teacher to undergo physical and psychological testing, the teacher sued the district for violating the Americans with Disabilities Act. But a federal court said that health problems that significantly affect an employee's performance of "essential job functions" justify a physical or mental examination *[Sullivan v. River Valley Sch. Dist.]*.

✘ Don't accommodate dangerous employee.

A typing teacher was injured in a car accident and lost dexterity in his hands, became depressed and angry, and sexually harassed a student. The teacher began seeing a psychiatrist. The psychiatrist warned the district that the teacher was dangerous. The district recommended that the teacher be terminated, and the board agreed. The teacher sued the district for discriminating against him. A California court upheld a jury decision in favor of the district. The court said the district terminated the teacher because he represented a potential danger to others, not because of his disability *[Mingo v. Oakland Unified Sch. Dist.]*.

✔ OK to deny request for indefinite or recurrent leaves.

A Montana district granted a teacher a leave of absence as an accommodation for his disability. But the next school year, the teacher worked less than 41 out of 178 school days. After a psychiatrist concluded that the teacher's condition incapacitated him, the school terminated the teacher, and the teacher sued. The state supreme court held that because of his numerous absences, the teacher failed to show he was qualified for his position. The court noted that indefinite leaves or recurrent leaves are not necessarily reasonable accommodations *[Pannoni v. Browning Sch. Dist. No. 9]*.

✔ OK to deny hiring of aide as reasonable accommodation.

A welding/auto mechanics teacher with impaired hearing requested a classroom aide. He claimed he could manage his classroom with the accommodation of an aide. The district provided several accommodations, including a flashing light phone and a separate phone line, as well as connecting the phone to the intercom. But the district refused to provide an aide, and the teacher sued. The court found that hiring an aide does not constitute a reasonable accommodation under the ADA and held that the teacher failed to show he qualified for his position with a reasonable accommodation *[Henry v. Unified Sch. Dist. #503]*.

✘ Don't promise accommodations without full review.

A Kansas teacher severely injured her arm on the job and needed several surgeries. The school principal told her that the custodial and paraprofessional staff could assist her, and that the district was attempting to hire a full-time paraeducator to help on a daily basis. But when the teacher returned to work after another surgery, the district had not hired a paraeducator. The teacher could not handle the job duties and quit. She sued the district. The district asked the court to dismiss the case because hiring a "helper" to assist with essential job functions is not a reasonable accommodation. But the court refused, finding that the issue remained as to whether the district could be liable if it promised to provide certain accommodations and then failed to do so *[Jewell v. Blue Valley Unified Sch. Dist. No. 229]*. ■

Insider Resources

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Stanford University: Diversity & Access Office, Stanford University, Stanford, CA 94305; *disability.access@stanford.edu*.

Americans with Disabilities Act of 1990: 42 USC § 12112.

Section 504 of the Rehabilitation Act: 29 USC § 794.

■ *Taylor v. Phoenixville Sch. Dist.,* 184 F.3d 296 (3d Cir. 1999).

■ *Sullivan v. River Valley Sch. Dist.,* 1999 WL 1067573 (6th Cir. 11/29/99).

■ *Mingo v. Oakland Unified Sch. Dist.,* 2005 WL 318775 (Cal. Ct. App. 2/10/05).

■ *Pannoni v. Browning Sch. Dist. No. 9,* 90 P.3d 438 (Mont. 2004).

■ *Henry v. Unified Sch. Dist. # 503,* 328 F.Supp.2d 1130 (D. Kan. 2004).

■ *Jewell v. Blue Valley Unified Sch. Dist. No. 229*, 2005 LRP 1283 (D. Kan. 2002).

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MODEL POLICY

Set policy to train staff to address requests for accommodations for disabilities

Here's a policy based on one used by **Stanford University**, which is also applicable to school district employees. The policy lays out the process by which employees request accommodations. Talk to your school attorney about adapting this policy for your district's use.

ACCOMMODATIONS FOR EMPLOYEES' PHYSICAL OR MENTAL DISABILITIES

Introduction. Our school district is committed to providing equal employment opportunities for qualified employees with disabilities in accordance with state and federal law. A disability is defined under the Americans with Disabilities Act as any physical or mental impairment that limits one or more major life activities (such as sleeping, thinking, interacting with others, caring for oneself, speaking, or working). To ensure equal access for employees with disabilities, the district will provide reasonable accommodations to enable the employee or prospective employee to perform the essential functions of the job and to participate in all district programs and activities. All employees, including principals and supervisors, must follow the policy guidelines below. The district human rights officer should consult with the superintendent and school district attorney if any questions arise.

1. Making accommodation requests. An employee is responsible for requesting a workplace accommodation for his or her disability. An employee shall make a request to either the employee's supervisor or the district human rights officer, *[insert name]*. The ADA permits "plain language" requests for accommodations, but the employee should include as much information as possible when making the request. Neither supervisors nor the human rights officer may initially deny a request because of its informality.

2. Discussing process. When an employee's supervisor first receives a request, he or she shall notify the district human rights officer. Upon receiving a request, the officer will meet with the employee to acknowledge the request and explain the process. The officer will meet again with the employee as necessary to discuss the request and possible accommodation alternatives.

3. Requesting documentation for disability. The officer will determine what type of documentation is necessary to verify the disability and may request a physician's or mental health professional's letter. The employee must provide the requested documentation. The officer will evaluate the request after the employee submits all requested documentation. The documents requested may include information about the nature of the disability; whether the disability limits one or more major life activities; how the disability may interfere with job performance; and what accommodations will address those limitations.

4. Evaluating accommodation. The officer should then evaluate the requested accommodation and decide whether the district can grant the accommodation. The officer shall consider the following factors, and others, in determining reasonable accommodations for employees:

- Whether the requested accommodation will allow the employee to perform essential job functions effectively.
- Whether the requested accommodation will alter or remove an essential function of the job.
- Whether the requested accommodation is reasonable and not unduly burdensome on the district.

The district is not required to provide an accommodation that will eliminate an essential function of the job or to provide an accommodation or service that is personal in nature, such as a hearing aid or wheelchair. Furthermore, the district is not required to lower performance, production or conduct standards, or to alter attendance requirements. The officer may require the employee to undergo a medical or psychological exam to determine if he or she can meet essential job functions.

5. Notifying employee of determination. The officer shall provide the employee with written notification of the determination within *[insert no.]* calendar days of receiving the completed request with documentation. If the determination grants an accommodation, the notice will also include the expected date it takes effect. If the officer needs additional time to assess a request, he or she shall provide the employee with written notification of the status of the request and the proposed date of determination.

6. Keeping records. The officer shall keep thorough records of the accommodation request, documentation received, and responses in a confidential file, apart from the employee's personnel file.

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NCLB

Ensure your district has tools to help migrant students succeed

Providing migrant students with a quality education should be a top priority, but too many districts don't develop strong migrant education programs with their states. This can harm your district in many ways, especially because the No Child Left Behind Act requires that migrant students participate in assessments and that you disaggregate their scores.

Odds stacked against migrant students

Most migrant families earn less than $10,000 a year, and migrant adults generally have less than six years of formal education, according to the **U.S. Labor Department**'s *National Agricultural Workers Survey*. Obstacles such as long and strenuous work days, field injuries, and pesticide dangers can make education a low priority in migrant families, education attorney **John Borkowski** said. To help students overcome these barriers, it's critical that your district work with state officials to build solid and supportive services.

The **U.S. Education Department** recommends districts establish their own MEPs and services or work with a larger regional program catering to the needs of migrant students in multiple districts. Brainstorm with your state about how to offer services.

Here are the components of a successful MEP, based on one developed by the **Round Rock** (Texas) **Independent School District** and now run through **Educational Services Center**, Region 13, in Austin, Texas.

1. Coordination of services. A district migrant services coordinator can serve as an advocate for migrant students and their families by helping students access academic and support services and career counseling.

2. Early childhood education. Make efforts to identify preschool migrant children and enroll them in home-based or school-based programs, recommended **Laura Alcorta**, director of student diversity at the Round Rock district. Training should be available for parents to work with their children at home to prepare them for school, she said.

3. Student record system. Make sure your student record system allows for record transfers. For example, the Round Rock district has a data transfer system that allows educators to record the movement of migrant students through the educational process by producing online records, Alcorta said. Student transfer documents facilitate academic placement as students transfer from school to school.

4. Parental involvement. Provide training and support services for migrant families, such as developing parenting skills, providing techniques to foster children's learning, utilizing community services, and promoting two-way communication between the home and school. Ask for parent input on how MEP funds should be used, Alcorta said.

5. Identification and recruitment. Your program must establish eligibility criteria for services. Under sections 1115(b)(1)(A) and 1309(2) of NCLB, students are eligible to participate in an MEP if they have moved with their parents, a guardian, a spouse, or on their own across school district boundaries within the last 36 months so that the parent, spouse, child, or other member of the immediate family may seek or obtain temporary or seasonal employment in agricultural or fishing work, Alcorta said. The qualifying work must be a principal means of livelihood.

6. Graduation requirements. MEP staff members should identify effective strategies to assist students in meeting high school graduation requirements. Strategies may include monitoring students' academic progress, tutorial services, and referrals to college assistance programs or correspondence courses. In addition, help students with their English-language skills, if needed, Alcorta said.

7. Exchange and accrual. The migrant services coordinator should document courses completed by migrant students in grades 6-12 and regularly submit reports to the data system. Make efforts to track partial and complete credits earned by students for work completed during the enrollment period in each school.

Funding

To pay for your district-level MEP services, find out how much money your state receives through the federal MEP and seek guidance. Authorized by Title I, Part C of NCLB, the federal MEP provides formula grants to state education agencies to develop or improve academic programs that support migrant students. ■

Insider Resources

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Laura Alcorta: Director of student diversity & learning programs, Round Rock Independent School District, 1311 Round Rock Ave., Round Rock, TX 78681; (512) 464-5056.

Education Department Non-Regulatory Guidance for the Title I, Part C Education of Migratory Children: *www.ed.gov/programs/mep/mepguidance2003.doc.*

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STUDENT ACHIEVEMENT

Involve all stakeholders in aligning district, school, classroom goals

By J. Jay Marino

Closing achievement gaps and increasing student learning have never presented a more difficult challenge. Under the pressures of the No Child Left Behind Act, districts around the country are working to implement best practices in instruction, professional development and school improvement in hopes of increasing test scores. But this isn't enough. To harness the efforts of every employee, stakeholder and resource, superintendents are discovering the power of "systemic alignment," which means you align all processes in your school district with your strategic plan.

5 key steps to systemic alignment

Step 1: Establish clear vision, mission, core values and goals.
Create these elements through a process of participative leadership and let them serve as the compass that guides the improvement. Be sure you communicate your strategic plan to all stakeholders and that they use it as a critical decision-making instrument.

Step 2: Engage support service departments in aligning their work to the district strategic plan.
Systemic alignment means that *all* support service staff (or non-classroom personnel) can contribute to raising student achievement. Often, support service departments are forgotten in continuous quality improvement initiatives, as most of the focus is on work at the classroom level. Effective organizations ensure that all employees, regardless of their position or rank, understand how their work directly contributes to the vision, mission, core values and goals of the district. For example, by maintaining a positive atmosphere on the bus, a bus driver is helping students get a good start in the morning. Likewise, when the cafeteria staff provide vital nutrition to students, they should know they are making a positive contribution to the learning process.

Step 3: Ensure school improvement plans are aligned to the district strategic plan.
The typical school plan includes goals; action plans that define the strategies used to accomplish the goals; and a professional development component. Effective school districts ensure that school plans are tightly aligned to the district's strategic goals. For example, if a goal of the district strategic plan is to have 100 percent of all second-graders reading at grade level, then every school needs to include a goal in its school improvement plan that ensures students in pre-K through first grade have the necessary interventions and support to be on grade level by second grade.

Step 4: Establish classroom goals that are aligned to the school improvement plan.
One way to promote alignment is to have classrooms establish SMART (specific, measurable, attainable, relevant and time-bound) goals that directly align to the school improvement plan. Classroom goals written in student-friendly language can be posted in classrooms, where progress can be measured and monitored by the students. For instance, if the school improvement plan calls for a reduction in discipline office referrals, then each classroom should have a goal to increase the percent of students who follow the rules. Teachers and students should collect, monitor and analyze classroom data and implement strategies.

Step 5: Connect every student to the school improvement plan.
When teachers assist students in setting individual goals, students begin to understand how their work connects to the goals of the classroom (which are aligned to the school improvement plan, which, in turn, is aligned to the district strategic plan). Classrooms should involve students in the monitoring and tracking of their own progress toward classroom goals in an individual student data folder. If the classroom goal is to increase the percent of students who follow classroom rules, then each student can track and monitor his own progress in doing so. Students can display their progress toward following classroom rules on a run chart and compare their achievement against the class average. ■

Insider Resources

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American Society for Quality: *www.asq.org.*

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PARENTAL INVOLVEMENT

Seek parental input for teacher tenure decisions

Looking for more ways to engage parents and improve teaching? When it's time to decide whether to grant tenure to a teacher, ask parents what they think. Seeking their opinions will let parents know their perspectives count and may also alert you to teaching problems of which you were not aware.

Granting tenure is an important decision for you and your board, but too often it is a *pro forma* process. It's smart to gather all the information you can during a teacher's probationary period.

In most cases, parental input is positive and will confirm your board's decision to grant tenure. But sometimes parents can point out problems. For example, you may hear that a teacher doesn't call parents back, that he frequently loses patience with students, or that students don't seem to be learning enough to complete their homework.

Of course, you and your principals must not accept parental comments at face value. Instead, use them as a basis for your own investigation. Look for facts that form the opinions, not just opinions. Don't rely on a parent's subjective view to derail a teacher's career.

Always keep in mind that parents are not skilled educators with the experience and ability to truly evaluate or observe the performance of teachers. And don't forget that parents may have an ax to grind.

One caveat to using parental input: Many union contracts require that teachers have the right to see and respond to parental comments about their performance, particularly if those comments might negatively affect the teachers' careers, said **Leslie Stellman**, an education attorney. Make sure parents know about this, he added. ■

Insider Resource

Leslie R. Stellman, Esq.: Hodes, Ulman, Pessin & Katz, P.A., 901 Dulaney Valley Rd., Suite 400, Towson, MD 21204; (410) 339-6752; *www.hupk.com.*

MODEL LETTER

Post letter to parents on tenure consideration

Here's a letter based on one used by the **Hastings-on-Hudson** and **Katonah-Lewisboro** school districts in New York. You can attach a list of teachers who are up for tenure. If tenure is not an issue in your state, you can modify the letter to seek parental input into evaluating teachers. Talk to your board and attorney about adapting this for your use.

REQUEST FOR INPUT IN EVALUATING TEACHERS FOR TENURE

Dear Parents,

Our district is committed to recruiting and retaining excellent teachers and to helping all teachers continuously develop and improve. To do this, the district provides ongoing feedback to both new and experienced teachers so they can reflect on their practice, learn, and make appropriate changes. Parental input is an important aspect of this feedback.

The following faculty members will be eligible for tenure recommendation during the 2006-07 school year.

What is the tenure process? Our state education law requires a _-year probationary period before new teachers are eligible to receive tenure. During this period, administrators observe and evaluate all aspects of a probationary teacher's performance, including the instruction provided and interactions with colleagues and students. Tenure recommendations are scheduled for Board of Education approval at the beginning of May.

Parental input is welcome. Parents have insights and a perspective that is unavailable from any other source. The district encourages parents to submit comments on teachers when they have knowledge of the quality of a teacher's work.

How to submit feedback. Submit a letter by February of the year in which the faculty member is being considered. You are welcome to share your experiences with the principals of the schools in which these teachers work or, if they are administrators, you can contact me directly at the district office via e-mail or by letter at the addresses below.

How feedback is used. While only supervisors evaluate the faculty and staff, we value the feedback received from parents in assisting us in the tenure process.

Thank you for your participation in our schools.

Sincerely,
Superintendent

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TEST YOUR JUDGMENT

What constitutes 'highly qualified' under NCLB?

You are the superintendent of a rural school district. Your district's middle school hired an English teacher for sixth grade last year to teach four sections of English. But this year, the sixth-grade class is smaller and only three sections are needed. The teacher wanted a full schedule, so volunteered to teach a new Latin class. The teacher meets all No Child Left Behind Act requirements to teach English but is not "highly qualified" to teach foreign languages.

If your district allows the instructor to teach Latin, will it be in compliance with NCLB's 'highly qualified' requirements?

A. No, because all teachers must be "highly qualified" in each core academic subject taught.

B. Yes, because an English teacher's certification would cover Latin, since it is useful for English grammar roots.

C. Yes, because under recent flexibility, NCLB allows all middle school teachers to teach multiple subjects if they are highly qualified in one core academic subject.

D. Yes, if your district meets the definition of an eligible rural district.

Answer

The correct answer is D. Based on flexibility guidance from the **U.S. Education Department**, in eligible rural districts, newly hired teachers of multiple subjects who are highly qualified in one subject have three additional years from the date of hire to become highly qualified in each subject.

In order to qualify for this flexibility, a school must be designated as "rural." This means that the total number of students in average daily attendance at all schools served by the district must be fewer than 600; alternatively, all schools in the district must be located in counties with population densities of fewer than 10 persons per square mile. In addition, each school served by the district must have a rural school locale code designation by ED or be designated by its state education agency as rural.

In order to use this flexibility, covered districts will need to:

- Ensure that all teachers in core academic subjects are highly qualified in at least one core academic subject they teach.
- Provide high-quality professional development that increases the teachers' content knowledge in the additional subjects they teach.
- Provide mentoring or supervision that consists of structured guidance and regular ongoing support so teachers can become highly qualified in the additional core academic subjects they teach.

Districts must submit, as soon as possible, an amendment to their state consolidated application that contains plans for meeting the highly qualified teacher goals. States should not wait until the regularly scheduled consolidated application submissions to inform ED that they are taking advantage of this flexibility.

Wrong answers explained

A. In most cases, this is true, but not here. In general, NCLB requires all teachers to be highly qualified in each core academic subject they teach. That is, each must attain at least a bachelor's degree and state certification or licensing and demonstrate knowledge of the content they teach. However, as noted above, ED has given rural districts additional flexibility.

B. An English teacher's certification would not cover a foreign language. Foreign languages are separate core academic subjects under NCLB. Core academic subjects include English, reading, math, science, foreign languages, civics, economics, arts, history and geography.

C. The recent guidance does not go so far as to allow middle school teachers to become highly qualified in all subjects they teach by being highly qualified in one core academic subject. ■

ED accepts more revised HQT plans

The **U.S. Education Department** has formally accepted nearly all of the states' revised "highly qualified" teacher plans. The plans serve as blueprints for states to meet the No Child Left Behind Act's highly qualified standards by this summer. The plans also will help shape ED's development of new monitoring protocols by which it will gauge states' progress.

For HQT revised state plans, see www.ed.gov/programs/teacherqual/hqtplans/index.html. ■

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SCHOOL DISTRICTS IN COURT

➤ Controversy over purported speech sparks retaliation claim

A Tennessee superintendent whose elected term was ending received an invitation to speak at a convention sponsored by a church with a predominantly homosexual congregation. Although the superintendent could not accept, the local media reported that he had accepted, then changed his mind. The superintendent attempted to rectify the article's inaccuracies. He explained that although he did not endorse the homosexual life style, he would not refuse to associate with gay people.

Board members expressed concern that the superintendent was approving homosexuality as an acceptable life style. They purportedly believed the article undermined public confidence in him and impaired his ability to function effectively. The board voted not to appoint the superintendent to the new post of director of schools. The superintendent sued for retaliation under the First Amendment.

The **6th U.S. Circuit Court of Appeals** reinstated the superintendent's claim, ruling that the board's decision was based on expression of his views. Even though the superintendent did not actually speak at the convention, the court said that the media and others had reacted as though he had. Board members had formerly supported the superintendent's candidacy for a newly created director of schools position, and then voted against him after learning of his intended speech. This raised questions as to whether the decision was improperly motivated by the superintendent's free speech activities.

PRACTICAL POINTER: The First Amendment prohibits retaliation against employees based on the exercise of free speech rights. A school board that takes an adverse employment action against a superintendent or other employee for the expression of unpopular views exposes itself to a lawsuit.

■ *Scarbrough v. Morgan County Bd. of Educ., et al.*, No. 04-6302, 106 LRP 68774 (6th Cir. 11/22/06).

➤ District may enforce chain-of-command policy

An Indiana district's chain-of-command policy required teachers to address grievances requiring administrative action with their supervisor before airing them to the school board. A teacher claimed the policy had a chilling effect, causing him to be afraid to speak out on public issues concerning the school. He sued the district for infringing on his free speech rights.

The **U.S. District Court, Northern District of Indiana** dismissed the case and concluded that the policy did not impermissibly restrict the teacher's First Amendment rights. The policy did not prevent teachers from raising matters of public concern before the board when the floor was opened for public comments. Moreover, an employee dissatisfied with his supervisor's response could appeal to board members without further obstacle.

PRACTICAL POINTER: Your district can enforce a policy requiring employees to bring matters for administrative action to their department supervisor before contacting board members directly. Make sure your policy leaves other avenues for employee expression.

■ *Samuelson v. LaPorte Community Sch. Corp., et al.*, No. 3:05-CV-99 RM (N.D. Ind. 11/17/06).

➤ District can question teacher about religious objection to ID badge

A Pennsylvania district required staff members to wear photo ID badges as part of a school safety plan. A chemistry teacher of 20 years refused because his "very deep personal, moral and religious convictions" prevented him from wearing a badge. The district argued that the teacher's refusal was a purely personal preference. The district asked the teacher to explain the basis of his religious objection, but he refused. When the teacher was terminated, he sued the district under Title VII, which prohibits employers from discriminating against employees on the basis of religion.

The **U.S. District Court, Western District of Pennsylvania** dismissed the teacher's case. The teacher failed to establish a sincerely held religious belief that conflicted with the school's newly implemented badge policy. The court noted that the teacher was required to respond to the district's inquiries about the basis of his religious objection. While courts may not inquire into the verity of a religious belief, "it is entirely appropriate — indeed necessary — for a court to engage in analysis of the sincerity of someone's religious beliefs" to evaluate a Title VII claim.

PRACTICAL POINTER: It is possible for an employee to have a genuine religious objection to a district policy such as wearing an ID badge. Once an employee asserts a religious objection under Title VII, your district is entitled to determine whether the belief is religious and sincerely held, or whether it is a personal preference.

■ *Sidelinger v. Harbor Creek Sch. Dist.*, No. 02-62 Erie (W.D. Pa. 11/29/06).

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SCHOOL DISTRICTS IN COURT

➤ Performance deficiencies derail 66-year-old teacher's age bias claim

A Texas district terminated a 66-year-old teacher for performance problems. The district presented evidence that the teacher had exhibited a pattern of deficiencies for many years related to classroom management and student discipline. Both internal and independent evaluators who observed her teaching rated her "below expectations" and "unsatisfactory" in nearly all categories. The district also placed her in a special remediation but contended that she failed to improve. The teacher sued under the Age Discrimination in Employment Act.

A federal District Court dismissed the case. The teacher admitted that her suspicions of discrimination were based only on conjecture and subjective beliefs. The court noted that "bald assertions" of discrimination are inadequate to permit an ADEA claim. And because the district presented evidence of ongoing performance deficiencies, the court rejected the claim.

PRACTICAL POINTER: To establish a case of discrimination under the ADEA, an employee must establish that she: 1) is at least 40 years old; 2) met the employer's legitimate job performance expectations; 3) experienced an adverse employment action; and 4) was replaced by or treated differently than a person substantially younger. Always document performance deficiencies to refute a discrimination claim.

■ *Goodfriend v. Houston Indep. Sch. Dist.,* H-04-3728 (S.D. Tex. 11/30/06).

➤ Disclosure of 'hit list' fails to violate student's right to privacy

A seventh-grade student complained of harassment by approximately 50 students. A janitor found the student's geography book, which contained a "hit list" of names, and turned it over to the principal. The student received a 10-day suspension and had to see a psychiatrist. The principal told her administrative staff of the suspension and told one of the targeted students about the list. After learning of these disclosures, the parent sued the district for violating the student's right to privacy under the 14th Amendment and the Family Educational Rights and Privacy Act.

The **U.S. District Court, District of Connecticut** dismissed the privacy claim. The principal's disclosures did not violate the student's right to privacy. Although the student's punishment was private information, the principal's act of informing her staff was appropriate because it was related to student safety and discipline and was necessary for the efficient administration of the school. In addition, the court pointed out that the student had no reasonable expectation of privacy, because he left the book that the list was written on out in plain sight, where it was found by a janitor. Therefore, the principal did not violate any privacy concerns when she told a potential target about the list.

PRACTICAL POINTER: Your district should train employees on the requirements of FERPA to avoid privacy violations. In this case, school officials were justified in discussing the information because the information was not a part of the student's educational records and the disclosure was related to student safety.

■ *Risica v. Dumas, et al.*, No. 3:02-CV-00449 (DJS)(TPS) (D. Conn. 11/17/06).

➤ District must face claim for negligent supervision

A New York student was hit in the eye with beef jerky while attending an unsupervised "honors" study hall in the cafeteria. The student's parent claimed there were at times 50 or more students attending the study hall; it was not supervised by an adult; and the group was only periodically monitored to determine whether there were students present who were not authorized to be there. Further, the parent alleged that the district was aware of three prior incidents involving students throwing objects, one of which resulted in a student injury. The parent sued the district for negligent supervision.

The **Supreme Court of New York, Appellate Division** refused to dismiss the case. The court reasoned that a jury should determine whether the district's lax monitoring caused the student's injury. The fact that the district knew that students had thrown objects during study hall in the past, causing injuries, suggested that the harm which befell the student was foreseeable.

PRACTICAL POINTER: Be sure your district adequately supervises students at all times. A district may be liable for student injuries that occur in the absence of adult supervision if it knew or should have known that someone was likely to get hurt.

■ *Schirmer v. Bd. of Educ. of the Spencerport Central Sch. Dist.*, 1400 CA 06-01588 (N.Y. App. Div. 11/17/06).

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DOS AND DON'TS

✔ Do research alternate energy sources

Consider whether an alternative energy source, such as wind or solar energy, is right for your district. This will set a good example for your students and eventually could help your district save energy — and money. To find out more, team up with a local college or university or a research institution.

Example: The **Maine School Administrative District #3** in Waldo County is looking to become the first district in the state to use wind power. The district is teaming up with **Unity College** and **Coastal Enterprises Institute** to explore whether there is enough wind to put an industrial-scale wind turbine near the high school. For the next three months, they'll be measuring wind speed and direction at a nearby farm. Coastal Enterprises is putting sensors part way up on an existing windmill. The district is hoping to save money while taking advantage of a natural source of renewable energy.

Insider Resource

Maine School Administrative District #3: 74 School St., Unity, ME 04988-9734; (207) 948-6136; *www.mvhs.sad3.k12.me.us.*

✘ Don't deny certain groups same access privileges as others

If your high school lets a non-curricular student group meet on school premises during noninstructional time, it has created a "limited open forum." Under the Equal Access Act, this means you must give other non-curricular groups the same access privileges and cannot discriminate on the basis of political, religious, philosophical, or other viewpoint. You cannot characterize a non-curricular group as curricular to avoid the law. If you do and exclude other groups or give them fewer privileges, you'll likely face a lawsuit.

Example: A district classified "Straights and Gays for Equality" as non-curricular and only granted them limited privileges to use the school and its communication avenues. But the district characterized swimming and cheerleading as curricular. The SAGE group contended that the district was violating the EAA by mischaracterizing these groups as curricular and giving them greater access to school facilities and communication options. SAGE asked a federal court to order the district to allow them the same privileges. The federal court granted the group's request for a preliminary injunction. The court characterized the cheerleading and swimming as non-curricular because no regularly offered course at the school taught the subjects; participation did not result in academic credit; and the subjects did not concern the school's body of courses as a whole. Thus, the EAA required the school to give SAGE the same access as the cheerleading and swimming groups, including using the public address system and yearbook.

Insider Resource

■ *Straights and Gays for Equality v. Osseo Area Schools - District No. 279*, 2006 WL 3751569 (8th Cir. 12/22/06).

✔ Do consider PaySchools for school payment management

Consider using a new online payment processing system, PaySchools™, sponsored by the **National School Boards Association**, to collect, process and manage online payments for a broad range of school-related fees. With PaySchools, districts can offer parents a secure "one-stop" service to pay all their child's school fees — from lunches, textbooks and field trips to prom tickets, T-shirts and drivers' education. Parents can access the online system 24 hours a day to review their payment history, as well as their child's purchases.

To ensure transactions are secure, PaySchools does not store personal bank or credit card information. The program is designed to help districts improve their internal controls and accelerate cash flow by reducing manual check processing and the need for school staff to manually collect and administer cash funds.

Insider Resource

PaySchools: *www.payschools.com.*

Competition for outstanding improvement efforts announced

The first annual Team Excellence Competition for Education, sponsored by the **American Society for Quality**, invites participation from educators and students from K-12 school districts. The highest scoring teams will receive gold, silver and bronze awards. The ASQ will showcase the nation's most outstanding improvement efforts at the 15th Annual National Quality Education Conference in St. Louis, Mo., Nov. 11-13. Criteria and guidelines for the competition available this month, with application forms due from teams by March 2007. For more information, visit *http://nqec.asq.org/2007/team-competition/index.html*, e-mail *gbalagopal@asq.org*, or call (800) 248-1946, Ext. 7303. ■

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