

ADA Amendments Go Into Effect January 1, 2009

A major revision to the Americans With Disabilities Act that will affect School Districts will become effective January 1, 2009. Congress has overruled several prior U.S. Supreme Court decisions in making it much easier for an employee to be qualified as “disabled” under the Americans With Disabilities Act. Congress explicitly overruled the Supreme Court decision in *Toyota Motor Manufacturing* by stating that when the Supreme Court in *Toyota* stated that a disability must be substantial and major, it created an inappropriately high level of limitation necessary to obtain coverage under the ADA.

Congress also overruled the prior Supreme Court decision in *Sutton v. United Airlines* which found that the determination of a disability should be made with reference to the ameliorative effects of mitigating measures. Thus, under the ADA Amendments, the question of whether a person has a disability is to be determined without consideration of ameliorative measures. The Act specifically states that the determination of whether an impairment substantially limits a major life activity shall be made without regard to mitigating measures such as medication, medical supplies, low vision devices (other than eyeglasses or contact lenses), prosthetics, hearing aids, implantable hearing devices, or even learned behavioral or adaptive neurological modifications. The only exception listed is ordinary eyeglasses or contact lenses.

Thus, under these provisions, any School District employee who is on maintenance medication, such as blood pressure medication, anti-depressants, H2 blockers, and proton pump inhibitors, are now likely covered as individuals with disabilities under the ADA.

The revised definition of “disability” under the ADA Amendments makes it clear that virtually anyone except an individual in excellent health could be considered to

have a “disability.” For example, major life activities are defined to include “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” Obviously, it will be easy for employees to claim difficulties in concentrating, thinking, and learning. It can be expected that there will be many more mental disability claims under these revisions.

Further, the Amendments specifically state that an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a “disability.” Consequently, a limitation of one of the listed major life activities can be enough to constitute a “disability” under the new ADA Amendments.

Further, the Amendments make it much easier to have a disability when it states that an impairment that is “episodic” or “in remission” is a disability if it would substantially limit a major life activity when active. Prior court decisions had stated that episodic disabilities or those in remission would not constitute a disability under the ADA.

In fact, the Amendments go so far as to state that “the definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.” Therefore, these Amendments essentially limit the ability of a School District to file a Motion for Summary Judgment on the basis that a School District –Plaintiff does not have a disability.

In addition, the practical effect of this new law will be that Districts will be required to consider more accommodations of individuals claiming disabilities, or face potential litigation.

Commonwealth Court Permits Appeal From Arbitration Decision

In the first decision since the Supreme Court case of *Westmoreland Intermediate Unit #7*, where the Supreme Court found a limited right to appeal an Arbitrator's decision, and only in cases involving a "public policy violation," the Commonwealth Court found a basis to appeal an Arbitrator's decision in the case of *Philadelphia Housing Authority v. AFSCME*. In the *Westmoreland Intermediate Unit* case, the Supreme Court held that the core function test was no longer available to appeal an Arbitrator's decision, and it reinstated an Arbitrator's decision where a school employee was found using drugs in the restroom to a suspension of employment.

In this *AFSCME* case, the Commonwealth Court ruled that an Arbitrator erred in reinstating a public employee who was guilty of sexual harassment. The Commonwealth

Court stated that "it now is well-established that there is an explicit, well-defined, and dominant public policy against sexual harassment in the workplace." Consequently, the Court found that the Arbitrator was without authority to change the discipline imposed by the Employer.

This case gives some hope to School Districts where an Arbitrator may reduce a termination to a suspension. However, the School District must be able to identify a clear public policy, such as sexual harassment, or the possible violation of law, such as theft.

From a practical standpoint, School Districts must still concentrate its best efforts on winning the arbitration case, rather than relying on the possibility of overturning an Arbitrator's decision on appeal.

Court Upholds School Ban on Student T-Shirt With Violent Imagery

The Federal District Court for the Eastern District of Pennsylvania has found in favor of a School District in prohibiting a high school student in Penn Manor School District to wear a T-shirt advocating violence. In this case of *Miller v. Penn Manor School District*, a high school student wore a T-shirt that displayed images of an automatic handgun on front and back. On the front of the shirt were imprinted the words "Volunteer Homeland Security," and on the back the words "Special Issue-Resident-Lifetime License, United States Terrorist Hunting Permit, No. 91101."

After wearing the T-shirt several times to School, the School asked the student to turn the shirt inside out or it would have to enforce its policy which prohibited expression that was a distraction to the educational environment. When the student refused, he was given a two-hour detention. The parents then sued the School District, alleging that the policies and actions of the District violated the student's right to free speech and due process.

In finding for the School District, the Court found that the message advocated vigilante violence and therefore was not constitutionally protected as political speech. The Court concluded that the Penn Manor School District was

not required to show substantial material disruption to justify its prohibition.

The student also challenged the School District's policies as being unconstitutionally overbroad. Although the Court had a problem with the policies being somewhat overly broad, the Court still found that there was no legal authority for the proposition that the student had a constitutional right to wear clothing that advocated violence. Although the Court conceded that there was an element of subjectivity in the policy, it found that Public School Administrators cannot be expected to foresee the myriad ways in which students might conceivably exceed the permissible bounds of protected speech.

Fortunately, this decision comes down in favor of the School District's discretion in an attempt to control clothing that in any way advocates violence. The wording of the decision does give direction to School Districts in making sure their policy is not overly broad, and School Districts should review their policies regarding student expression to make sure that they are not overly broad and can be enforced whenever a situation such as this one arises within the School District.

Federal Court Upholds Discipline for Fake MySpace Profile

The Blue Mountain School District's discipline of a 14-year old eighth grade student for creating a false internet profile on MySpace.com was upheld by the Federal District Court for the Middle District of Pennsylvania this fall in *J.S. v. Blue Mountain School District*. In that case, the student posted a MySpace profile stating that the Principal was a pedophile and a sex addict. The profile was created at the student's home during non-school hours. However, news of the profile spread through the school and students, who discussed the profile at school the day after it was created. There was a "buzz" in the school regarding students talking about the profile. A teacher had informed the Principal that students were talking about the profile during class. A student provided the teacher with a printout of the profile, and subsequently, the student who created the MySpace profile was given a 10-day out-of-school suspension.

The student filed a lawsuit alleging a violation of the First Amendment, on the basis that the School District had no right to discipline a student for out-of-school conduct.

The Federal Court, in ruling for the School District and dismissing the First Amendment claim, stated that "a school can validly restrict speech that is vulgar and lewd, and it also can restrict speech that promotes unlawful behavior." The Court found that the profile was not silent political speech that has been declared as protected under prior Court decisions.

Importantly, the Court found that the profile was sufficiently connected to school even though it was created out of school, since the profile pertained to the Principal of the School, the intended audience were students, a paper copy of the profile was taken to the school, the profile was discussed at school, the picture of the Principal was taken off the School District website, and the Plaintiff prepared the profile out of anger at the Principal. The Court concluded that there was disruption at the school because of the profile.

This case must be distinguished from the Federal Court decision in the Western District in *Laysbuck v. Hermitage School District*, decided in 2007. In that case, the Court ruled that there was an insufficient nexus between the out-of-school behavior with the MySpace profile and the school to justify discipline. In that case, the Court ruled that the speech was protected by the First Amendment.

In this case, the Blue Mountain School District provided ample evidence to show the disruption in the school with the students by the profile in question.

If School Districts are going to discipline for an out-of-school MySpace profile or other type of internet posting, it must be careful to show the sufficient connection between the internet posting and disruption at the school.

Fortunately, this decision is a good decision for School Districts in providing a basis for discipline of vulgar MySpace postings related to Administrators.

Right-To-Know Law Goes Into Effect January 1, 2009

School Districts can expect more Right-to-Know Law requests with the revised Right-to-Know Law becoming effective January 1, 2009. The new general rule is that "public records" and "financial records" are subject to disclosure upon request. The term "record" includes photographs, film, or sound recording, information stored or maintained electronically, and a data-processed or image-processed document.

Fortunately, the revised law specifically defines exceptions to documents that need to be disclosed. For example, documents relating to labor relations,

negotiations, arbitration, academic records, criminal investigations, non-criminal investigations, draft minutes, real estate appraisals and feasibility studies, pre-contract award documents and insurance communications, are among the exceptions to the rule.

The State has issued a clarification that Districts may charge up to a maximum of 25¢ per page for the release of documents. School Districts must be ready to respond promptly to Right-to-Know Law requests, since given all the publicity regarding the change in the law, the media will be watching all requests very closely.

Andrews and Beard Education Law Focus

As solicitors, labor counsel and special counsel, Andrews and Beard represents more than 50 school districts in Pennsylvania. The Firm has successfully negotiated hundreds of teacher and support staff contracts. Andrews and Beard is also one of the first firms in the state to pioneer Timed Mediation to successfully negotiate teacher-union contracts in a 48-hour process. This process can result in the settlement of the contract six months before expiration, at a large financial savings to the school district.

The Firm also represents a large area of the State for coverage of school board directors through their insurance carrier.

Our legal expertise includes:

- Negotiation of teacher and support staff contracts
- Employment Discrimination
- Special Education Litigation
- Veterans' Preference Litigation
- Teacher and student discipline hearings
- Leaders in Timed Mediation contract negotiations

About the Pennsylvania School Study Council

The Pennsylvania School Study Council (PSSC), a partnership between the Pennsylvania State University and member educational organizations, is dedicated to improving education by providing research information, professional development activities, and technical assistance to enable its members to meet current and future challenges. The PSSC offers professional development to the membership through colloquiums, workshops, study trips, consultation, publications, and customized services. For more information, visit the PSSC website, www.ed.psu.edu/pssc/ or contact the Executive Director Paul T. Begley, at 814-863-1838.

Subsequent Issues

If you have a school law question or topic you would like to have addressed in subsequent issues of the newsletter, please send an email to:

David Andrews: dandrews@andrewsbeard.com
 Carl P. Beard: cbeard@andrewsbeard.com
 Robin Binder Heath: rbheath@andrewsbeard.com
 Patrick J. Fanelli: pfanelli@andrewsbeard.com
 Aimee L. Willett: awillett@andrewsbeard.com
 Robert K. Lascher: rlascher@andrewsbeard.com
 Elizabeth Benjamin: ebenjamin@andrewsbeard.com
 Jason M. Imler: jimler@andrewsbeard.com

The information contained in the *Education Law Report* is for the general knowledge of our readers. The *Report* is not designed to be and should not be used as the sole source of legal information for analyzing and resolving legal problems. Consult with legal counsel regarding specific situations.

Education Law Report is published by Andrews and Beard Law Offices.

**ANDREWS
& BEARD**
LAW OFFICES

MAIN OFFICE:
 3366 Lynnwood Drive P.O. Box 1311
 Altoona, Pa 16603-1311
 814/943-3304 FAX: 814/943-3430
www.andrewsbeard.com