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**U.S. Supreme Court To Review
The Pledge of Allegiance**

The United States Supreme Court has agreed to review a decision by the Ninth Circuit Court of Appeals, which ruled that a school board policy mandating teachers to begin each school day by requiring students to recite the Pledge of Allegiance is unconstitutional. The Ninth Circuit Court of Appeals specifically ruled that the board policy in question was unconstitutional because the policy impermissibly coerced a religious act.

In this case, Elk Grove United School District v. Newdow, the self-professed atheist father of a student in the school district filed suit on behalf of his daughter challenging the school board policy that requires teachers to begin each school day by having students recite the pledge. The father is the non-custodial and out-of-wedlock father of the student. Neither the child's mother nor the child are atheists, nor are they troubled by the child reciting the pledge each day in school. The father was assured that his daughter was not required to join her classmates in reciting the pledge each day; she had the option of remaining in her seat while her classmates recited the pledge. However, the father maintained that his daughter was injured simply because she had to watch and listen as her teacher led her classmates in the pledge, which he described as a ritual proclaiming, "there is a God."

The Supreme Court has previously ruled that school districts cannot require students to recite the pledge. Rather, students must be allowed to sit or stand respectfully while the pledge is recited or to leave the room during the pledge. Students also may not be disciplined for refusing to recite the pledge. The Supreme Court in this case will consider whether students' constitutional rights are infringed upon merely because they may be required to listen to the recitation of the pledge.

The Supreme Court is scheduled to hear arguments on this highly controversial case on March 24, 2004, and is expected to issue a ruling by the end of June 2004. The Newdow decision will likely have far-reaching implications for school districts across the nation. Additionally, the U.S. Congress has indicated that it might take action on the matter if the Supreme Court refuses to overturn the Ninth Circuit's decision.

**New State FOIA Guide For RFP
Evaluation Meetings**

Just over two years ago, the South Carolina Supreme Court ruled, in Quality Towing, Inc. v. City of Myrtle Beach, that an evaluation committee formed for the purpose of reviewing and scoring Request for Proposal ("RFP") responses, in order to forward a recommendation to a city council, is a "public body" that is subject to the Freedom of Information Act ("FOIA") public meeting rules. The court ruled that this is true even when the evaluation committee does not consist of members of the governing body, so long as the committee's recommendation goes to the governing body for final action. While the full applicability of FOIA to an RFP that will be awarded at the staff level is unclear, it has become a best practice to ensure that FOIA requirements are met when an RFP committee evaluates proposals for contracts that can only be awarded by the public body itself.

One of the most high-profile RFP selection processes that occurs in any school district is the selection of professional services, especially for construction managers, architects, and engineers. To aid FOIA compliance in situations where Quality Towing applies, the State of South Carolina's own procurement staff have developed a new guide entitled, *How to Comply with FOIA in Holding RFP Evaluation*

Panel Meetings and Architect/Engineer Selection Committee Meetings, which was issued in October of 2003. The State's new guide contains many suggestions, forms, and "walk-through" procedural steps to help any evaluation committee manage the FOIA technical requirements, while still engaging in an evaluation process that retains appropriate levels of fairness and confidentiality for the proposers. Topics include proper notice, what minutes are required, and public access to the committee meeting. Of particular interest are the delicate topics of closed sessions of the evaluation committee, and the proper methods under FOIA for individual and aggregate scoring and ranking.

We believe this guide is a well-reasoned approach to the complex overlapping of FOIA and procurement rules, and highly recommend that procurement and business officials acquire a copy for quick consultation. We will be happy to supply a copy of *How to Comply with FOIA in Holding RFP Evaluation Panel Meetings and Architect/Engineer Selection Committee Meetings* to our clients upon request.

Alternate Achievement Standards And Alternate Assessments Under The No Child Left Behind Act Of 2001

In December 2003, pursuant to the No Child Left Behind Act of 2001 ("NCLBA"), the United States Department of Education ("USDOE") issued final regulations addressing the use of alternate achievement standards and alternate assessments for students with significant cognitive disabilities. These regulations give local school districts greater flexibility in meeting the NCLBA's requirements for students with serious disabilities.

Pursuant to the newly issued regulations, states may establish alternate achievement standards and alternate assessments for students with the most severe cognitive disabilities for the purpose of satisfying the adequate yearly progress ("AYP") requirements of the NCLBA. Also, states are allowed to identify through IEP teams students who have severe cognitive disabilities. The legislation does not limit the number of students that can be tested with an alternate assessment; however, it does limit the number of scores based on alternate achievement standards that can be included in proficient AYP calculations. Specifically, the regulations place a one percent cap on the number of proficient and advanced scores earned by students who are subject to alternate standards that may count towards AYP. Individual schools are not subject to the one percent cap. The cap applies only to state and school district accountability decisions. Further, states and school districts may exceed the one percent limit if they can satisfactorily

demonstrate to the USDOE that they have a larger population of students with the most severe cognitive disabilities.

The new regulations will help ensure that schools receive credit for the progress of all students, including those children with the most severe cognitive disabilities, while at the same time ensuring that schools are not penalized for the failure of these students to achieve at the same level as students without similar severe disabilities.

Fourth Circuit Court Of Appeals Rules Student Dress Code Overbroad

In Newsome v. Albemarle County School Board, the Fourth Circuit Court of Appeals recently addressed a student's First Amendment challenge to his school's dress code. A sixth-grade student wore a t-shirt that depicted three black silhouettes of men holding firearms superimposed over the letters "NRA," positioned above the phrase "Shooting Sports Camp." In reaction to the t-shirt, the school subsequently revised its student handbook and dress code to prohibit students from wearing "messages on clothing, jewelry, and personal belongings that relate to drugs, alcohol, tobacco, weapons, violence, sex, vulgarity, or that reflect adversely upon persons because of their race or ethnic group." The student challenged the school's policy on the grounds that his First Amendment rights to freedom of speech and association had been infringed upon and that the dress code was both unconstitutionally overbroad and vague.

The Fourth Circuit determined that the school was required in this instance to show a specific and significant fear of disruption, not just some remote apprehension of disturbance, in order to preclude the student from wearing this shirt. The court summarized that "if a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster." The court also stated, however, that the First Amendment will protect the non-disruptive expression of ideas. The court concluded that banning support for or affiliation with the myriad of organizations and institutions that include weapons (displayed in a nonviolent and non-threatening manner) in their insignia can hardly be deemed reasonably related to the maintenance of a safe or distraction-free school. The court determined that the dress code in its present form excluded a broad range and scope of symbols, images, and political messages that are entirely legitimate and even laudatory. Accordingly, the Fourth Circuit determined that the school's dress code was unconstitutionally overbroad.

Even though the Fourth Circuit ruled in the student's favor on these particular facts, it also recognized the need

for school officials to prescribe and control conduct in the schools. Accordingly, school districts should review their dress codes to ensure that they are justified under each school's unique circumstances and appropriately tailored to meet the needs of a safe, secure, and non-threatening learning environment.

McKinney-Vento Homeless Assistance Act

The McKinney-Vento Program for Homeless Students was originally authorized in 1987, and most recently reauthorized by the No Child Left Behind Act of 2001. This program is designed to address serious problems that homeless children and youth face in enrolling, attending, and succeeding in school. When this program was reauthorized as part of the No Child Left Behind Act, several important changes, discussed below, were made.

Initially, the definition of "homelessness" has been broadened to specifically include children and youth who are: sharing the housing of others due to a loss of housing or economic hardship; living in motels, hotels, trailer parks or campgrounds due to the lack of alternate adequate accommodations; staying in shelters; sleeping in cars, parks, abandoned buildings, substandard housing, bus/train stations or public places; or awaiting foster care placement. 42 U.S.C. § 11434A. (The legislation does not specifically define "trailer park"; presumably, however, this does not include mobile homes in permanent, fixed locations that families own or rent in a manner similar to an apartment.) Second, the revised legislation expressly prohibits a district or school from separating homeless students from the mainstream school environment. In fact, school districts are required to keep students in their school of origin, if at all possible, unless doing so would be against the wishes of the parents or guardians. Further, school districts must now ensure that homeless students are provided transportation at the request of parents or guardians to and from the school they attended prior to becoming homeless. Third, homeless students must be enrolled in a school immediately, even if they are unable to provide the records normally required by traditional students for enrollment. Finally, school districts must designate a local liaison for homeless students to serve as one of the primary contacts between homeless families and district personnel.

School districts should review their admissions and attendance policies to ensure they are in compliance with the reauthorized McKinney-Vento Program for Homeless Students. Additionally, school districts should review their transportation programs and capabilities to ensure that they are able to provide transportation for homeless students, should the need arise.

On-Call Time – Compensable Under the FLSA?

In light of the overtime compensation lawsuits currently pending against 25 South Carolina school districts and the self-audits being conducted by most districts in the state, we have received numerous inquiries about how time that classified employees spend "on-call" and ready to respond to after-hours alarms and other emergencies should be treated under the Fair Labor Standards Act ("FLSA"). The FLSA requires employers to pay employees for any "compensable time" during which an employee is performing services on behalf of the employer. Likewise, any compensable time must be counted each week to determine whether an employee has exceeded the 40-hour threshold, after which the employee would be entitled to overtime or compensatory time under the FLSA.

Under the regulations adopted by the U.S. Department of Labor ("DOL") and court decisions interpreting those regulations, whether time that an employee spends "on-call" and not actively performing services for the employer should be counted as compensable time depends on several factors:

- The terms of any employment agreement. Although employers and employees cannot agree to waive requirements of the FLSA, the DOL and courts give some weight to how on-call time is treated under an employment agreement.
- Any physical restrictions placed on the employee while on call. Employees required to remain on site or at home while on-call normally must be compensated for the time; employees permitted to go where they choose and spend time with families while waiting for calls normally are not entitled to count that time under the FLSA.
- The amount of time the employer allows the employee to respond to the call and report back to work. The shorter the allowable time for reporting to work, the more likely on-call time must be considered compensable. For example, if an employee is expected to respond to a call and report to work within 10 minutes, time spent on-call will likely be compensable. Unless the on-call employee lives in an extremely remote area, a response time of 30 minutes or longer normally would mean the on-call time is not compensable.
- The percentage of calls expected to be returned by the on-call employee. If several employees are on-call at once and share responsibilities for reporting to actual duty, the time is less likely to be

considered compensable.

- The frequency of calls during the on-call period. The fewer calls and actual call-outs that require active duty, the less likely the time will be considered compensable.
- The normal use of on call time by the employee. If employees are not overly restricted in their personal activities while on call, the time is probably not compensable.
- The disciplinary action taken, if any, against on call employees who do not respond to calls. Finally, the more likely that an on-call employee will receive discipline for failing to respond to calls or report to work, the more likely that the time will be considered compensable.

School districts should consider implementing a written policy or procedure that clearly expresses their expectations of employees who are on-call and that is drafted to take these factors into account. Otherwise, on-call employees may be accruing significant amounts of compensable time that will have to be factored into their compensation, and the school district may be creating unnecessary exposure to liability for unpaid overtime for on-call workers.

FMLA Reminders

School districts are required to address complex leave issues pursuant to the Family and Medical Leave Act (“FMLA”) on an almost daily basis. In fact, leave issues are among the most challenging situations that the human resources staffs of school districts are required to handle. Full-time employees who meet certain eligibility requirements are entitled to 12 weeks of unpaid FMLA leave annually, which requires school districts to balance the often competing needs of their employees with the needs of the school system.

Although each FMLA leave situation is unique and requires specialized attention and consideration, the following reminders will help school districts ensure that their practices comply with the FMLA requirements.

- Always designate, in writing, leave taken pursuant to the FMLA as promptly as possible. It is always possible to retroactively “undesignate” leave, but it is much harder to retroactively designate leave.
- Always request sufficient information from employees regarding their medical conditions so that the school district can ensure that it appropriately designates leave. Detailed medical information also enables a school district to ensure that it provides necessary and reasonable

accommodations to employees when they return to work.

- Keep in close contact with employees out on leave, particularly regarding anticipated return to work dates and accommodation issues, in order to ensure that the school district is able to appropriately plan for its instructional and operational needs.
- Ensure that all appropriate staff members receive annual training regarding the school district’s obligations under the FMLA. This includes principals, assistant principals, athletic directors, custodial supervisors, transportation supervisors, cafeteria supervisors, and other appropriate district-level employees, especially those who are the district’s primary points of contact with absent and on leave employees.
- Review leave policies annually to ensure they are current and comply with all applicable regulations and other laws.



We are very pleased to announce that Thomas K. Barlow has become a shareholder with Childs & Halligan.



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