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Contract and Policy Issues In Light of the TERI Retirement Program

In 2000, the General Assembly authorized the creation of the Teacher and Employee Retirement Incentive (TERI) program, which allows State employees to continue their employment with a covered employer, yet “retire” with the South Carolina Retirement System. While in the program, the employees’ retirement benefits are deferred, and the employees continue to earn their full salary. Upon exiting the TERI program, the participants receive the full balance of their accrued retirement benefits.

Based on the limitations contained in the TERI program, employees may only participate in the program for a maximum of five years. Thus, employees must terminate employment at the end of their five-year period. Any subsequent employment with a covered employer is subject to the earnings limitation and requires a break in service. However, the decision to re-employ a TERI employee whose five-year period has expired is within the sole discretion of the employer.

The TERI program became effective January 1, 2001. Thus, any employee who entered the program at its inception must exit the TERI program on or before January 1, 2006. This exit date, which falls in the middle of the school year, will necessitate school districts developing new methods of issuing contracts and filling mid-year vacancies. Specifically, although

Continuing Contract teachers are generally guaranteed employment for a full school year, TERI teachers may not remain in the employ of a school district without a break in service after the expiration of their TERI participation. Because these teachers may not contract for covered employment in violation of State law, school districts should issue teachers contracts that expire on the date their TERI eligibility terminates. In other words, a teacher might be issued a Continuing Contract for the period July 1, 2005, through December 31, 2005, as opposed to a typical contract for the 2005-06 school year.

We recommend that school districts confirm in writing to affected employees that their contracts expire on the date their five-year eligibility for participation in TERI expires. We have previously provided superintendents and personnel directors with a sample letter to employees to accomplish this task.

Finally, in light of the number of positions that likely will be vacated during the 2005-06 school year, we recommend that school districts consider revising their policies, if necessary, to eliminate the requirement that all vacancies must be advertised. By way of explanation, if such a requirement is contained in policy, it will be difficult to fill mid-year vacancies without significant disruption to school operations and instruction. We have previously provided superintendents and personnel directors with sample policy language regarding this issue.

School districts will be faced with a variety of contract and personnel issues related to employees participating in the TERI program in the coming months. We will be glad to provide individual assistance to our clients to ensure compliance with the numerous requirements.

Individuals With Disabilities Education Act Reauthorized

On December 3, 2004, President Bush signed into law the long-awaited reauthorization of the Individuals with Disabilities Education Act (IDEA), the federal law that conditions funding to states for special education on compliance with the law and its regulations. The reauthorized IDEA requires changes, which will force school boards and administrators to sort through very complex issues. Although some of these issues will only be apparent once the United

States Department of Education, as well as the State Board of Education, develop new regulations and procedures to put into action the changes Congress requires, we have attempted to predict the specific requirements that will affect our client districts most directly. Although we have provided, and will continue to provide, detailed information to special education directors, below are the highlights of the reauthorized version of the IDEA.

- **Hearings:** IDEA now limits the time in which a parent can request a hearing and also limits the issues addressed in the hearings. Parents or agencies must request a due process hearing within two years from the time they “knew or should have known about the alleged action that forms the basis of the complaint,” or if the State has a time limitation for requesting a hearing, the State’s time limit applies. Also, IDEA limits hearings to the issues actually identified in the complaint. Hearing officers must base decisions on whether the child received a free and appropriate public education and will only consider errors in procedure if the errors prevented the child from receiving a free and appropriate public education required by the Individualized Education Plan (IEP).
- **Resolution Sessions:** Unless the district and parents use mediation or sign a written waiver, the IDEA now requires that the parents meet with relevant members of the child’s IEP team to try to resolve the complaint and develop a binding, written settlement before one of the parties initiates a formal hearing.
- **Hearing Officers:** Hearing officers still may not be employed by the child’s district or a state agency and now may not have any “personal and professional interest that conflicts with the person’s objectivity in the hearing.” Hearing officers must have knowledge of the appropriate, standard legal practice and the knowledge and ability to understand IDEA.
- **Attorneys’ Fees:** The IDEA now authorizes school districts that prevail in hearings and litigation to collect attorneys’ fees if a parent or parent’s attorney files a complaint or lawsuit for an improper reason or if the parent’s attorney files or pursues a complaint or lawsuit that is frivolous, unreasonable, or without foundation.
- **IEPs:** School employees may use conference calls or video conferencing to participate in IEP meetings. With parental agreement, the IEP team may excuse a member of the team from attending an IEP meeting. Also with parental agreement, the team may modify an IEP without holding a meeting.
- **Evaluations:** The IDEA now prohibits states from requiring districts to use an analysis of the discrepancy

between a child’s IQ and achievement to identify the child as having a specific learning disability. Districts may use a “response-to-intervention” model to identify specific learning disabilities.

- **Funding Issues:** Congress has neglected to appropriate the necessary funding but did increase funding levels. Districts may use up to 15% of their Part B funding to develop and implement early intervening services. States may require districts to use the maximum allowable amount if they over-identify ethnic and racial minorities as disabled.
- **Discipline:** IDEA now allows schools to move a child to an “interim alternative educational setting” not only for a conduct violation involving drugs or weapons, but also where the child has inflicted serious bodily injury upon another person. Further, when a parent or district requests a hearing to appeal a decision about placement or the relationship of the behavior with the child’s disability, the child may remain in the interim alternative educational setting. The hearing to review the child’s case must be expedited.
- **Teacher Quality:** The IDEA specifies the standards special education teachers must meet to be considered “highly qualified” as the term is used in No Child Left Behind.
- **State Enforcement:** Monitoring priorities for the states include: provision of free and appropriate public education, state supervision, and the disproportionate identification of minority groups as disabled. States must develop performance plans to show how they will meet IDEA requirements. Thus, districts will likely have additional requirements imposed by the State.

This summary highlights only a few of the changes the reauthorized IDEA will bring. We will continue to monitor and advise districts as new developments occur and assist districts with the practical implications of the new law.

New Law Expands the Rights of Employees on Leave for Military Duty

The Veterans Improvement Act of 2004 (VIA) amended the Uniformed Services Employment and Reemployment Rights Act (USERRA), expanding the rights of employees on leave for military duty.

Initially, the VIA increased from 18 months to 24 months the maximum amount of time an employee on military leave may continue to receive the same health insurance coverage he enjoyed as an active employee.

Additionally, the VIA prohibits employers from charging employees on military leave for fewer than 31 days more than the regular employee contribution in order to maintain their health insurance. If, however, an employee is on leave for 31 days or more, an employer may charge the employee up to 102% of the full insurance premium, or 102% of the employee and employer portions of the premium.

Finally, effective March 10, 2005, employers must post a notice informing employees of their rights under USERRA. The notice will be provided by the U.S. Secretary of Labor and must be posted in the same location as other similar notices.

Schools Must Present Programs Regarding the U.S. Constitution Each September 17th

On December 8, 2004, President Bush signed legislation that requires every educational institution in the U.S. receiving federal funding - from the elementary level through the college level - to present an annual program teaching students about the U.S. Constitution. This instruction must take place each September 17th, the anniversary of the signing of the Constitution in 1787.

The U.S. Department of Education is expected to issue guidelines implementing this legislation in the near future. Although it is still uncertain what form this instruction must take, it has been suggested that schools may satisfy this requirement by holding an assembly for the entire student body or may choose to provide appropriate instruction in individual classrooms. Presumably, the Department's guidelines will provide alternative options if September 17th falls on Saturday, Sunday, or a school holiday.

While the legislation has generated some controversy on the basis that the federal government should not dictate curriculum requirements, we believe school districts should proceed to develop programs and activities to meet the requirements of this statute.

Fourth Circuit Clarifies Parental Notification Requirements

In Wofford v. Evans, 390 F.3d 318 (4th Cir. 2004), the United States Court of Appeals for the Fourth Circuit held that a student's constitutional rights to due process and against unlawful search and seizure were not violated when elementary school employees, without providing parental notification, twice questioned a student regarding her alleged gun possession. In doing so, the Court expressly declined to mandate that schools notify parents before initiating investigations into allegations of student

misconduct. The Court acknowledged that schools are granted latitude in their efforts to maintain a safe learning environment, in this instance focusing on the serious threat gun possession poses to school safety.

In the Wofford case, the school's assistant principal first became suspicious of the student after several of the ten-year-old's classmates reported that she had brought a gun to school. The assistant principal immediately questioned the student, ultimately allowing her to ride the bus home after she allowed the assistant principal to search her book bag and desk. However, on the following school day, the assistant principal and the principal investigated the allegations further. During this follow-up investigation, one of the girl's classmates reported that he saw her throw the handgun into the woods next to the school. The principal immediately removed the student from class and asked her additional questions. At this point, the administrators denied the student's request for her mother and instead summoned the police to the school. Three officers quickly arrived at the school and began investigating the incident, which involved further questioning of the girl in the presence of the administrators. While with the police, the student requested her mother several more times but was not allowed to contact her. Unable to confirm the allegations or locate the gun on school premises, the police officers ceased their investigation and contacted the mother to inform her of the allegations on their way to the police station.

In its decision, the Court listed several reasons why it would not require parental notification in situations like the one presented. First, school officials are in the best position to respond to the disciplinary and safety needs of a school as they arise and also must be able to implement the most effective means to respond to these needs. Second, school officials already face liability for inaction in many circumstances, and creating additional liability for proactive responses would cause confusion regarding the appropriate measures to take in a given situation. Third, mandating parental notification would only open the door to a host of new questions regarding the proper procedures for notification. Finally, the Court noted that it should refrain from hindering the ability of those directly affected by school policies and actions to shape those policies and actions through representative government.

While the Court's deference to school officials is certainly a welcome affirmation of the discretion vested in school officials, administrators should take steps to ensure that they do not arbitrarily ignore their students' constitutional rights. Further, even when an official has reason to believe that misconduct has occurred, school officials must ensure that any subsequent investigation be

related to the threat imposed. Also, the decision to notify or not notify parents of an ongoing investigation should be made on a case-by-case basis.

Although the better practice generally is to notify parents of an ongoing investigation when requested to do so by a student, in light of this recent decision, school officials may rest easier knowing that notification is not required in all cases. Consultation among school administrators, district office personnel, and legal counsel during such situations is advisable.

Boy Scouts of America Equal Access Act

Based on the recently enacted *Boy Scouts of America Equal Access Act*, all public school districts that allow any outside groups to meet on school grounds or use school facilities before or after school must also permit the Boy Scouts of America and other patriotic youth groups to use school grounds and facilities. Based on proposed regulations, school districts will be required to permit the scouts to use school-related means of communication, such as bulletin boards and public announcement systems, if they grant other groups access to these means of communication. Additionally, school districts will be required to grant the scouts access to student directory information for recruitment purposes. Finally, also based on the proposed regulations, although school districts may charge the scouts fees for facility usage, the fees must be equal to or less than the lowest fees the district charges any other group.

School districts retain the discretion to not open their facilities to outside organizations. Based on these proposed regulations, however, if a school district determines that it is appropriate to allow outside organizations to use its facilities, the district will be required to permit the scouts to use its facilities and grant them the most favorable terms and conditions.

Accordingly, in administering and developing facility use policies for community groups, school districts need to be cognizant of the impact of the new proposed regulations.

E-Rate Funding Developments

In August 2004, the Schools and Libraries Division of the Universal Service Administrative Company (USAC) placed a moratorium on all new funding requests under the E-Rate program, which provides money to school districts and libraries for internet installation and usage. As a result, many school districts faced the prospect of covering this unexpected shortfall by shifting funds from other sources or simply delaying payment to their service providers.

Fortunately, limited funding for new E-Rate applications finally resumed in November with \$23.4

million promised to 198 applicants, though not before over 4,000 requests with a total value of over \$400 million were received. Based on newly-enacted federal accounting requirements, even though funding resumed in November, schools were notified that they could still expect to face significant delays in funding authorization while USAC collected the necessary funds.

On December 23, 2004, President Bush signed into law House Bill 5419, which, in part, grants the USAC a one-year exemption from complying with the accounting requirements and will allow the USAC to promptly process the pending applications. Thus, E-Rate funds appear to be secure at the present time, although delays in funding may arise again if the USAC is forced to comply with the federal accounting requirements in future years.



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