

ELQ EDUCATION LAW QUARTERLY

A PREVENTIVE LAW NEWSLETTER

Published For Our Clients by the Cuddy & McCarthy Law Firm

SPRING/SUMMER 2010

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IN THIS DOUBLE ISSUE

by Evelyn A. Peyton

This year, the National School Boards Association (“NSBA”) has prepared an Employment Records Retention Summary Guide. The Guide is a detailed, but easy-to-read, chart showing how long school districts must keep various types of employment records under federal law. We thought this Guide would be so valuable to our *Education Law Quarterly* subscribers that we would include it in an *ELQ* issue. The NSBA has graciously given us permission to publish this Guide for you. Enjoy!

Because the Guide is so long, it could have taken an entire *ELQ* issue all by itself. Consequently, we have combined the Guide with three articles to create a special

Spring/Summer double issue for 2010. Have you ever wondered whether a quorum of school board members can attend a meeting, conference, or other activity together without violating New Mexico's Open Meetings Act? Has your school district ever tried to investigate an employee who may have engaged in criminal conduct in connection with his or her school district job, only to have the employee claim that cooperating with such an investigation would violate the employee's constitutional rights? Has a disabled student in your school district ever claimed that he or she needs to bring an assistance dog to school? The articles in this Spring/Summer double issue can help you and your school district recognize and deal with some of the issues involved in these potentially complex situations.

As always, we hope this issue of the *ELQ* will be helpful to you. We welcome your feedback, including your suggestions for topics you would like to see in future issues.



**EMPLOYMENT RECORDS RETENTION
REQUIREMENT SUMMARY GUIDE**
(Updated July 2010)



I. Documents Relating to Recruitment, Selection, Retention, and Termination of Employees

Type of Record	Retention Period	Statute and/or Regulation	Who is Covered?
Job orders submitted by employer to employment agencies or labor organization for recruitment of personnel for job openings	One year from date of personnel action	<u>29 C.F.R. § 1627.3</u> (Age Discrimination in Employment Act (ADEA) - see 29 U.S.C. § 626)	Employers that are engaged in an industry affecting interstate commerce and have at least 20 employees. 29 U.S.C. § 630.
Job advertisements and notices to the public or to employees regarding job openings, training programs, promotions, and opportunities for overtime	One year from date of personnel action	<u>29 C.F.R. § 1627.3</u> (ADEA - see 29 U.S.C. § 626)	Employers that are engaged in an industry affecting interstate commerce and have at least 20 employees. 29 U.S.C. § 630.
Employment test papers which disclose results	One year from date of personnel action	<u>29 C.F.R. § 1627.3</u> (ADEA - see 29 U.S.C. § 626)	Employers that are engaged in an industry affecting interstate commerce and have at least 20 employees. 29 U.S.C. § 630.
Results of physical examinations used in connection with a personnel action	One year from date of personnel action	<u>29 C.F.R. § 1627.3</u> (ADEA - see 29 U.S.C. § 626)	Employers that are engaged in an industry affecting interstate commerce and have at least 20 employees. 29 U.S.C. § 630.
Promotion, demotion, transfer, selection for training, layoff, recall, or discharge	One year from date of personnel action	<u>29 C.F.R. § 1627.3</u> (ADEA - see 29 U.S.C. § 626)	Employers that are engaged in an industry affecting interstate commerce and have at least 20 employees. 29 U.S.C. § 630.
Hiring documents, including job applications, resumes, job inquiries, and records of refusals to hire	One year from date of personnel action	<u>29 C.F.R. § 1627.3</u> (ADEA - see 29 U.S.C. § 626)	Employers that are engaged in an industry affecting interstate commerce and have at least 20 employees. 29 U.S.C. § 630.
<u>Form I-9 Employment Eligibility Verification Form</u>	Three years after date of hire or one year after date of termination, whichever is later	<u>8 U.S.C. § 1324a</u> (Immigration and Nationality Act)	Any entity hiring, recruiting, or referring an individual for employment in the United States. 8 U.S.C. § 1324a.



II. Documents Related to Compensation of Employees

Type of Record	Retention Period	Statute and/or Regulation	Who is Covered?
Payroll records, collective bargaining agreements – including any changes, individual contracts, written agreements under the FLSA, and memoranda summarizing oral agreements – sales and purchase records, and certificates and notices of the Wage and Hour Administrator	Three years	<u>29 C.F.R. § 516.5</u> (Fair Labor Standards Act (FLSA) – see 29 U.S.C. §§ 206(d)(1) & 211)	Employers of employees engaged in commerce or in the production of goods for commerce, or employed in an enterprise engaged in commerce or in the production of goods for commerce. 29 U.S.C. § 206.
Supplementary basic records including basic employment and earnings records; wage and rate tables utilized to calculate straight time and overtime work schedules; work-time schedules; order, shipping, and billing records; records of additions to or deductions from wages paid; records used for determining costs; and records explaining basis for payment of any wage differential to employees of the opposite sex	Two years	<u>29 C.F.R. §§ 516.6 & 1620.32</u> (FLSA - see 29 U.S.C. §§ 206(d)(1) & 211)	Employers of employees engaged in commerce or in the production of goods for commerce, or employed in an enterprise engaged in commerce or in the production of goods for commerce. 29 U.S.C. § 206.
Certificates of age	Until termination of employment	<u>29 C.F.R. § 570.6</u> (FLSA - see 29 U.S.C. §§ 206(d)(1) & 211)	Employers of employees engaged in commerce or in the production of goods for commerce, or employed in an enterprise engaged in commerce or in the production of goods for commerce. 29 U.S.C. § 206.
New! Effective July 19, 2010 Work-Study Program (WSP) written participation agreements	Three years from the date of the student's WSP enrollment	<u>29 C.F.R. § 570.37</u> (FLSA, as amended - Child Labor Regulations)	Both the employer and the school supervising and administering the work-study program. 29 C.F.R. § 570.37(b)(4)(ii).
Payroll and other records containing name, address, date of birth, occupation, pay rate, and weekly compensation	Three years	<u>29 C.F.R. § 1627.3</u> (ADEA - see 29 U.S.C. § 626)	Employers that are engaged in an industry affecting interstate commerce and have at least 20 employees. 29 U.S.C. § 630.
Employment tax records	At least four years after the tax's due date for the return period to which the records relate, or the date such tax is paid, whichever is later	<u>26 C.F.R. § 31.6001-1</u> (Internal Revenue Code – see 26 U.S.C. § 6001)	FICA: All U.S. employers, including schools, for all employees except those that are also students in the school. 26 U.S.C. § 3121(b). FUTA: any employer who pays wages of \$1,500 or more per year. 26 U.S.C. § 3306.



III. Documents Related to Employee Benefit Plans

Type of Record	Retention Period	Statute and/or Regulation	Who is Covered?
Employee benefit plans (such as pension or insurance plans); seniority and merit systems which are in writing; memoranda fully outlining those systems not in writing	Duration of plan and for at least one year after the plan's termination	29 C.F.R. § 1627.3 (ADEA – see 29 U.S.C. § 626)	Employers that are engaged in an industry affecting interstate commerce and have at least 20 employees. 29 U.S.C. § 630.
Copies of notices required by COBRA; documentation that the notices were received; documentation of any circumstances in which COBRA continuation is not offered due to gross misconduct, Medicare entitlement, late notification, etc.; any related communication	Not specified by COBRA; COBRA amended ERISA, so it is recommended that ERISA requirements be followed: six years from date of record	ERISA recordkeeping requirements: 29 U.S.C. § 1027; COBRA: 42 U.S.C. §§ 300bb-1 to -8; see 29 U.S.C. § 1161 <i>et seq.</i>	States that receive funds under the Public Health Service Act, and all political subdivisions, agencies, and instrumentalities of such states. 42 U.S.C. § 300bb-1.
Records of HIPAA/HITECH-compliance policies and procedures	Six years from the date of record's creation or date it was last in effect, whichever is later	45 C.F.R. § 164.316(b) & .530(i) (HIPAA – see 42 U.S.C. § 1320d-1) (HITECH – see 42 USC § 17938)	A health care provider that conducts certain transactions in electronic form; a health care clearinghouse; a health plan; and business associates (BAs) under the HITECH Act. 42 U.S.C. § 1320d-1; 45 C.F.R. § 164.501. (Definition of a BA – see 45 C.F.R. § 160.103).



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IV. Documents Related to Employee Exposure to Toxic Substances

Type of Record	Retention Period	Statute and/or Regulation	What is Covered?
Records of medical examinations required by law	Duration of employment plus thirty years, with exceptions for certain records	29 C.F.R. § 1910.1020 (Occupational Safety and Health Act (OSHA) – see 29 U.S.C. § 657)	“Federal OSHA standards do not apply to public sector employees, but the 24 states and two territories that operate OSHA-approved state plans are required to enforce an ‘at least as effective’ standard in the public sector.” <u>Source</u>
Records of monitoring exposure to hazardous materials	Thirty years	29 C.F.R. § 1910.1020 (OSHA– see 29 U.S.C. § 657)	“Federal OSHA standards do not apply to public sector employees, but the 24 states and two territories that operate OSHA-approved state plans are required to enforce an ‘at least as effective’ standard in the public sector.” <u>Source</u>
Records of “significant adverse reactions” to the health of employees	Thirty years from date of adverse reaction first reported to or known by person maintaining record	15 U.S.C. § 2607 (Toxic Substances Control Act (TSCA))	Manufacturers, processors, or distributors of any chemical substance. See also: <u>PCBs</u>
Any other records of “significant adverse reactions” to health or the environment	Five years from date of adverse reaction first reported to or known by person maintaining record	15 U.S.C. § 2607 (TSCA)	Manufacturers, processors, or distributors of any chemical substance. See also: <u>PCBs</u>
A copy of reports submitted under the TSCA, materials and documents sufficient to verify or reconstruct the report, a copy of notices sent to customers, and return receipts signed by customers who received notices	Three years following creation or compilation of the record	40 C.F.R. § 704.11 (TSCA – see 15 U.S.C. § 2607)	Manufacturers, processors, or distributors of any chemical substance. See also: <u>PCBs</u>



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V. Documents Related to Drug and Alcohol Testing

Type of Record	Retention Period	Statute and/or Regulation	Who is Covered?
Records related to positive test results and/or refusals to take a required alcohol and/or controlled substances test; driver evaluation and referrals	Five years	49 C.F.R. § 382.401; <i>see also</i> 49 C.F.R. § 40.333 (Controlled Substances and Alcohol Use and Testing)	Employers of drivers of commercial motor vehicles, including school bus drivers. 49 C.F.R. § 382.103.
Equipment calibration documentation, records related to administration of alcohol and controlled substances testing programs, copy of annual calendar year summary	Five years	49 C.F.R. § 382.401; <i>see also</i> 49 C.F.R. § 40.333 (Controlled Substances and Alcohol Use and Testing)	Employers of drivers of commercial motor vehicles, including school bus drivers. 49 C.F.R. § 382.103.
Records related to the collection process, including collection logbooks; documents relating to the random selection process, reasonable suspicion testing, and post-accident testing; and documents verifying employee's inability to provide breath for testing	Two years	49 C.F.R. § 382.401; <i>see also</i> 49 C.F.R. § 40.333 (Controlled Substances and Alcohol Use and Testing)	Employers of drivers of commercial motor vehicles, including school bus drivers. 49 C.F.R. § 382.103.
Records related to negative and cancelled test results	One year	49 C.F.R. § 382.401 (Controlled Substances and Alcohol Use and Testing)	Employers of drivers of commercial motor vehicles, including school bus drivers. 49 C.F.R. § 382.103.
Records related to the training of individuals for breath-alcohol testing	While the individual performs the functions which require the training and for two years after ceasing to perform those functions	49 C.F.R. § 382.401 (Controlled Substances and Alcohol Use and Testing)	Employers of drivers of commercial motor vehicles, including school bus drivers. 49 C.F.R. § 382.103.



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VI. Documents Related to Discrimination

Type of Record	Retention Period	Statute and/or Regulation	Who is Covered?
Personnel records concerning a discrimination charge or an action brought against a school (e.g., personnel or employment records relating to the charging party and to all other employees holding similar positions, application forms, or test papers completed by all applicants for the same position)	Until final disposition (the date of expiration of the statutory period or the date on which litigation is terminated)	<u>29 C.F.R. § 1602.40</u> (Americans with Disabilities Act (ADA) – <i>see</i> 42 U.S.C. § 12112) (Section 709 of Title VII of the Civil Rights Act – <i>see</i> 42 U.S.C. § 2000e) (Genetic Information Nondiscrimination Act (GINA) – <i>see</i> 42 U.S.C. § 2000ff-5(a))*	Every public elementary and secondary school system or district, including every individually or separately administered district within a system, with 15 or more employees and every individual school, regardless of the size of the school. <u>29 C.F.R. § 1602.39.</u>
Any personnel record made or kept by a school or district (including but not limited to requests for reasonable accommodation, application forms and records having to do with hiring, promotion, demotion, transfer, layoff or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship)	Two years from the date the record is made or the personnel action is taken, whichever occurs later	<u>29 C.F.R. § 1602.40</u> (ADA – <i>see</i> 42 U.S.C. § 12112) (Section 709 of Title VII of the Civil Rights Act – <i>see</i> 42 U.S.C. § 2000e) (GINA – <i>see</i> 42 U.S.C. § 2000ff-5(a))	Every public elementary and secondary school system or district, including every individually or separately administered district within a system, with 15 or more employees and every individual school, regardless of the size of the school. <u>29 C.F.R. § 1602.39.</u>
Personnel records of an individual whose employment has been involuntarily terminated	Two years from the date of the termination	<u>29 C.F.R. § 1602.40</u> (ADA – <i>see</i> 42 U.S.C. § 12112) (Section 709 of Title VII of the Civil Rights Act – <i>see</i> 42 U.S.C. § 2000e) (GINA – <i>see</i> 42 U.S.C. § 2000ff-5(a))	Every public elementary and secondary school system or district, including every individually or separately administered district within a system, with 15 or more employees and every individual school, regardless of the size of the school. <u>29 C.F.R. § 1602.39.</u>
All records and information which are necessary for the completion of report EEO-5 (regardless of whether or not a school is required to file the report)	Three years (at the central office of the school system or district, or at the individual school, whichever is more convenient)	<u>29 C.F.R. § 1602.39</u> (ADA – <i>see</i> 42 U.S.C. § 12112) (Section 710 of Title VII of the Civil Rights Act <i>see</i> 42 U.S.C. § 2000e) (GINA – <i>see</i> 42 U.S.C. § 2000ff-5(a))	Every public elementary and secondary school system or district, including every individually or separately administered district within a system, with 15 or more employees and every individual school, regardless of the size of the school. <u>29 C.F.R. § 1602.39.</u>
A copy of the most recently filed report EEO-5 (EEO-5 survey) [†]	Three years (at the central office of the school system or district)	<u>29 C.F.R. § 1602.41</u> (Section 710 of Title VII of the Civil Rights Act – <i>see</i> 42 U.S.C. § 2000e)	The school systems and districts covered are: (a) Every one of those which have 100 or more employees, and (b) Every one of those others which have 15 or more employees from whom the Commission requests the filing of reports. <u>29 C.F.R. § 1602.41</u>
Any personnel records concerning an employee or applicant relative to an ADEA action brought against the employer	Until final disposition	<u>29 C.F.R. § 1627.3</u> (ADEA - <i>see</i> 29 U.S.C. § 626)	Employers that are engaged in an industry affecting interstate commerce and have at least 20 employees. 29 U.S.C. § 630.

[†] A school system or district may apply for an exemption from these reporting requirements by submitting a specific proposal for an alternative reporting system.
See 29 C.F.R. § 1602.44



VII. Documents Related to Employee Leave

Type of Record	Retention Period	Statute and/or Regulation	Who is Covered?
Basic payroll and identifying employee data, including name, address, occupation, rate of pay and terms of compensation, daily and weekly hours worked per pay period, and additions or deductions from wages	Three years	29 C.F.R. § 825.500 (Family and Medical Leave Act of 1993 (FMLA) – see 29 U.S.C. § 2616)	Employers that are engaged in or affect commerce and have at least 50 employees. 29 U.S.C. § 2611.
All records pertaining to compliance with FMLA's leave requirements, including dates and hours (if less than a full day) of FMLA leave; copies of employer notices, documents describing premium payments and employee benefits and records of disputes with employees over FMLA benefits. Documents describing FMLA notices and copies of employer's FMLA policy	Three years	29 C.F.R. § 825.500 (FMLA – see 29 U.S.C. § 2616)	Employers that are engaged in or affect commerce and have at least 50 employees. 29 U.S.C. § 2611.



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VIII. Documents Related to Employee Polygraph Testing

Type of Record	Retention Period	Statute and/or Regulation	Who is Covered?
Copy of statement that sets forth the specific incident or activity under investigation and the basis for testing that particular employee; records identifying any loss or injury in question and the employee's access to it	Three years from date polygraph examination is administered (or from the date the exam is requested if no exam is administered)	<u>29 C.F.R. § 801.30</u> (Employee Polygraph Protection Act (EPPA) – <i>see</i> 29 U.S.C. § 2001)	Employers engaged in or affecting commerce or in the production of goods for commerce. 9 U.S.C. § 2002.
Copy of the written statement that sets forth time and place of examination and examinee's right to consult with counsel	Three years from date polygraph examination is administered (or from the date the exam is requested if no exam is administered)	<u>29 C.F.R. § 801.30</u> (EPPA – <i>see</i> 29 U.S.C. § 2001)	Employers engaged in or affecting commerce or in the production of goods for commerce. 29 U.S.C. § 2002.
Written notice to the examiner of the persons to be examined	Three years from date polygraph examination is administered (or from the date the exam is requested if no exam is administered)	<u>29 C.F.R. § 801.30</u> (EPPA – <i>see</i> 29 U.S.C. § 2001)	Employers engaged in or affecting commerce or in the production of goods for commerce. 29 U.S.C. § 2002.
Copies of all opinions, reports, or other records furnished to employer by examiner relating to such examinations	Three years from date polygraph examination is administered (or from the date the exam is requested if no exam is administered)	<u>29 C.F.R. § 801.30</u> (EPPA – <i>see</i> 29 U.S.C. § 2001)	Employers engaged in or affecting commerce or in the production of goods for commerce. 29 U.S.C. § 2002.

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THE OPEN MEETINGS ACT AND GOING TO MEETINGS TOGETHER

by C. Emery Cuddy, Jr.

The recent School Law Conference in Albuquerque on June 4-5, 2010 again raised the perennial question about whether there are Open Meetings Act (“OMA”) issues to be considered when a quorum of a school board attends a meeting, conference or other activity together. Many school board members and superintendents seem to be under the impression that so long as the board will not be “taking action” at such meetings, the OMA does not impose any notice obligations. This assumption is not correct.

The OMA requires notice to the public any time a quorum of the board is together and public business is discussed. The relevant provision of the Act states:

All meetings of a quorum of members of any board . . . held for the purpose . . . of . . . discussing public business . . . are declared to be public meetings open to the public at all times, except as provided in the constitution of New Mexico or the Open Meetings Act.

NMSA 1978 § 10-15-1(B). The quoted language begs the question of what constitutes the “discussion of public business.” The Attorney General has taken an expansive view of this topic. Essentially, any discussion of school business, activities, operations, problems, personnel, budget, policy, etc. will be considered a discussion of public business, with any doubt being resolved in favor of a “public business” conclusion. That conclusion then triggers the legal requirement that where a quorum is present and such discussions are occurring, those discussions are a meeting open to the public, and public notice of the meeting is required.

The Attorney General has recognized that the OMA “is not intended to alter the business or social relationships” of members of school boards, and you should feel free to continue to meet socially or attend social or business events where a quorum of school board members may be present. However, the Attorney General’s Compliance Guide cautions that if public business arises in such business or social settings, a quorum of school board members “should avoid discussing the matter between themselves.”

The essence of this issue is public perception. Typically, some members of the public will automatically assume that when a quorum of school board members are together in one place, they must be talking about school business and therefore are violating the OMA. Certainly, as a school board member, you should avoid discussing school business in such situations. You should be aware of the public scrutiny that board members are often under and, to the extent possible, avoid a quorum of board members being seen talking together publicly, particularly where you know that the press or disaffected members of the public are keeping an eye on you.

There are several situations where you know in advance that a quorum of board members will be together and public business, in the broadest sense, will be discussed. The OMA does not prohibit you and other members of your school board from being together and discussing public business. What the OMA does require, however, is that you give notice to the public that such meetings and discussions will be taking place. Out of an abundance of caution, we recommend that in such situations, you give notice to the public of such events and tell the public that they are entitled to attend and listen, if they wish. The mechanism for such notice should be provided in your annual OMA notice.

Here are some examples of situations where we believe you should be providing notice to the public of meetings of a quorum of the board:

1. A quorum of board members regularly gets together for some period before the official start of a board meeting (sometimes referred to as a “pre-meeting”) or remains together after the board meeting has adjourned.
2. “Work sessions” at which school business is discussed, even if no action will be taken.

All that the OMA requires in the situations described above is that the public be given notice of such meetings and that the public be invited to attend and listen. The notice part of the requirement is easy. All you need to do is to indicate in your meeting notice the earliest time that board members will convene (even if that time is 15 or 30 minutes before the official start time of the board meeting) or the latest time that a quorum will still be present.

The Attorney General recognizes that where a quorum is together only for training, with the members simply receiving information (as opposed to actively engaging in policy formulation or discussion), no public notice is required. This exception should be used sparingly, however, and only after advice of counsel that the exception is appropriate under the circumstances.

Some questions have arisen about whether public notice is required when a quorum of a school board’s members travel together in the same vehicle when going to a conference or other activity. Although the public-perception problem can arise in such situations, we believe that giving public notice in such situations is unnecessary and impractical. Instead, we recommend that school board members assure that they do not discuss public business in such situations.

EMPLOYEE RIGHTS UNDER *GARRITY ET AL. V. NEW JERSEY*

by Evelyn A. Peyton

Imagine that you are a school district administrator, and you suspect an employee in your school district of engaging in criminal conduct in connection with his or her school district job. Examples of such conduct might include stealing school district funds, or having criminal sexual contact with a student. The suspected conduct is serious, and you want to investigate. However, the employee doesn't want to meet with his or her supervisor, because the employee is afraid that the supervisor will give the employee's statement to the police. The employee and/or the employee's lawyer or union representative claim that the school district can't force the employee to talk, because doing so would violate the employee's constitutional rights. What can (or should) the school district do in such a situation?

Answering that question involves an analysis of *Garrity et al. v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616, 17 L.Ed.2d 562 (1967). In the *Garrity* case, New Jersey police officers were accused of "fixing" traffic tickets. *Id.* at 494. The officers were investigated by the New Jersey Attorney General's office. *Id.* Before being questioned, each officer was warned that anything he said might be used against him in a state criminal proceeding; that he could refuse to answer if the disclosure might tend to incriminate him; and that if he refused to answer, his employment with the police department could be terminated. *Id.*

The officers answered the questions, and some of their answers were used in subsequent criminal prosecutions against them for the ticket-fixing. *Id.* at 495. After the officers were convicted, they appealed their criminal convictions, claiming that their statements to the investigators from the Attorney General's office were coerced and therefore could not be used against them in their criminal trials. *Id.*

Ultimately, the officers' appeal ended up before the United States Supreme Court. The Supreme Court reasoned that the officers' confessions during the investigation were coerced rather than voluntary, and coercion can be mental as well as physical. *Id.* at 496. As the Supreme Court explained, the officers had been forced to choose "between self-incrimination or job forfeiture," a choice that "is the antithesis of free choice to speak out or remain silent." *Id.* at 496. Consequently, the Supreme Court held that the Fourteenth Amendment prohibits the use of "statements obtained under threat of removal from office" in subsequent criminal proceedings. *Id.* at 500. The *Garrity* case may be raised by union representatives as a basis for limiting administration contact with an employee suspected of misconduct.

A school district investigating an employee for potentially criminal misconduct can require the employee to meet with his or her supervisor, but the school district cannot give the employee's statement made in such a meeting to the police if the employee's statement was not given voluntarily. The school district is not required to advise the employee of his or her *Garrity* rights, but if asked, the school district can tell the

employee that if the employee is compelled to cooperate with the school's investigation, the school district cannot give the employee's statement or admissions to the police. If the employee refuses to answer the supervisor's questions, that refusal can constitute insubordination. Firing an employee for this particular type of insubordination will raise a claim that he or she was forced to choose between self-incrimination and job loss. Where no effort has been made to share the investigation results with law enforcement, or assurance is given that the school district will not do so, the claim should fail.

In certain circumstances, a state or federal prosecutor might grant a school district employee immunity from prosecution in exchange for the employee's testimony in a criminal case. This immunity may take one of two forms. *Transactional immunity* (also known as "blanket" or "total") immunity completely protects the witness from future prosecution for crimes related to his or her testimony. *Use and derivative use immunity* only prevents the prosecution from using the witness' own testimony, or any evidence derived from that testimony, against the witness. However, if the prosecution acquires evidence substantiating a criminal charge independent of the witness' testimony, the witness may then be prosecuted for that criminal charge. Prosecutors at the state level typically may offer a witness either transactional or use immunity, but federal prosecutors typically offer only use immunity.

Of course, neither a school district nor its administrators has any authority to grant immunity from criminal prosecution. Only a federal or state prosecutor can grant such immunity. Ideally, any grant of immunity would be in writing signed by the prosecutor in order to provide the employee with a written assurance that the employee's statements would not be used against the employee in any subsequent criminal prosecution regarding the employee's alleged misconduct. If a school district employee has been granted immunity, the employee cannot use the *Garrity* case as a defense to insubordination.

School district investigations of employees facing possible criminal charges involve potentially difficult legal issues, and the appropriate legal advice depends upon the facts of each specific case. If you need to deal with such an investigation, you should contact your school district's legal counsel for guidance even before beginning your investigation.

DOGS IN THE CLASSROOM?

by Stefen Wasserman

Accommodating blind or visually impaired students by permitting the use of assistance animals (*i.e.*, guide dogs, service dogs, and mobility aide dogs) has become commonplace due to federal legislation such as the Americans with Disabilities Act ("ADA") and the Individuals with Disabilities Education Act ("IDEA"). However, the law in New Mexico allowing students with other disabilities (such as autism, emotional

disturbance and other recognized disabilities under the IDEA) to bring assistance animals into public schools and classrooms is somewhat less clear. School districts in New Mexico and other states have recently challenged students' rights to bring assistance dogs into the classroom. For example, in Illinois, a six-year-old student with autism attempted to go to first grade with his assistance dog. The dog had been trained for nearly two years and had learned 30 commands regarding how to interact with autistic children in various settings. However, the Illinois school district sought to keep assistance dogs out of the classroom, because the district was concerned about safety issues and classroom distraction. Like New Mexico, Illinois has laws permitting visually impaired children to have guide dogs at school, but state laws are less fully developed regarding assistance dogs for students with other impairments.

In fact, cases are starting to pop up across the country regarding the use of assistance dogs by students with various disabilities. In New York, for example, a hearing-impaired student with a disability attending the 10th grade at the East Meadow Union Free School District attempted to enter a test examination site with his assistance dog. The principal, who was responsible for administering the examination, met the student at the main entrance and denied his request to have the dog accompany him while he took the examination. The principal explained that no prior request or arrangements had been made for the dog's admission. After consulting with the superintendent, the principal told the student he would be admitted to the examination without the dog. The student's parents filed suit, contending that the superintendent and principal violated federal and state anti-discrimination laws, and sought a determination that their son be granted access, with his assistance dog, to all New York State Education Department-approved examination testing sites.

In *New York State Division of Human Rights v. East Meadow Union Free School District*, 108 LRP 15211 (2008), the New York State Division of Human Rights ("NYSDHR"), relying on the above facts, stated:

A school district must stop enforcing an access policy that the commissioner found discriminatory. The policy did not provide an absolute right of access to its educational facilities to students with disabilities who used guide dogs, hearing dogs or service dogs. The district, instead, used a balancing test to assess on a case-by-case basis whether a student with a disability was allowed to enter its facilities with a dog. The test weighed the potential benefits to the student with a disability against the risks inherent in having a service animal in the school building. The district argued that the policy was implemented in accordance with the ADA.

The NYSDHR commissioner noted that the district's reliance on the ADA did not relieve it of its responsibility under the state's human rights law, which is far broader than the ADA. The commissioner instructed the district to stop enforcing its access policy

regarding guide dogs and to develop a new policy based on provisions of state law rather than the ADA. As such, the school district lost the initial stages of litigation.

Thereafter, the school district appealed the matter to the New York appellate courts. In the *Matter of East Meadow Union Free School District v. New York State Division of Human Rights*, 65 A.D.3d 1342, 109 LRP 62241 (N.Y. App. Div. 2009), the school district successfully challenged the commissioner's determination that the school's access policy regarding guide dogs violated state law. Ultimately, the appellate court reasoned that the school district was not bound by the state law's access provisions and ruled in favor of the school district. Nonetheless, the multiple levels of litigation in this matter certainly proved costly to the school district, and the court's esoteric rationale and distinction between the ADA and state law may only create more confusion as to whether aide dogs should be allowed in the classroom.

Although other states have provided mixed guidance regarding allowing assistance dogs in schools, New Mexico statutes provide some insight. The Assistance Animal Act (NMSA 1978, § 28-11-1 *et seq.*) states in pertinent part that:

As used in the Assistance Animal Act, "qualified assistance animal" means any assistance dog or other animal that has been or is being trained to provide assistance to an individual with a disability and includes:

- A. an assistance dog that has been or is being trained as a guide dog, hearing dog or service dog;
- B. a guide dog that has been or is being trained to aid a blind or visually impaired person;
- C. a hearing dog that has been or is being trained to aid a deaf or hearing-impaired person; and
- D. a service dog that has been or is being trained to aid a person with a disability other than a sight or hearing impairment.

If a dog meets the qualifications cited above, the school district should be inclined to allow the dog to accompany a disabled student at school. Indeed, the Assistance Animal Act dictates that qualified assistance animals "shall be admitted to any building open to the public," provided that the animal is under the control of its owner or trainer. NMSA 1978, § 28-11-3(A).

Significantly, a service dog must receive special training in order to be considered a "qualified assistance animal." In *Letter to: Mercer University*, 108 LRP 10898 (2007), the complainant alleged that the school adopted a policy regarding the use of service animals on campus that violated Section 504 of the Rehabilitation Act (the federal statute barring discrimination on the basis of disability in federally supported programs). The

student claimed that the policy established conditions, limitations, and procedural prerequisites for the use of service animals that have the effect of excluding or limiting students and other individuals from accessing the facilities, programs and services of the school. The Office of Civil Rights (“OCR”) investigated the issue of training and made the following observations:

The record revealed that the school used a protocol from Assistance Dogs International (“ADI”) to test whether an animal could demonstrate its training as a service animal. ADI standards required that a service animal be able to demonstrate three or more tasks designed to mitigate aspects of a student’s disability. Because the ADI tasks requirement might limit use of a service animal that only serves one task (*e.g.*, notifying a student with a disability of an impending seizure), the school agreed to discontinue use of the ADI standards as the guide for demonstration of a service animal’s training.

OCR explained that a school may require sufficient documentation or other information to show that a service animal has been individually trained to do work or perform tasks for a student with a disability. Nevertheless, a school may not require that a service animal be trained or certified by any particular organization or in any particular method. Therefore, school districts should have a policy in place to avoid any potential compliance concerns with training or other restrictions that would deny the admittance of qualified assistance animals.

School districts should be aware of the possible consequences for violating the Assistance Animal Act. Anyone who violates the Assistance Animal Act “shall be guilty of a misdemeanor” and can be sentenced to imprisonment and/or payment of a fine of up to \$1,000. NMSA 1978, §§ 28-11-4, 31-19-1(A). Additionally, as noted in the *East Meadow Union* case discussed above, such violations could give rise to a discrimination claim against a school or a school district.

Finally, school districts must consider the effects that allowing an assistance dog in the classroom could have on students other than the dog’s owner. For example, what if other students in the same classroom are adversely affected by the dog due to allergies to, or fear of, animals? Even though the district may be required to allow the assistance dog in the school, a further level of inquiry is needed when a district is confronted by students with conflicting rights. In that instance, the school district may have to consider accommodations for the other students. When dealing with the Assistance Animal Act, the district should be cognizant of additional issues that may develop involving other students as a result of allowing assistance dogs in the classroom. If you have any questions or concerns regarding such situations, please consult with your school district’s counsel for legal advice.

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