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**Legal Insights**

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*for School Districts*

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**New employee leave available to family members of Armed Forces' members**

**by Brian J. O'Connor**

Employees who are family members of a military service member are eligible under certain circumstances for unpaid leave when the service member is called to military service. In addition to the current Illinois Family Military Leave Act ("ILFMLA") that has been in effect since August 2005, a new entitlement for family members of injured service members became law earlier this year under the federal Family Medical Leave Act ("FMLA").

***FMLA for family members of an injured member of the Armed Forces***

On January 28, 2008, the National Defense Authorization Act for Fiscal Year 2008 ("Act") was signed into law as Public Law 110-181. Section 585 of the Act expands applicability of the Family Medical Leave Act ("FMLA") to FMLA eligible employees who are family members of a service member injured during military service. To be eligible for leave under the new law, the employee's military family member must be "undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness" and not just acting pursuant to military orders (29 U.S.C. 2611(16)).

Under the Act, an eligible employee who is the spouse, son, daughter, parent, or next of kin (a new term defined in 29 U.S.C. 2611(18)) of a covered service member (as defined above) is entitled to a total of 26 weeks of leave during a single 12-month period to care for the convalescing service member. This 26 week leave option is inclusive of the 12 week leave already available under FMLA. An employee entitled to take the 26 week leave to care for a convalescing military family member cannot subsequently take an additional 12

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**IHSA to conduct student-athlete drug testing**

**by David Zafiratos**

Beginning with the 2008-2009 school year, the IHSA will implement random drug testing of student-athletes for performance enhancing substances. Section 24 of the IHSA's Administrative Procedures, Guidelines and Policies for 2008-2009 (the "Policy") establishes procedures for student-athlete testing. The Policy includes a list of banned substances, sets forth the procedures for testing, and defines the penalties for testing positive for a banned substance. The Policy applies only to the 2008-2009 school year and will be subject to annual reapproval by the IHSA. A video presentation detailing the Policy may be found on the IHSA's website, [www.IHSA.org](http://www.IHSA.org).

***Banned Substances***

IHSA By-law 2.170 established a list of banned substances including four general categories: stimulants, anabolic agents/steroids, diuretics, and peptide hormones/analogues. The Policy also lists several examples of banned substances within each category, though the list is not meant to be exhaustive. The National Collegiate Athletic Association (NCAA) uses the same list of banned substances for its student-athlete performance enhancing substances policy.

The Policy also warns student-athletes regarding the use of dietary supplements which they believe are free from banned substances. Since the FDA does not strictly regulate dietary supplements, it is possible that a product could contain an ingredient not listed on the label. Student-athletes therefore run the risk of unknowingly ingesting a banned substance. The Policy notes, however, that student-athletes are responsible for any substance they ingest. Inadvertence is not a defense to a violation of the Policy.

***Procedures for Testing***

Testing under the Policy will occur only for state-series or post-season competition. To participate in post-season competition, student-athletes and their parents must sign a consent form agreeing to the testing procedures under the Policy. Anyone who does not sign a consent form will be ineligible to participate in tournaments or other post-season competition.

The Policy will apply to all sports, but participants in higher risk sports will have a greater likelihood of being tested. The IHSA will determine which sports pose a greater risk of performance-enhancing substance abuse, and call for more testing in those sports. Additionally, the IHSA has selected an independent third-party administrator, Drug Free Sport, to conduct the random testing of participants.

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## New employee leave available

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weeks of leave during the same 12-month period. Furthermore, unlike the 12 week leave that is repeatedly available to an employee every 12 months, the new 26 week leave opportunity is only available one time. If an employee takes 26 weeks of leave under this provision, they will only be eligible for the standard 12 week FMLA entitlement in future years. An employee requesting FMLA leave under this new provision must still be an FMLA eligible employee: having performed 1250 hours of service within the previous 12-month period (see 29 U.S.C. 2611(2)). As with the traditional FMLA leave, the leave available under this new entitlement is also unpaid leave.

The requirements for this new FMLA leave entitlement include some changes to traditional FMLA entitlement requests. Similar to traditional FMLA leave, the 26 week period may be taken intermittently (29 U.S.C. 2612(b)). Also, an employer may require the requesting employee to substitute accrued paid vacation leave, personal leave, family leave, or medical or sick leave for any part of the 26 week period (29 U.S.C. 2612(d)), subject to negotiated union contract provisions.

In a change from the notice required for traditional FMLA leave, an employee seeking FMLA leave under this provision is only required to provide reasonable and practicable notice to the employer when the need becomes foreseeable (29 U.S.C. 2612(e)). Under this provision, an employer may request certification from the employee who is requesting FMLA leave. The U.S. Secretary of Labor is developing a form for such certification (29 U.S.C. 2613(f)) to be used by employees. That form has not been developed at the time of this publication.

### ***ILFMLA for family members of a member of the Armed Forces***

Another opportunity for unpaid leave for certain employees with family members who are service members is available under the Illinois Family Military Leave Act ("ILFMLA"). This leave is available to an employee who is the spouse or parent of a service member called to military service for a period greater than 30 days (820 ILCS 151/5). While ILFMLA leave is more limited than the federal FMLA and only the spouse or parent of the service member are eligible, the leave may be used whenever the service member's orders are in

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## Federal law protects students with food allergies

**by Maureen Anichini Lemon**

School districts are currently required to accommodate the needs of students with food allergies despite recent failed attempts to pass legislation to bolster that requirement. As many of you know firsthand, food allergy is a growing safety concern for school districts throughout America. Ninety percent (90%) of all food allergic reactions stem from the following eight foods: milk, eggs, fish, shellfish, tree nuts, peanuts, wheat, and soy. From 1997 to 2002, the number of children with peanut allergy doubled. Allergic reactions to any allergen may vary, ranging from mild to life-threatening. Children with life-threatening allergies, particularly to peanuts and tree nuts, can die within minutes of exposure to the allergen. There are an estimated 93,000 school-age children in Illinois with life-threatening food allergies. Although recent legislation introduced at both the federal and state levels did not become law, school districts have a legal obligation to manage life-threatening food allergies in the school setting.

In Illinois, HB 5338 was introduced this year that would require all Illinois school boards to implement a policy for the management of students with life-threatening food allergies no later than January 1, 2010. This bill was believed to have died in the Rules Committee. However, on August 26, 2008, in an amendatory veto, Governor Blagojevich added pertinent language from HB 5338 to SB 2685, a bill governing school institute days. Whether this action becomes law will not be known until the conclusion of the General Assembly's November 2008 veto session.

So why are we writing an article on legislation that may or may not pass? Because irrespective of these legislative initiatives, Illinois school districts are mandated to protect children with severe food allergies pursuant to Section 504 of the Rehabilitation Act of 1973 ("Section 504"), and the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"). The recent rise in the number of children affected by food allergies warrants a review of those mandates.

A child may qualify for special education and related services under the "other health impairment" ("OHI") category of IDEIA if the food allergy causes the child to have limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, and adversely affects the child's educational performance. In *Pacific Grove Unified School District, 47 IDELR 138 (OCR 2006)*, a third-grade child with a life-threatening allergy to nuts was found eligible under the OHI category. The child's IEP provided for a one-to-one classroom aide to assist with cleaning, monitoring the student's contacts with other students, providing cleaning products and ensuring a 'nut-free' environment. Modifications listed in the IEP included daily vacuuming of the classroom carpet, daily washing of the desks in the classroom, daily hand washing by everyone upon entering the classroom and after snack recess and lunch break, and maintaining the classroom as a 'food-free' area.

Section 504 requires schools to provide 'reasonable' accommodations to children who have a mental or physical impair-

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## Students with food allergies

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ment that substantially limits one or more major life activities. In *Mystic Valley Regional Charter School*, 40 IDELR 275 (Mass. SEA 2004), the parents of a child with a life-threatening peanut and tree-nut allergy filed a claim that the school district failed to accommodate their son's disability. The parents wanted a complete ban on all peanut / tree nut products in their son's first grade classroom. The school had made numerous accommodations, including sending a letter to the parents of other students requesting that they not send any products containing the allergens to school. The school required the students and staff to wash their hands before and after eating, and provided staff training on recognizing the symptoms of an anaphylactic reaction as well as how to administer the life-saving medicine. The school also ceased supplying peanut butter sandwiches as an alternative lunch option, required the allergic child to eat with a chosen classmate at a peanut / tree nut free table, and washed all tables and desks before and after meals. The first grade teacher checked each child's food that was brought into the classroom before the food was consumed. The school district cited these measures as reasonable accommodations and did not implement a complete ban on peanut / tree nut products in the classroom. The state hearing officer disagreed, finding that the district discriminated against the child because of his food allergies. The boy was not allowed to participate in an educational experience involving Asian food, and his assignment for lunch and snacks was deemed stigmatizing and isolating.

The hearing officer directed the school district to ban peanuts and tree nut products from the child's classroom. The key factor in the hearing officer's decision was that the child's allergy was not merely 'severe' or 'serious' but, rather, 'life-threatening.' Every time the student had ever come into contact with even a small amount of peanut, he has had an allergic reaction and has suffered at least one anaphylactic reaction. Unlike other allergens, where repeated exposure might minimize future allergic reactions, peanuts and tree nuts tend to create a more severe reaction with each incident of exposure. Thus, avoidance of these allergens is the only means for truly protecting the children involved.

The parents sought the complete ban so that their son could eat and socialize among all of his classmates during lunch and snack periods. Under Section 504, school districts are required only to provide 'reasonable' accommodations that are not unduly burdensome to the school district. In *Mystic Valley*, the district argued that a complete ban would be unreasonable because it would inconvenience the other families in the child's classroom. The hearing officer rejected this argument, ruling that the "impact of a modification on the rights of other students is in regard to education and how the modification would affect their education." Here, there was no evidence that the ban of peanut / tree nut products would affect the educational program of the other students.

The school district further argued that it could not guarantee 100% compliance, and that a complete ban on the allergens would cause a false sense of security among the staff who might then not act as diligently as they would without the ban. The hearing officer acknowledged that a school district can never guarantee 100% com-

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## Drug testing rules

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Drug Free Sport will also play a part in selecting student-athletes for testing. For each sport, the IHSA will inform Drug Free Sport of the number of students and schools to be tested. Drug Free Sport will then randomly select the students and schools. On the week of the post-season competition, the IHSA will notify the schools selected for testing. On game day, the chosen school will provide its roster, from which Drug Free Sport will randomly select student-athletes for testing. The test itself will take place post-competition, on school grounds in the form of a urine sample.

### Post-testing Procedures and Penalties

The samples collected by Drug Free Sport will be analyzed for banned substances by a certified laboratory selected by the IHSA. Schools will be notified of the results within two weeks of the test, even if all test results are negative. If a positive test result occurs, the IHSA Medical Review Officer will investigate the result to rule out legitimate medical reasons for the positive test result. Test results will remain confidential throughout the process; only the student-athlete, his or her parents, the principal of the individual's school, and the IHSA will be given the results.

If an individual's test result is positive and the IHSA Medical Review Officer confirms that no legitimate reason exists for the positive result, the student-athlete will have the opportunity to appeal. The student-athlete will have the burden of proving, by a preponderance of the evidence, that he or she bears no fault or no negligence for the violation. IHSA Article 1.460 governs such appeals, which are heard by the IHSA Board of Directors.

If a student-athlete tests positive for a banned substance, or if a student-athlete refuses to provide a sample when chosen for testing, the individual will be subject to a 365-day ban from IHSA competition. The student-athlete will also forfeit any individual honor earned. However, the individual may apply for reinstatement after 90 days, after completion of an educational program and a subsequent negative test administered by Drug Free Sport. The student-athlete is responsible for the costs of the educational program and additional drug test.

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## **New employee leave available**

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effect, not merely to care for the service member if injured (820 ILCS 151/10(a) and 10(b)). Similar to FMLA, an employee requesting ILFMLA leave under this provision must be an eligible employee: having worked 1250 hours within the past 12-month period (820 ILCS 151/5). The amount of leave available is determined by the number of employees: an employer having 50 or more employees shall provide up to 30 days of leave (820 ILCS 151/10(b)) while an employer with between 15 and 50 employees shall provide up to 15 days of unpaid leave (820 ILCS 151/10(a)).

The requirements for ILFMLA leave entitlement differ from FMLA leave. Unlike FMLA where an employer may require substitution of other types of accrued leave, ILFMLA leave is not available unless the employee has exhausted all accrued vacation leave, personal leave, compensatory leave, and any other leave that may be granted to the employee, except sick leave and disability leave (820 ILCS 151/10(d)). The notice requirements of ILFMLA leave also differ from the FMLA provision. The ILFMLA requires that an employee seeking five or more consecutive work days of leave notify the employer at least 14 days prior to the intended date upon which the family military leave will commence; for leave of less than five consecutive work days notice is to be given as soon as practicable (820 ILCS 151/10(c)). ILFMLA requires that, if possible, the employee schedule the leave so it does not unduly disrupt the operations of the employer (820 ILCS 151/10(c)). Similar to FMLA, an employer may require certification to verify the employee's eligibility for the family military leave requested, however, certification is provided by the proper military authority rather than the U.S. Secretary of Labor (820 ILCS 151/10(c)).

### ***Have a plan***

School district administrators must be cognizant of the leave opportunities available to employees who are related to military personnel serving in the Armed Forces. We recommend that you review your district's policies and procedures and collective bargaining agreements to include these additional military-related leave entitlements. If you have any questions or would like assistance, please contact Brian O'Connor at [boconnor@obkcg.com](mailto:boconnor@obkcg.com) or (630) 365-6441 ■

## **Students with food allergies**

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pliance with such a ban, but that the inability to ensure 100% compliance is not a legitimate reason for failing to impose the ban in the first place. Staff members would need to continue to implement the accommodations currently in place to ensure compliance to the best of their abilities.

Finally, the hearing officer noted that the school district failed to introduce substantial evidence with respect to the costs or other burden of implementing the ban. For this reason, the hearing officer concluded that the total ban sought by the parents did not impose an undue hardship on the school district.

These cases illustrate the fact that current federal law protects children with food allergies. Many educators and parents are unaware of this fact, and schools often fail to provide the reasonable accommodations required by law. If you have any questions regarding your legal obligations including what constitutes a reasonable accommodation or what constitutes an undue hardship with respect to students with food allergies, please contact Maureen Anichini Lemon at [mlemon@obkcg.com](mailto:mlemon@obkcg.com) or (630) 682-0085. ■

## **Drug testing rules**

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Schools may be penalized for the positive results of its student-athletes. Those penalties will be governed by IHSA Article 1.460, on a case-by-case basis. The influence on the team's success of a student-athlete who tests positive could play a role in determining the penalty imposed.

### ***Schools' Responsibilities under the Policy***

Individual schools are responsible for collecting the consent forms required by the Policy prior to the start of post-season competition for each sport. Student-athletes who participate in more than one sport must submit a consent form for each sport in which they participate. Schools are also responsible for assisting in the testing process outlined above. If you have any questions regarding the new random drug testing policy, please contact David Zafiratos at [dzafiratos@obkcg.com](mailto:dzafiratos@obkcg.com) or (630) 682-0085. ■

Otosen Britz Kelly Cooper & Gilbert, Ltd.'s newsletter, *Legal Insights for School Districts*, is issued periodically to keep its clients and other interested parties informed of legal developments that may affect or otherwise be of interest to its readers. Due to the general nature of its contents, the comments herein do not constitute legal advice and should not be regarded as a substitute for detailed advice regarding a specific set of facts. Questions regarding any items should be directed to:

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