

LEGALINSIGHTS

FOR SCHOOL DISTRICTS

OTTOSEN BRITZ KELLY COOPER & GILBERT, LTD.

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Student markings on test papers constitute student records under the ISSRA

by Patrick J. Jesse

In *Garlick v. Oak Park and River Forest High School District 200*, No. 1-08-2017, Ill.App. (1st Dist. 2009), the First District Court of Appeals recently held that test questions issued to students containing student markings (i.e. name, calculations, and answers) are school student records under the Illinois School Students Records Act (the "Act").

In *Garlick*, a student's father submitted a written request to the superintendent of Oak Park and River Forest High School District 200 ("District") requesting a copy of his daughter's Advanced Algebra examination booklets. The District responded to his request by providing a copy of his daughter's answers and calculations, which were written on the test question booklets along with her name. However, the District redacted the test questions from the copies because they contained no identifiable student information and the student's teacher often reused test questions from year to year.

On July 18, 2006, Garlick filed a complaint for declaratory judgment and injunctive relief, seeking to compel the District to provide him with a photocopy of the redacted Advanced Algebra test question booklets. Following a hearing, the trial court granted the District's motion to dismiss the case finding "the test questions themselves do not give information regarding the student and do not in any way individually

identify the student." Garlick appealed this ruling to the appellate court.

The appellate court turned to the specific language of the Act to discern the legislature's intent in passing the Act. In examining the ordinary and plain meaning of the statute, the court stated that Section 2(d) of the Act clearly and unambiguously defines a "School Student Record" as "any writing or other recorded information concerning a student and by which a student may be individually identified, maintained by a school or at its discretion or by an employee of a school, regardless of how or where the information is stored." 105 ILCS 10/2(d).

The court broadly interpreted the statute, specifically declining to limit the record to those portions of the document that individually identify a particular student. In addition, the court reasoned that Section 2(d) does not grant a school the explicit authority to redact portions of a student record that do not individually identify the student. Because the Advanced Algebra test questions booklets contained student markings and other individually identifiable information, the booklets were entirely under the definition of a student record found in Section 2(d) of the Act. Therefore, Garlick had the right to "inspect and copy" the entire test question booklets as student records.

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Stimulus package changes to COBRA premiums

by Joseph Miller III

The recent American Recovery and Reinvestment Act of 2009 ("the stimulus package") lightens the financial burden encountered by recipients of Consolidated Omnibus Budget Reconciliation Act (COBRA) benefits. Enacted in 1986, COBRA provides former employees of qualified employers the right to a temporary continuation of health insurance coverage. Specifically, a former employee is allowed to continue health insurance coverage for a period of up to 18 months at his or her own expense. A former employee electing COBRA benefits usually pays a higher amount than active employees, because most employers typically pay at least a portion of their active employees' health insurance premiums.

Under the stimulus package, persons who lose their employment pursuant to a qualifying event between September 1, 2008 and December 31, 2009 qualify for a 65 percent reduction in COBRA premiums for up to nine months. Individuals who involuntarily lose their employment after December 31, 2009 are not eligible for the reduction.

A recent IRS notice indicates that the determination of whether a separation from employment qualifies as involuntary is made based on all the facts and circumstances. The termination is considered involuntary for pur-

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Ill-advised comments open door for potential FMLA retaliation claims

by William R. Thomas

In *Lewis v. School District No. 70*, 523 F. 3d 730 (7th Cir. 2008), the Seventh Circuit of the United States Court of Appeals reversed a district court's decision to dismiss portions of this case, allowing allegations of violations of the Family and Medical Leave Act (FMLA) by the district, superintendent, and school board to proceed to a jury trial. Employed as a bookkeeper and treasurer for the Freeburg Community School District No. 70 in St. Clair County, Illinois since September 1997, Debra Lewis' responsibilities included maintaining various financial accounts and records, and assisting the superintendent. Ms. Lewis performed her duties as treasurer and bookkeeper satisfac-

torily until 2004. During that year, Ms. Lewis' parents became terminally ill, her father died, and Ms. Lewis cared for her elderly mother at home. During 2004, Ms. Lewis was absent 72.5 of the total 242 workdays. With the superintendent's knowledge, Ms. Lewis worked from home during the evenings and weekends to complete her assignments.

During several board meetings, the superintendent and board members discussed Lewis' absenteeism and its detrimental effect on office operation, including the untimely production of some financial reports. After the June 2004 meeting, the superintendent sent a letter to Ms. Lewis advising her that she must

resume a regular 8:00 a.m. to 4:00 p.m. business day during the next school year. However, in September 2004, Ms. Lewis missed 6 of 21 workdays, and in October 2004, she missed 7 of 20 workdays.

At the October 2004 board meeting, the superintendent again discussed Lewis' absenteeism and performance difficulties, including a late tax payment to the IRS resulting in a penalty. During this meeting, a board member expressed an opinion that Ms. Lewis should be fired for her absenteeism and poor performance. The superintendent and board members discussed potential legal liability under the

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Student records under the ISSRA

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The District argued it had substantially complied with the Act by allowing Garlick the opportunity to "review and hand-copy" his daughter's Advanced Algebra test booklet, including the redacted test questions themselves. By contrast, Garlick had demanded an actual photocopy of the examination booklets rather than the ability to merely review and hand-copy the test questions.

Relying upon Section 5(d) of the Act, the court concluded the legislature intended for a school to provide an actual copy of the student record when requested. The language in Section 5(d) states the school "may charge reasonable costs for the copying." This language suggests the legislature intended the school to provide a parent with a "photocopy" of the record if requested. Clearly, allowing a parent to hand copy a student record is not the same as providing a parent with a photocopy of a student record. Therefore, the court ruled the District did not substantially comply

with the Act by allowing the parent to only review and hand-copy his daughter's test questions booklets.

Under the ISSRA schools must allow parents broad access to student records.

Given this decision, any piece of homework, test, quiz, project or paper containing the student's name, markings, calculations or any other identifying information will constitute a student record under the Illinois School Students Records Act. In addition, schools must comply with the legislature's intent of providing broad access to student records by allowing parents to photocopy all such records as well. ■

Attorney Notes

■ On Thursday, May 14 2009, **Maureen Anichini Lemon** presented on "Teacher Evaluations" at a Lorman Seminar in Hoffman Estates, Illinois.

■ **Maureen Anichini Lemon** presented on the "Legal Aspects of Response to Intervention" at a Northwest Division Meeting of the Illinois Association of School Boards on Thursday, March 5, 2009.

■ **Maureen Anichini Lemon** was a featured speaker at the National Business Institute's seminar on "Legal aspects of managing autism spectrum disorders at school" held on Friday, February 6, 2009 at the Hilton Lisle/Naperville in Lisle, Illinois. Ms. Lemon addressed legal ethics including maintaining confidentiality, determining attorneys' fees under the IDEA, avoiding potential conflicts of interest, and strategies for working with parents. ■

FMLA retaliation claims

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FMLA as it was widely known that Lewis was at home caring for her terminally ill mother.

Following the October 2004 board meeting, the superintendent sent a letter to Ms. Lewis stating that her sick and vacation time were depleted, but she was entitled to up to twelve (12) weeks of unpaid leave under the FMLA. Ms. Lewis completed the appropriate paperwork and began to take intermittent FMLA leave. During her intermittent leave, she was requested to perform all of her treasurer and bookkeeping duties, even though she was not paid or credited for the time she spent working at home.

At the November 2004 board meeting, during closed session, board members discussed firing Ms. Lewis and their legal liability under FMLA. The audiotape recording of the meeting contained numerous comments on the FMLA made by board members indicating that it was “just ludicrous” and “it’s such a fiasco that you can’t just say thank you for your services and good-bye” because of “FMLA and Bill Clinton.” The Board requested that the superintendent continue documenting Ms. Lewis’ performance problems in order to build a case against her unrelated to her absences.

On March 10, 2005, the superintendent provided Ms. Lewis with a written job performance evaluation that indicated a variety of rankings including very good, satisfactory, and needs improvement. At its March 21, 2005 meeting, the board decided to offer Ms. Lewis two options: (1) resign with the benefit of paid insurance for the rest of the school year; or (2) accept a re-assignment to a teacher’s assistant position to be paid at her current salary and benefits for the few remaining months of the current school year, after which she would be paid at the much lower rate of a teacher’s assistant. The reassignment, if accepted, was intended to be permanent.

The board voted at this meeting to replace Ms. Lewis as the bookkeeper. The superintendent sent a letter to Ms. Lewis informing her of the board’s decision to remove her from the bookkeeper position. As a reason for removal, the letter stated: “It was determined that you missed too much work to meet the essential functions of your present assignment.”

Ms. Lewis elected to accept reassignment to the teacher’s assistant position. In August 2005, Ms. Lewis requested reinstatement to her bookkeeper position. However, the superintendent denied her request for reinstatement, citing performance problems related to her reassignment.

In her complaint against the board, Ms. Lewis alleged the board terminated her in retaliation for taking protected FMLA leave. The court believed direct evidence of possible discrimination existed because the superintendent’s letter informing Ms. Lewis of the decision to replace her as a bookkeeper stated only that she missed too much work to meet the essential job functions. Further testimony indicated that the superintendent informed Ms. Lewis that the board’s decision to demote her was due to absenteeism.

This evidence questions whether Ms. Lewis’ removal from the bookkeeper position was due to incompetence or absenteeism. The court indicated that the conduct of the board and the superintendent prior to granting Lewis’ FMLA leave appeared to be an effort to establish grounds for her future discharge due to incompetence. Upon reviewing the audiotape recordings of several closed session board meetings, the court noted that several board members criticized the FMLA and the rights it provided employees. Additionally, the court noted the board failed to take steps to limit the effect of Lewis’ absence on the District. The court suggested that

during Lewis’ FMLA leave the board could have assigned some of her job duties to other employees, transferred her into another position temporarily, or hired a part-time employee to assist her. The court believed the board placed unrealistic expectations on Ms. Lewis to accomplish all of her job duty requirements while she was on protected, intermittent FMLA leave.

Further, the court noted that despite the board’s knowledge of the reason for Ms. Lewis’ absenteeism, it failed to provide her with proper, timely written notice of her FMLA rights. The court concluded these facts raised concern that the board’s actions might have been improperly motivated and ruled that a jury should determine whether the board and superintendent acted with discrimination.

The court’s decision highlighted the danger posed when school board members and administrators complain about an employee’s exercise of his or her rights under a federal employment statute such as the FMLA. The decision also cautions employers against expecting an employee to complete the same amount of work while on an intermittent FMLA leave.

If you have any questions regarding your obligations under the FMLA, please contact one of our attorneys to review your concerns. ■

SAVE THE DATE

*You are invited to attend the
Eighth Annual School Law Conference*

*Hosted by
Ottosen Britz Kelly Cooper & Gilbert, Ltd.*

*Saturday, September 12, 2009
8:00 a.m. to 12:00 noon*

Registration at 7:30 a.m.

*Hilton Lisle / Naperville
Lisle, Illinois*

COBRA premiums

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poses of the subsidy if the facts and circumstances show that the decision to terminate employment was the independent exercise of the employer's unilateral authority, where the employee was willing and able to continue performing services.

Examples of involuntary terminations include: (i) layoffs, furlough or other suspension of employment; (ii) employee-initiated termination if for good reason due to a material negative change in the employment relationship; (iii) employer action to end employment status while employee is on leave of absence; (iv) retirement when absent said retirement the employer would have terminated the employee's services; (v) resignation if prompted by a material change in the geographic location of the employment; (vi) lockout initiated by the employer (however, work stoppage as a result of a strike initiated by the employees is not); and (vii) termination elected by the employee in exchange for a severance package ("buy-out").

Under COBRA, employers are required to provide a notice to its Plan Administrator of the former employee's COBRA eligibility within 30 days of the end of his or her employment. The Plan Administrator then has 14 days to notify the former employee of his or her COBRA eligibility. Within 60 days of receiving the notice from the Plan Administrator, the former employee shall

notify the Plan Administrator of his or her decision to elect COBRA benefits.

Once an individual elects to receive the COBRA premium subsidy, the employer shall be responsible for the remaining 65 percent of the premium. While the employer can apply for a reimbursement of its portion of the premium paid on behalf of subsidy recipients, the employer cannot file an application for reimbursement until it has received the 35 percent premium payment from the former employee.

In order to receive reimbursement, the employer must submit IRS Form 941, the Employer's Quarterly Federal Tax Return Form. The form includes questions concerning COBRA premium assistance payments by employers. Form 941 requests that an employer supply information concerning the amount spent on COBRA subsidy premium assistance payments and the number of individuals provided with COBRA assistance payments. Although no additional information is required for an employer to receive the COBRA subsidy reimbursements, employers would be well-served to retain all documentation for claimed credits. Employers should maintain the following: 1) information on the receipt, including date and amount, of the former employee's 35% share of the premium; 2) copies of any invoice or other proof of payment made to an insurance carrier for insurance for the

COBRA recipient; 3) information concerning the qualifying event that enabled the individual to receive the COBRA subsidy under the stimulus plan; and 4) a record of the amount of subsidy reimbursed with respect to each covered employee.

Employers can also receive a payroll tax credit in the amount of its reimbursement. For a payroll reimbursement, the subsidy provided by the employer will be applied to the employer's payroll tax deposit requirements. Local governmental entities should contact their payroll providers for assistance in receiving the payroll tax credit. Entities that process their own payroll will use IRS Form 941, Form 943 or Form 944 for the reimbursement. The IRS website contains directions for employers on applying for the payroll tax credit.

Employers will only be eligible to receive the subsidy reimbursement or payroll tax credit for a qualifying event that occurs in the period beginning September 1, 2008 and ending December 31, 2009. Therefore, it is anticipated that subsidy reimbursement eligibility will end during the fourth quarter of 2010. Because the IRS indicated it will not extend the deadlines for filing the required paperwork for the subsidy reimbursement or payroll credit, employers must keep good records to guarantee compliance and receipt of funds pursuant to the stimulus package. ■

Ottosen Britz Kelly Cooper & Gilbert, Ltd.'s newsletter, *Legal Insights for School Districts*, is issued periodically to keep 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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