

Education Law Today

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**HAPPY NEW
YEAR!!!**

A NEWSLETTER FOR CONNECTICUT EDUCATORS
Frederick L. Dorsey, Editor

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TEACHER RENEWAL DECISIONS Must Be Planned And Made Now

BY FREDERICK L. DORSEY

If you are not well into the decision-making process on teacher renewals for the next school year, you are quickly running out of time. Under the Teacher Tenure Act (C.G.S. §10-151), the board may nonrenew the contract of a **nontenured** teacher if written notice is provided by April 1 that the teacher's employment will not continue beyond the end of the current school year. Because the nonrenewal process is procedurally easier and more cost-efficient, gives teachers fewer appeal rights, and carries less of a stigma on the teacher's record than does termination, this is the preferred method for involuntarily ending the employment of **nontenured** certified staff. It also provides the employee ample time to seek a new position for the upcoming school year.

The April 1 deadline for nonrenewals makes it especially important to make the nonrenewal decision well before April 1 of the teacher's final year as a nontenured employee. Upon achieving tenure, a teacher may no longer be nonrenewed, leaving termination as the only option for involuntarily ending the teacher's employment. While a board may nonrenew a nontenured teacher for failure to meet district performance

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standards, the board may not use mere poor performance as a basis for terminating a teacher, whether tenured or nontenured, without proving that the teacher was actually inefficient or incompetent.

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UPCOMING SEMINARS

- February 23, 2011** **Nuts & Bolts of Being a Supervisor**, Manchester, CT. Attorney Frederick L. Dorsey is presenting this seminar, sponsored by the Connecticut Conference of Municipalities.
- March 2, 2011** **Sexual Harassment Prevention Training for "Supervisors": Satisfy Your Training Requirements**, Waterford, CT. Attorney Meredith G. Diette is presenting this seminar as part of the Chamber of Commerce of Eastern Connecticut's Business Education Series.
- March 23, 2011** **Wage and Hour Overview**, Waterford, Connecticut. Attorney Meredith G. Diette is presenting this seminar as part of the Chamber of Commerce of Eastern Connecticut's Business Education Series.
- April 8, 2011** **Raising Money for Public Education on a Local Level Through Non-Traditional Sources**, San Francisco, California. Attorney Frederick L. Dorsey is on the faculty for this presentation at the National School Boards Association 2011 School Law Seminar.

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The nonrenewal process can also be used to conduct layoffs for budgetary reasons. Nonrenewed teachers can then be rehired if sufficient funds are eventually available to cover their salaries. While unpleasant, this process does allow the board to ensure that it is not over committing its financial resources, while still leaving the option of rehire if the budget process goes well. Budgetary nonrenewal must also, however, meet the April 1 nonrenewal deadline.

Whether you are making difficult budget decisions or sorting through teacher evaluations, it is important to keep the April 1 deadline in mind. Looking closely at the evaluation process now, especially for any nontenured staff who are marginal performers, still allows sufficient time to be sure all observations and communications required by your evaluation plan have been completed prior to April 1. You should also use the intervening time to resolve any questions about teacher tenure status and the procedures for nonrenewal notices. Please contact our education counsel for specific guidance on these issues.

FOUR BOARD POLICIES TO REVIEW and Revise in 2011

BY MELANIE E. DUNN

Make it your new year's resolution to update existing policies and procedures in your school district on topics that have been subject to changes in the law in the past few years. Even a recently revised board policy or set of administrative regulations in the following areas could use a fresh look, to ensure compliance with relatively new requirements, as well as consistency with policies in related areas:

1. Bullying and Cyberbullying

The 2008 anti-bullying law redefined a "bully" as a student who commits an act of bullying more than once during the course of the school year, regardless of whether one or multiple victims are involved. In addition to updating this language, the new law required districts to have developed their own bullying policies for submission to the SDE for review, and to have incorporated the policy into student handbooks, by the summer of 2009. In 2010, the SDE reported that a large number of districts still had not fully complied with these requirements, including the development of a comprehensive "prevention and intervention strategy" for addressing bullying, rather than merely prohibiting it.

The subject of "cyberbullying" deserves its own section in your bullying policy, not to mention in your internet acceptable use and student discipline policies. Setting clear consequences for the use of communication technology to harass or intimidate students, even when it occurs outside of school and without the use of school networks or technology, will leave you better equipped to sniff out offenders and practice damage control when these situations arise.

2. Family and Medical Leave Act (FMLA)

Amendments to this federal law in 2008 added new leave provisions for employees with servicemembers in their families. Military caregiver leave gives an employee up to 26 weeks in a 12-month period to care for an injured or ill servicemember. Employees may also take up to 12 weeks a year for a "qualifying exigency" arising from a family member's deployment, such as financial and legal arrangements, childcare and school activities, and post-deployment processing and recuperation.

3. Student Suspension & Expulsion

The much-hyped amendments to the student discipline laws, first attempted in 2007 and repeatedly reworked and delayed until the summer of 2010, now require all suspensions be served in school unless (1) the student poses such a danger or disruption that an out of school suspension is warranted, or (2) the student's disciplinary history supports an out of school suspension and other means, including but not limited to positive behavioral supports, have been attempted and have failed to address the misconduct. Even if your suspension procedures have already been updated, it's always a good idea to review your policies to see if all of your bases are covered in situations such as off-campus sales of drugs or other crimes, cyberbullying (see number one above) and other inappropriate uses of technology, and the discipline of special education students and students with 504 accommodation plans.

4. Family Educational Rights and Privacy Act (FERPA)

The 2009 revisions to the federal FERPA regulations were made in response to the 2007 Virginia Tech shooting, in which school officials reportedly construed privacy laws as restricting access to records that could have indicated the shooter's troubled mental state before the tragedy occurred. School districts should be aware of new FERPA provisions that, in the event of an "articulable and significant" threat to health or safety, increase the ability to disclose to law enforcement officials and other appropriate parties personally identifiable information. In addition, the definition of

“personally identifiable information” subject to FERPA’s confidentiality and disclosure requirements has been expanded to include biometric records (e.g., fingerprints, handwriting, and even voicewaves and retinal patterns), “indirect identifiers” such as place of birth and mother’s maiden name, and any information requested by a person the district “reasonably believes knows the identity of the student to whom the education records relates.” Educational agencies are also prohibited from disclosing social security numbers as part of student directory information, but may use a student ID number as long as the number cannot by itself be used to gain access to confidential records.

CONNECTICUT AWAITING ADOPTION OF Revised Special Education Regulations

BY FREDERICK L. DORSEY

The comment period for the Connecticut State Department of Education’s proposed revisions to the special education regulations (Sections 10-76a-1 through 10-76l-1 of the Regulations of Connecticut State Agencies) closed on December 1, 2010. Public hearings on the potential changes to Connecticut’s regulations were held on August 30, September 22, November 9 and November 17, 2010. The stated purpose for the revisions is “to adopt the standards of the Individuals with Disabilities Education Act for the provision of special education and related services to eligible students and, clarify state-specific provisions for the provision of special education and related services to children with disabilities and the identification and evaluation of gifted and talented children,” as described by the State Board of Education in its Notice of Intent.

Here are some highlights of the proposed revisions:

Calendar Days, Not School Days

By amending the definitions section applying to the special education regulations as a whole, the timelines for most requirements would be shortened by making these actions due within calendar days, rather than school days. Unfortunately, the proposed revisions do not take into account the impact these timelines would have on the district’s compliance if a parent makes a time-sensitive request during a holiday or vacation period, preventing district officials from even being aware of its existence until after the break.

Graduation and Extracurricular Activities

Under the proposed revisions, school districts will be expressly required to allow each special education

student to participate at least once in graduation exercises and related activities. The PPT shall determine the student’s graduating class. If a student is educated in a program that does not award a high school diploma, the board shall award its general high school diploma to the student upon meeting the requirements for graduation.

“Unfortunately, the proposed revisions do not take into account the impact these timelines would have on the district’s compliance if a parent makes a time-sensitive request...”

Special Education Personnel

The proposed revisions would require all supervision of aides by certified staff to include training the aide in the implementation of IEPs, observing the aide working with the student, and verifying all reports of the child’s progress. The proposed regulation does not specify the progress reports described in the revised language, especially in light of the fact that aides normally do not provide such reports.

In addition, the proposed revisions would expressly authorize the board of education to require personnel to attend specific in-services required as part of corrective action ordered by the SDE as a result of complaint investigation or monitoring.

Child Find

It appears under the proposed revisions that each board of education would be required to ensure that home-schooled children “regardless of the severity of their disability” be located, identified and evaluated, along with homeless children, children who are wards of the State, and children attending private schools.

While potentially burdensome, school districts are reminded that the annual portfolio review you should be conducting for each home-schooled child is an opportunity to inquire whether a parent suspects that his or her child may have a disability. Compliance should not become an issue if the district regularly offers to refer such children for evaluation, and keeps clear, up-to-date documentation of a parent’s denial of consent for referral to special education in favor of home-schooling.

Fortunately, this scenario is more likely to involve parents whose children are already receiving an IEP who then withdraw them from school entirely. More

care should be taken in situations where a teacher or parent suspects that a child may have a disability, but the child is withdrawn to be home-schooled before the PPT has the opportunity to determine eligibility for services.

Initial Referrals to Special Education

Proposed new sections of the regulations would require school districts to inform parents and staff of specific procedures for conducting Scientific Research-Based Intervention prior to initial evaluations, and of the name of at least one person in each school building to contact about policies and procedures governing referrals and evaluations. The new regulations would clarify that parents need not submit initial referrals on the district's standard form, and may simply write a letter to a teacher or administrator for this purpose, or follow another procedure developed by the district for handling referrals when a parent is unable to put the request in writing.

The operative referral date would be considered the actual date the school district was notified of the referral, not the date placed on the referral form filled out to record receipt of the referral. The initial PPT meeting would be required no later than 15 calendar days following receipt of the referral.

Notwithstanding the focus on SRBI measures prior to conducting initial evaluations, the revised regulations would emphasize the school district's obligation to accept referrals to special education and timely convene the PPT to plan any necessary evaluations.

Prior Written Notice

Prior Written Notice is perhaps the trickiest page for the drafter of the IEP, but becomes a lot simpler to handle if you keep in mind that the purpose of this page is to inform the parent of which actions were proposed by the team, and to provide "prior written notice" of the implementation of such proposed actions by way of the parent's receipt of the IEP. **Prior written notice does not have to be given to the parent prior to the PPT.** Currently, the box that shows the date for implementation of the proposed action must reflect that at least 5 school days will pass after written notice is provided. Under the revised regulation, this timeline would change to 10 calendar days.

Eligibility Determinations for Students with Specific Learning Disabilities

Relatively recent changes in IDEA require the use of Response to Intervention (RTI) measures to identify learning disabled children. RTI refers to the process by which educators determine whether a child's weaknesses in a given subject area or discipline can be remedied in the regular education environment, before referring a child for evaluation as a special education student. In Connecticut, RTI measures are known as Scientific Research-Based Intervention (SRBI), and the SDE has issued guidance, most recently revised in the fall of 2010, on the use of SRBI prior to determining a child's LD eligibility.

The proposed revisions to the special education regulations would incorporate existing SDE requirements for the use of SRBI measures where learning disabilities are suspected. In addition, the revised regulations expressly prohibit using a finding of a severe discrepancy between the student's ability and achievement to determine a student's LD status.

Gifted and Talented Students

School districts will be required to use the PPT process to evaluate and identify students as "gifted and talented" and may so identify up to 10% of the total school population. The proposed revisions would also allow parents to use the due process hearing procedures to contest the results of a district's evaluation to determine gifted and talented status. However, no board of education will be required to provide any special services to a child who is identified as gifted or talented.

Students' Rights Upon Turning 18 Years Old

Under the revisions, a student will be expressly authorized to notify the board of education that, upon turning 18 years old, his or her parents shall retain educational decision-making rights on the student's behalf. The proposed new section of the regulations does not address the potential for conflicts with the laws governing other rights of adults with disabilities, such as the requirement that a court must adjudicate any claims of incompetency and determine whether a conservator should be appointed for the disabled person.

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IEP Timelines

The proposed revisions require that, upon receipt of an initial referral, the board shall schedule a PPT meeting within 15 calendar days, and conduct any resulting evaluations that are planned within 60 calendar days of receiving parental consent for evaluation. If the student is eligible for special education, the PPT may develop the IEP at the meeting at which eligibility was determined, and shall "implement" the IEP within 15 calendar days of this meeting, not including the time needed to secure parental consent. It is unclear whether "implement" means "begin programming" or "have in place" (e.g., for the beginning of the upcoming school year, if the PPT met over the summer). A complete copy of the IEP is due to the parents within 10 school days (one exception to the new calendar day rule) of the PPT meeting.

Homebound/Hospitalized Instruction

Eligibility for homebound or hospitalized instruction would require a written verification by a treating physician provided directly to the board of education, on a form to be provided by the board, stating that the physician has consulted with school health supervisory personnel and determined that the child cannot attend school, even with reasonable accommodations, for at least 10 consecutive school days or for short, repeated periods over the course of the school year. The proposed revisions would also include procedures for handling disputes over eligibility for homebound or hospitalized instruction, as well as a new determination procedure by which the PPT may find that a student requires instruction outside of school as a "medically complex" student. Homebound or hospitalized instruction must begin by the eleventh consecutive day of absence, or by the third day of absence for "medically complex" students, as long as the student is able to receive instruction. Determinations shall also be made regarding the expected date for return to school.

Parent Access to Records

The proposed revisions would replace the requirement to answer parent requests for records at least 3 days before a PPT meeting or due process hearing with a general timeline of responding within 10 days of the request, and "without unnecessary delay" before any meeting, due process hearing or resolution session.

School Year and ESY Requirements

The school year would continue to run from July 1 through June 30 under the proposed revisions. The PPT would be required to determine whether any child

who turns three years old during the summer requires ESY services, while also requiring that students turning 21 in the middle of a school year be allowed to continue receiving services through the end of that school year. ESY or ESD determinations shall also be made with sufficient time to allow the parent to challenge such determinations (in terms of eligibility as well as substantive programming) prior to implementation, "unless it is clearly not feasible to do so."

Transportation

Parents who choose to transport their children for special education placements will be eligible for reimbursement at the standard IRS rate for a round trip by a personal vehicle. However, the board need not reimburse a parent who rejects an offer of transportation, unless a hearing officer finds that the offer was not appropriate.

Physical Restraint and Seclusion

Proposed amendments to the regulations concerning the prohibition of seclusion and physical restraint except in emergency situations would require the PPT to review the IEP whenever such an emergency occurs more than twice in a school quarter. The way this timeframe applies is unclear for those districts who use trimesters instead of quarters. Also, any locked doors used for seclusion purposes will require an automatic release device for emergencies. Students will also require constant monitoring, rather than periodic observations, during periods of seclusion.

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