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SHIPMAN

What's New in '21-22?

A LEGAL UPDATE FOR THE CONNECTICUT ASSOCIATION OF SCHOOLS

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INTRODUCTION:

The new school year brings with it changes in the law that affect school district operations. Many such developments are the result of legislative changes, and the General Assembly was especially busy this year. A comprehensive review of new legislation is beyond the scope of this update, and a detailed summary of new legislation affecting school districts is available for review on our website, www.ctschoollaw.com, at https://www.shipmangoodwin.com/education-legislation-summary-2021.pdf. In the following, we will answer ten questions about school district operation that will highlight some of the most interesting changes this year.

Question One:

What's all this about Mental Health Days, and where do I get some?

Answer to Question One:

Effective July 1, 2021, Section 19 of Public Act No. 21-46 requires local and regional boards of education to allow any student enrolled in grades kindergarten through twelve to take two non-consecutive days each school year as mental health wellness days:

> Sec. 19. (NEW) (Effective July 1, 2021) (a) As used in this section and section 10-198b of the general statutes, as amended by this act, "mental health wellness day" describes a school day during which a student attends to such student's emotional and psychological well-being in lieu of attending school.
>
> (b) For the school year commencing July 1, 2021, and each school year thereafter, a local or regional board of education shall permit any student enrolled in grades

> kindergarten to twelve, inclusive, to take two mental health wellness days during the school year, during which day such student shall not be required to attend school. No student shall take mental health wellness days during consecutive school days.

Given the brevity of this provision, it is not clear whether and how this new right of students to take mental health days fits into the framework of excused and unexcused absences, as elaborated by the Connecticut State Department of Education pursuant to Conn. Gen. Stat. § 10-198b: Connecticut State Department of Education, Guidelines for Excused and Unexcused Absences (May 15, 2013). Those Guidelines were enacted to implement Conn. Gen. Stat. § 10-198a, which defines a student with four unexcused absences in a month or ten unexcused absences in a year as "truant" with attendance consequences. Under the Guidelines, parents can excuse the first nine absences on their own, and the Guidelines go on to describe which and how additional absences may be excused. It is simply not clear whether these mental health days are supplemental or are to be included in the nine days that parents can excuse on their own.

A similar issue arises with Conn. Gen. Stat. § 10-198a(e) (as added in 2014):

> (e) A child, age five to eighteen, inclusive, who is enrolled in a public or private school and whose parent or legal guardian is an active duty member of the armed forces, as defined in section 27-103, and has been called to duty for, is on leave from or has immediately returned from deployment to a combat zone or combat support posting, shall be granted ten days of excused absences in any school year and, at the discretion of the local or regional board of education, additional excused absences to visit such child's parent or legal guardian with respect to such leave or deployment of the parent or legal guardian. In the case of excused absences pursuant to this subsection, such child and parent or legal guardian shall be responsible for obtaining assignments from the student's teacher prior to any period of excused absence, and for ensuring that such assignments are completed by such child prior to his or her return to school from such period of excused absence.

Unless and until we have further guidance, school districts should treat a declared mental health day as excused when it is taken. If it is taken as one of the first nine days, it will be excused by the parent, and if it is taken after the parent or guardian has already excused nine days, it will be considered excused in accordance with Section 19 of Public Act 21-46. By contrast, given the separate statutory authority under Conn. Gen. Stat. § 10-198(e) for excused absences of children of active service members, we suggest that such requests be processed outside the more general framework of excused and unexcused absence established by the Connecticut State Department of Education, as described above.

Finally, despite anecdotal evidence to the contrary, teachers and administrators are not authorized to take mental health days, at least by statutory right.

Question Two:

One of the teachers in my building showed me his medical marijuana card and told me that he will be out in his car taking a "Mary Jane" break during his preparation period! Dude, for real?

Answer to Question Two:

Recreational use of marijuana for people 21 and older was legalized in June Special Session Public Act 21-1, "An Act Concerning Responsible and Equitable Regulation of Adult-Use Cannabis." However, under that new law and an earlier law, Palliative use of Marijuana Act (PUMA), Conn. Gen. Stat. § 21a-408 *et seq.*, boards of education do not have to permit the use of marijuana at school, even for employees with medical marijuana cards.

Under June Special Session Public Act 21-1, all employers can prohibit the possession or use of recreational marijuana in the workplace, and no employer can be required to allow an employee to perform his or her duties while under the influence of marijuana. Employers, including boards of education, can also take disciplinary action against employees for possession, use, and consumption of recreational marijuana outside the workplace, so long as the employer has a policy that is in writing and made available to employees. However, because the Board is an "exempted employer," it need not have a written policy to take such action. Thus, exempted employers, like the Board, can refuse to hire or take disciplinary action for possession, use or consumption of marijuana inside or outside of the workplace, including before employment, or solely on the basis of a positive marijuana test, with or without a policy in place.

In addition to these provisions, the Act amends the definition of "smoke" or "smoking" to include marijuana and clarifies that smoking is prohibited in any area of a school building or on the grounds of a school. "Any area" is now defined as "the interior facility, building or establishment and the outside area within twenty-five feet of any doorway, operable window or air intake vent of the facility, building, or establishment."

By contrast, a qualifying patient under the Palliative Use of Marijuana Act (PUMA) is protected, and employers may not refuse to hire, penalize, or discharge an employee based on his or her status as a qualifying patient under PUMA, and they must continue to make a reasonable accommodation for employees who use marijuana outside the workplace under the PUMA. However, under PUMA, the use of medical marijuana is not protected on school grounds. Conn. Gen. Stat. § 21a-408a(b)(2)(c). PUMA also does not restrict an employer's ability to prohibit the use of intoxicating substances, like marijuana, during work hours or restrict an employer's ability to discipline an employee

for being under the influence of intoxicating substances during work hours. Conn. Gen. Stat. § 21a-408p(b)(3). The Act does not change these provisions of PUMA. Moreover, Section 86 of the Act expands the prohibition of smoking at schools to include the smoking or vaping of marijuana in any area of a school building or the grounds of such school. Accordingly, there is no requirement that employees with a medical marijuana card be permitted to take a "marijuana break" during the workday or otherwise on school grounds, even during a teacher's preparation period.

Question Three:

We were rather desperate to find teachers to fill our classrooms this fall, and one of our new hires is just terrible. When can I cut her loose?

Answer to Question Three:

The Teacher Tenure Act, Conn. Gen. Stat. § 10-151, defines a "teacher" in a way that permits prompt action when a school district makes a serious mistake in hiring. Conn. Gen. Stat. § 10-151(a)(2) provides "(2) "Teacher" includes each certified professional employee below the rank of superintendent employed by a board of education ***for at least ninety calendar days*** in a position requiring a certificate issued by the State Board of Education." (Emphasis added). Accordingly, for the first ninety calendar days of employment, a certified employee is not covered by the Teacher Tenure Act and its provisions governing non-renewal or termination.

That said, such employees have protection against arbitrary dismissal. Typically, a newly-hired teacher will have signed a salary agreement or otherwise have received assurance that he or she is employed for the year. That expectation of continued employment is considered a property interest, and the Fifth and Fourteenth Amendments provide that a governmental entity may not deprive a person of life, liberty or property without due process of law. The question, then, is what process is due in this situation.

In such a situation, it is necessary to conduct a pre-termination hearing, often called a *Loudermill* hearing (named after *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, a 1985 decision of the United States Supreme Court). At such a hearing, the employer should share the concerns that cause it to consider terminating the employment relationship. The employer must then give the employee an opportunity to respond to those concerns, and the employer must consider that response and then make a decision whether or not to proceed with the termination.

While the employee is not a "teacher" during those first ninety calendar days, the employee is a member of the teachers' bargaining unit. While the right to union representation is triggered by an employee's request, here we suggest that school

officials notify a union representative and request that the union represent the employee at the *Loudermill* hearing.

In considering such action, it is important that the concern be significant. Typically, a new teacher has signed a contract, and he or she may have a claim that a termination during its term violates that contract. In such matters, it will be important to review whatever contract has been signed. However, whether or not the contract addresses the issue of termination, satisfactory performance is an implicit term of any employment contract, and school officials should be able to show that the employee's performance was unsatisfactory and terminate any separate contract.

Finally, in considering such action, school officials may ask whether the ninety-day clock starts when the employee signs his or her contract or on the first day of school. We do not have any guidance from judicial or administrative decisions on this point. The most logical interpretation, of course, is that the ninety days should start with the first day of work. To the extent that the Teacher Tenure Act establishes a "super-probationary" period of ninety calendar days, performance on the job would be the relevant consideration. It is unlikely that the courts will ever rule on this point, however, because employees confronted with a decision that their employment will be terminated after a *Loudermill* hearing will typically resign their employment.

Question Four:

After we denied a parent's request to provide remote instruction again this year, she has now claimed that her child must attend school remotely this year because she (the parent) is immunocompromised. What should we do now?

Answer to Question Four:

As we all know, the general rule is that remote instruction is not required this year. Effective July 1, 2021, Public Act No. 21-46, as revised by Sections 390 through 393 of June Special Session, Public Act No. 21-2, defines "remote learning" as "instruction by means of one or more Internet-based software platforms as part of a remote learning model." The new legislation, however, does not require the provision of remote learning in the 2021-2022 school year. Indeed, remote learning is not authorized for the current school year.

Specifically, for the school year beginning ***July 1, 2022***, the Act allows local and regional boards of education to authorize remote learning for students in grades nine through twelve, if districts (1) provide instruction in compliance with the SDE standards for remote learning, and (2) adopt a policy regarding the requirements for student attendance during remote learning. Such attendance policy must comply with SDE attendance guidance and count as "in attendance" any student who spends at least one-half of the school day during such instruction engaged in virtual classes, virtual

meetings, activities on time-logged electronic systems, and completing and submitting assignments.

Conn. Gen. Stat. § 10-16 provides that each school district must provide at least one hundred and eighty days of actual school sessions for grades kindergarten through twelve. Section 17 of the Act, as amended by Section 392 of June Special Session, Public Act No. 21-2, amends the statute effective July 1, 2021 to provide that remote learning shall be considered an actual school session, provided that such remote learning complies with the remote learning standards to be developed by the Commissioner of Education by January 1, 2022. Accordingly, school districts are not currently authorized to consider remote learning a school session.

Notwithstanding the foregoing, in a PowerPoint presentation developed for superintendents dated August 9, 2021, the Commissioner of Education informed superintendents as follows:

> CSDE encourages school districts to develop administrative procedures or regulations regarding continued educational opportunities for:
>
> - Students in isolation or quarantine
> - Localized outbreaks
> - Students with vulnerable family members

By email dated August 13, 2021, the Office of the Commissioner elaborated as follows:

> School districts are encouraged to develop policies for the provision of continued educational opportunities to students in isolation or quarantine, those with vulnerable family members, and during potential localized COVID-19 outbreaks. Programming decisions for these students and circumstances should be made on a case-by-case basis, and school districts are encouraged to consider a variety of continued educational opportunities. Finally, school districts are reminded that the 2021 Remote Learning Legislation does not supersede the IDEA or Section 504, and programming decisions for students with disabilities must be made by their PPTs or Section 504 teams, as appropriate.

Given this guidance from the State Department of Education, when a family requests that a student receive remote instruction because of a vulnerable family member, school officials should consider that request on an individual basis. In so doing, school officials should keep the following in mind:

- Each request must be considered individually.

- In-person instruction, if feasible, is best for the student.

- Districts may wish to consider such requests as a request for exemption from in-person learning, similar to requests for mask exemptions. Such requests should be supported by medical evidence. Moreover, school officials and parents should talk together about alternatives, such as risk mitigation steps, that would permit the student to continue to receive in-person instruction.

- If school districts decide to grant the exemption and provide remote instruction, school officials are free to consider different options, including Internet-based instruction. School districts are not obligated to provide "dual teaching," whereby such students would participate remotely in the class(es) that they would otherwise be attending.

Given these considerations, school officials should work with their legal counsel to establish appropriate procedures for considering and acting on such requests.

Question Five:

I heard that the vulgar cheerleader won her case at the United States Supreme Court last June. How bad is the decision for us school people?

Answer to Question Five:

Let's start by clarifying that this cheerleader was not "vulgar," but rather she had a bad day and published some vulgar comments on Snapchat that landed her school district before the United States Supreme Court. In *Mahanoy Area School District v. B.L.* (U.S. 2021), the student prevailed in her claim that school officials violated her First Amendment rights when they suspended her from the cheerleading squad for making those vulgar comments. But the Court's decision was actually helpful to school districts, as explained below.

B.L. had labored in the obscurity of the JV squad for her freshman year, and she was hopeful that she would move up to the varsity cheerleading squad with the new season. When she heard the news that she did not make the varsity squad, she was disappointed. So much so that she and a friend shared her disappointment with the world by posting two pictures on Snapchat, including one with middle fingers raised with the caption, "Fuck school fuck softball fuck cheer fuck everything." When one of her teammates forwarded that Snapchat post to the cheerleading coach, B.L. was suspended from cheerleading for that entire season, notwithstanding her apology for her post.

Her parents sued, claiming that her posts were speech protected by the First Amendment, and the district court agreed. The school district appealed, and the Third Circuit affirmed. But in so doing, a divided Third Circuit announced a broad new rule to the

effect that school officials have no authority to discipline students for off-campus speech, including the posts in question.

Given the potential disruption that off-campus speech on social media and otherwise can cause, the Court's affirming such a rule would be a big problem for school officials. Other appellate courts, including the Second Circuit, have ruled that school officials do have such authority to discipline students for off-campus speech in accordance with *Tinker v. Des Moines Independent Community School District* (U.S. 1969), where the Court famously held, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." In *Tinker*, the Court ruled that school officials violated the First Amendment rights of Mary Beth Tinker, her brother and their friend for wearing black armbands to school to protest the war in Vietnam in violation of an ad hoc rule prohibiting such protests. However, in *Tinker* the Court clarified that student free speech rights are limited, holding that school officials may regulate student speech when they reasonably forecast that such speech would seriously disrupt or materially interfere with the educational process or violate the rights of others.

In the *Mahanoy Area School District* case, the United States Supreme Court agreed with the Third Circuit in its finding that B.L.'s actions were not disruptive of the educational process. Fortunately, however, the Court also ruled that *Tinker* does apply to off-campus conduct, albeit in limited circumstances. For the majority, Justice Breyer describes the rule as follows:

> Significantly, however, and in light of the realities that most modern day discourse takes place through internet communications, the Court also recognized that some off-campus speech is harmful and should be regulated: "The school's regulatory interests remain significant in some off-campus circumstances. . . . . These include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers."

In short, the Mahanoy Area School District may have lost its case on appeal, but it and school districts more generally won a significant victory in the Court's ruling that school officials retain jurisdiction over student off-campus speech that interferes with the educational process.

Question Six:

My secretary got up in the middle of the afternoon the other day and told me that she was going to a union meeting for the rest of the day. Can she just do that?

Answer to Question Six:

No, she cannot. However, Public Act No. 21-25, which becomes effective on October 1, 2021, sets forth new obligations on public employers, including boards of education, regarding union access to their employees and payroll deductions. This new law is a response to the decision of the United States Supreme Court in *Janus v. AFSCME* (U.S. 2018), in which the Court reversed a precedent set forty-one years earlier and held that mandatory agency fees for public sector employees who do not join the union violate their First Amendment rights.

The Act imposes a number of new requirements on public employers. Most germane to the question, we note that unions now have a statutory right to meet with employees at the workplace, but not during work time, as is the situation in the question above. New requirements for union access to the employees they represent includes the right to: (1) meet with individual employees on the employer's premises during workdays to investigate and discuss grievances, workplace-related complaints, and other workplace issues; (2) conduct worksite meetings on the employer's premises before and after the workday and during meal periods and other paid or unpaid breaks; and (3) meet with a newly hired employee within the bargaining unit, without charge to the employee's pay or leave time, for between 30 and 120 minutes within 30 calendar days after the employee is hired, during orientations, or if the employer does not hold orientations, at individual or group meetings.

Other requirements in the Act include the following. Public employers must now provide the exclusive collective bargaining representative with a newly hired employee's (1) name; (2) job title, department, and work location; (3) work phone number; and (4) home address. This information must be provided in an editable digital file format, and if possible, in a format agreed to by the union. If possible, the employer must also provide the information with real-time electronic transmission of new hire data, but no later than ten days after the employee was hired or the first pay period of the month after the employee was hired, whichever is earlier.

Beginning on January 1, 2022, public employers are required to provide the exclusive collective bargaining representative with each bargaining unit employee's (1) name; (2) job title; (3) worksite location; (4) work phone number; (5) hire date; (6) work email address; and (7) home address. The employer must provide the information in an editable digital file format agreed to by the union (1) every 120 days, unless an agreement between the parties requires more frequent or more detailed lists, and (2) in addition to any other employee information to which a union is entitled. If authorized by the

employee via written authorization provided to the union, the information above must also include the employee's home telephone number, personal cell phone number, and personal email address if on file with the public employer.

Further, the exclusive collective bargaining representative must be given access to new employee orientations and must be given notice of the orientation at least ten days in advance. The parties must negotiate these issues upon either party's request. In the event that the parties are unable to reach agreement on such issues, the statute provides for an expedited arbitration process regarding those matters.

The Act permits public employees and retirees to authorize deductions from their salaries, wages, or retirement benefits to pay union dues, and it regulates how employers may require employee authorization of deduction for union dues. Public employers must now rely on certification from the public employee organization attesting that the employee in question has provided written authorization for any such deductions, and the employer may not require that the public employee organization produce the actual authorization from the employee unless there is a dispute over whether the employee provided such authorization. The Act also provides that employees may withdraw their authorization for the deduction of union dues only in accordance with the terms of the authorization. Moreover, the Act provides that the public employee organization must indemnify the employer if it makes an improper deduction in reliance on the organization's certification.

Finally, the Act makes it a prohibited labor practice for a public employer to do any of the following: (1) encourage an employee to resign or decline membership in a union; (2) encourage an employee to revoke authorization for a payroll deduction of dues to a union; (3) knowingly aid such an effort by another entity; or (4) allow an entity to use the employer's email system to discourage membership in a union or discourage authorization of payroll deductions for the union's dues.

Question Seven:

My superintendent is now insisting that I ask only pre-scripted questions in job interviews. Why would I have to do that?

Answer to Question Seven:

The hiring process is fertile ground for discrimination complaints, and pre-scripted questions help avoid claims by disappointed applicants. However, as with all things, interview committees must exercise some reasonable judgment, and the benefit of being able to ask follow-up questions may outweigh the risks of going "off-script."

Discrimination against prospective employees is prohibited on the basis of a number of protected characteristics, including age, sex, race, religion, national origin, ancestry, marital status, sexual orientation, gender identity or expression, veteran status, genetic information, and disability, and employment decisions should be made without regard to such characteristics.

Questions that touch on such protected characteristics can cause problems because discrimination claims are often decided without any direct proof of discrimination. Many years ago, the Connecticut Supreme Court described the problem: "One who indulges in discrimination does not usually shout it from the housetops. All too frequently persons publicly announce abhorrence of racial prejudice while privately practicing it." *Reliance Insurance Company v. CHRO*, 172 Conn. 485 (1977). Accordingly, the courts will draw inferences from words and actions to determine whether illegal discrimination has occurred.

The hiring process often gives rise to discrimination complaints, and those complaints are typically decided by drawing such inferences. It is not illegal per se, for example, to ask a candidate how old he or she is. But such information is (or should be) irrelevant to the hiring process, and the Connecticut Commission on Human Rights and Opportunities or the Equal Employment Opportunity Commission would be ready to infer that such a question was asked for an improper, discriminatory purpose. It is therefore important that administrators, teachers, parents or anyone else involved in the hiring process be aware of discrimination prohibitions and avoid questions that elicit information about a protected status.

Scripted questions that an interviewer should ask all candidates reduce the likelihood that a candidate with a protected status would claim discriminatory treatment. In the interest of a robust interview process, however, follow-up questions should be fine, but interviewers must be careful not to elicit information about a protected characteristic, such as age or disability.

Indeed, recent legislation underscores the interest of the General Assembly in protecting prospective employees from age discrimination. Effective October 1, 2021, Public Act No. 21-69 makes it a discriminatory employment practice for employers, including boards of education, to request or require a prospective employee to provide information on an initial employment application that would reveal his or her age, such as date of birth or dates of attendance at or date of graduation from an educational institution.

Finally, it is important to be sensitive to the protections against discrimination in completing any written forms related to the hiring process. Comments about a person's "grandmotherly" appearance or "ethnic hairstyle" can give rise to an inference of discrimination. To that point, school officials should be aware of Public Act No. 21-2, effective March 4, 2021 (known as the CROWN Act), now defines "race" as "inclusive of ethnic traits historically associated with race, including but not limited to, hair texture

and protective hairstyles." "Protective hairstyles" is defined as "includes but is not limited to, wigs, headwraps and hairstyles such as individual braids, cornrows, locs, twists, Bantu knots, afros and afro puffs." Comments on hairstyles can now in some cases be evidence of discrimination.

Question Eight:

Just tell me one thing. If I have to get vaccinated, when can I expect that the students who breathe on me will have to do so as well?

Answer to Question Eight:

Right now, there is no requirement that students be vaccinated against COVID. Consequently, under current law school officials cannot condition school attendance on a vaccination requirement. Moreover, as we have seen with vaccination requirements for school employees and contracted workers, such mandates are complicated by medical and religious objections.

The prospect that a vaccination requirement will be implemented for students seems unlikely, given the fight the General Assembly recently picked with parents who are against vaccination. This year, going forward the General Assembly eliminated the religious exemption from the established vaccination requirements for students. Public Act No. 21-6, *An Act Concerning Immunizations,* became effective on April 28, 2021. The Act modifies, in multiple ways, Conn. Gen. Stat. § 10-204a, which permitted exemptions based on religious beliefs for students enrolled in grades kindergarten through twelve.

The Act eliminates the religious exemption for certain students. However, under the Act's legacy provision, any child who was enrolled in kindergarten through twelfth grade ***on or before*** April 28, 2021 ***and*** whose parent(s) or guardian(s) had obtained and presented a religious exemption to the applicable school ***before*** April 28, 2021 may continue to rely on that exemption. This includes students who transfer from another district or private school in Connecticut with an exemption in place.

With respect to the required timing of vaccination compliance for children enrolled in preschool or pre-kindergarten, the Act contemplates the following two primary categories of students:

1) Any child who is enrolled in a preschool or other prekindergarten program and who had presented a religious exemption before April 28, 2021, and who presents a declaration from a physician, a physician assistant, advanced practice registered nurse, or local health agency stating that initial immunizations have been given to the child and additional immunizations are in process according to an alternative vaccination schedule, in a form

prescribed by the Commissioner of Public Health, must be fully vaccinated according to the alternative vaccination schedule.

2) Any child who is enrolled in a preschool or other prekindergarten program and who had presented a religious exemption before April 28, 2021, and who did not present a declaration from a physician, a physician assistant, or an advanced practice registered nurse regarding an alternative vaccine schedule, must comply with the state's immunization requirements by the later of September 1, 2022 or fourteen days after transferring to the district.

In addition, the Act still continues to exempt any child who presents a certificate from a physician, physician assistant, or advanced practice registered nurse stating that, in the opinion of such professional, such immunization is medically contraindicated because of the child's physical condition. However, when it becomes available, which is supposed to be on or before October 1, 2021, such certificate must comply with the requirements of a form prescribed by the Commissioner of Public Health. This form is to be made available on the Department of Public Health website.

The Act further provides that, if the parents or guardian of any child are unable to pay for required immunizations, the expense of such immunization shall, upon recommendation by the local or regional board of education, be paid by the town.

Finally, the Act maintains the requirement that boards collect and report immunization data to DPH, and it now also requires DPH to release annual immunization rates for each public and nonpublic school in the state, although the data may not contain information that identifies specific individuals.

On May 25, 2021, the SDE issued Guidance Regarding Public Act 21-6, "An Act Concerning Immunizations." Although this guidance does not have the force of law, it does provide helpful information on many aspects of the Act.

Question Nine:

One of the secretaries at my school worked remotely all last year. Can we make her come to work in person this year?

Answer to Question Nine:

In the best legal tradition, our answer to this question is: "It depends." In the early days of the pandemic, we were directed to work remotely if possible, and as those requirements were loosened to permit people to return to work, the continuing pandemic caused some employees to request permission to work remotely. School officials granted

many such requests, but as time has worn on, the question is presented - what, if any, duty do employers have to permit employees to work remotely?

The discussion starts with the basic premise that the employer may determine conditions of employment, and those conditions may include personal (rather than remote) attendance at work. Moreover, the temporary change to remote work for reasons of public health to respond to a public health emergency did not create a new past practice, a change in which would be subject to negotiation. Public sector unions have generally accepted that school districts appropriately required school employees to return to work, though they have reserved their right to negotiate over the impact of changed working conditions as we continue to work our way through the pandemic.

Rather than union issues, bringing employees back to in-person work after a long period when they were able to work remotely is more likely to raise issues under the Americans with Disabilities Act (ADA). The question is whether working remotely is a required accommodation for an employee whose disability requires that they work remotely. Accordingly, when confronted with a request to continue to work remotely because of a claimed disability, school officials must engage in the interactive process that is required under the ADA when their disability affects their ability to do their job.

The first question is whether in-person attendance is an essential job function. When in-person attendance is required, as is often the case with teaching and some support positions, the employee does not have the right to work remotely. An employee who is not able to do the essential functions of his or her job, with or without reasonable accommodation is not protected under the ADA, because he or she is not otherwise qualified for the job.

Our experience in authorizing remote work during the pandemic has caused reconsideration of when working in-person is in fact an essential job function. Some support functions can be performed remotely, and when an employee with a disability claims it is necessary for him or her to work remotely, employers must thoughtfully consider whether in-person work is an essential job function. If in-person attendance at work is an essential job function, working remotely is off the table as a reasonable accommodation. If it is not, however, employers must consider permitting the employee to work remotely among the options for accommodating his or her disability.

As with any other claim that a disability affects one's ability to perform one's job, as required by the ADA, the employer must engage in an interactive dialog with the employee. The threshold question is whether an employee has a disability, which is defined as a "physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment." Accordingly, the first question is whether and how the health condition of the employee affects his or her ability to perform his or her job.

If the employee establishes that he or she has a disability, the next question is what, if any, accommodations are required for the employee to do his or her job. Such accommodations must be reasonable, and the employee must still be capable of performing the essential duties of his or her job with or without any such accommodations.

Permitting an employee to work remotely as an accommodation to a disability would rarely be required if in-person work is preferred (though not an essential job function). Here, the employer and the employee would discuss the impact of the disability on the employee's work through the interactive dialog process. Accommodations may include personal protective equipment or reduced contact with others, and permitting an employee to work remotely is not automatically required, and indeed such an extreme accommodation may rarely be required. However, a key principle of the ADA is that disability claims should be considered on an individual basis. Unless in-person work is determined to be an essential job function, the employer should not adopt an absolute requirement that all employees, including those with disabilities, must work in person.

Question Ten:

It took me hours to read through the entire legislative update. However, I didn't see anything about bullying. I thought there was a change. What gives?

Answer:

The person asking this question has a good memory. The General Assembly changed the definition of "bullying" when it passed Public Act No. 19-166, but the new definition was not effective until July 1, 2021. The familiar previous definition read:

> (1) "Bullying" means (A) the repeated use by one or more students of a written, oral or electronic communication, such as cyberbullying, directed at or referring to another student attending school in the same school district, or (B) a physical act or gesture by one or more students repeatedly directed at another student attending school in the same school district, that: (i) Causes physical or emotional harm to such student or damage to such student's property, (ii) places such student in reasonable fear of harm to himself or herself, or of damage to his or her property, (iii) creates a hostile environment at school for such student, (iv) infringes on the rights of such student at school, or (v) substantially disrupts the education process or the orderly operation of a school. "Bullying" shall include, but need not be limited to, a written, oral or electronic communication or physical act or gesture based on any actual or perceived differentiating characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity or expression, socioeconomic status, academic status, physical

appearance, or mental, physical, developmental or sensory disability, or by association with an individual or group who has or is perceived to have one or more of such characteristics.

Now, the definition of "bullying" as set forth in Conn. Gen. Stat. § 10-222d is much shorter, and it reads:

> (1) "Bullying" means an act that is direct or indirect and severe, persistent or pervasive, which (A) causes physical or emotional harm to an individual, (B) places an individual in reasonable fear of physical or emotional harm, or (C) infringes on the rights or opportunities of an individual at school. "Bullying" shall include, but need not be limited to, a written, oral or electronic communication or physical act or gesture based on any actual or perceived differentiating characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity or expression, socioeconomic status, academic status, physical appearance, or mental, physical, developmental or sensory disability, or by association with an individual or group who has or is perceived to have one or more of such characteristics;

The second sentence is the same in both definitions, and thus the question is how the new first sentence changes the landscape. Point to consider include:

- Reference to "students" as those potentially engaged in bullying conduct, and reference to the potential victim as "another student attending school in the same school district" are deleted, and there is (1) no limiting description of the potential actor, and (2) the potential victim is described simply as "an individual." To be sure, this definition must be read in light of the required elements of the safe school climate plan, as also described in Conn. Gen. Stat. § 10-222d. However, are claims of potential bullying by or of a school employee now possible?

- Reference to repeated acts has been deleted. Now actions by the potential perpetrator may constitute bullying if the action(s) is "severe, persistent or pervasive" and if it "(A) causes physical or emotional harm to an individual, (B) places an individual in reasonable fear of physical or emotional harm, or (C) infringes on the rights or opportunities of an individual at school"

- As to cyberbullying, this new definition must be read in concert with the recent decision of the United States Supreme Court in *Mahanoy Area School District v. B.L.* (U.S. 2021), described above. Given the robust free speech rights students have when off-campus, as acknowledged by the Court in *Mahanoy Area School District*, school officials must keep in mind the Court's description of the limited circumstances when school officials may take disciplinary action against a student for off-campus speech. Such circumstances include "serious or severe bullying

> or harassment targeting particular individuals." When investigating and taking action on bullying complaints, school officials must take to heart the requirement of the amended statute that, to constitute bullying, actions must be "severe, persistent or pervasive."

Finally, we note that Section 1 of P.A. 19-166 was codified in Conn. Gen. Stat. § 10-222q, which establishes "a social and emotional learning and school climate advisory collaborative." One of the duties specified for the collaborative is to "develop a plain language explanation of the rights and remedies available under sections 10-4a and 10-4b for distribution to parents and guardians pursuant to subdivision (2) of subsection (c) of section 10-222d, and provide such explanation to each local and regional board of education not later than January 1, 2021."

Section 4 of P.A. 19-166 imposes a concomitant duty on school districts, as codified in Conn. Gen. Stat. § 10-222r:

> Not later than June 30, 2021, each local and regional board of education shall publish on the Internet web site of such board the plain language explanation of the rights and remedies available under sections 10-4a and 10-4b provided pursuant to subsection (a) of section 10-222q.

To date, the collaborative has not published that "plain language explanation," but we can draw an inference as to what the explanation will say by the reference to Conn. Gen. Stat. §§ 10-4a and 10-4b. Section 10-4a defines the educational interests of the State as including the interest that "the mandates in the general statutes pertaining to education within the jurisdiction of the State Board of Education be implemented." Section 10-4b sets forth a procedure by which residents of a community or parents of students who attend school in that community may file a complaint with the State Board of Education alleging that a board of education has not implemented the educational interests of the state. Presumably, parents who believe that a school district has not followed the requirements of the statutes as relates to bullying complaints will now be notified of their right to file a complaint with the State Board of Education.