School Law Newsletter

HALLIGAN MAHONEY & WILLIAMS

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Amendments to the Election of the State Superintendent of Education

The South Carolina Legislature amended the South Carolina Code of Laws Section 59-3-10 relating to the election of the State Superintendent of Education, so as to provide for the appointment of the State Superintendent by the Governor with the advice and consent of the Senate rather than an election. The Act also delineates specific academic and experience qualifications candidates must possess. The person elected State Superintendent in the 2018 General Election shall serve out his or her term; however, if the person vacates that office before the term expires in January 2023, any successors will be appointed by the Governor with the advice and consent of the Senate and must satisfy the requisite qualifying criteria. The provision of this Act delineating the academic and experience requirements for the State Superintendent of Education went into effect on May 15, 2018; the remaining provisions of this Act take effect if there is approval and ratification of an amendment to Section 7, Article VI of the South Carolina Constitution.

Elective Credit for Religious Instruction

On May 15, 2018, the Governor signed into law Act No. 179, which amends South Carolina Code of Laws Section 59-39-112 relating to elective credit for released time classes in religious instruction for high school students. The Act provides that a school district board of trustees may accept released time credit, on the basis of purely secular criteria, as transfer credits from an accredited private school, which has awarded private school credits for a released time program operated by an unaccredited entity. Specifically, the amendment states that a school district can leave the evaluation and assessment function for an off-campus released time class to an accredited private school and can accept the off-campus released time transfer of credit without individually assessing the quality or subject matter of the class, trusting the private school accreditation process to ensure adequate academic standards.

Disturbing Schools Law Amended and Student Threats Law Enacted

On May 17, 2018, the Governor signed into law Act No. 182 which, among other things, amends state law relating to offenses involving disturbing schools. Specifically, the amendment makes it unlawful for a person, **who is not a student**, to willfully interfere with, disrupt, or disturb the normal operations of a school or college. This includes entering upon the grounds or property without permission; loitering after notice is given to vacate; initiating a physical assault or fighting with another person on school property; being loud or boisterous after instruction to refrain from the conduct; threatening physical harm to a student or employee on school property; or threatening the use of deadly force on school property if it is believed the person has the ability to carry out the threat. For the purposes of this law, a

"person who is not a student" means a person who is not enrolled in, or who is suspended or expelled from, the school that the person interferes with or disturbs.

In addition, with the recent increase of the use of technology and social media, the Act also enacts the student threats law which makes it unlawful for a student to make threats to take the life of, or to inflict bodily harm upon, another by using any form of communication whatsoever.

In amending the Code of Laws, the South Carolina Legislature signified that recent reports indicate there has been an increase in the number of South Carolina students arrested for disturbing schools. The Legislature urged school administrators throughout the State to exhaust all avenues of behavioral discipline in accordance with the school's code of conduct prior to requesting the involvement of law enforcement officials.

Acceptability of ROTC and Marching Band as Physical Education Courses

On May 15, 2018, the Governor signed into law Act No. 185 which, among other things, amends South Carolina Code of Laws Section 59-29-80 relating to required physical education coursework. Specifically, the Act provides that public schools offering a military or naval ROTC program sponsored by one of the military services of the United States, training in the ROTC program must be considered the equivalent of physical education instruction and must be accepted in lieu of physical education instruction for all purposes, academic or nonacademic.

Additionally, the Act provides that public schools offering instruction in marching band based on the South Carolina Academic Standards for the Visual and Performing Arts and incorporating the South Carolina Academic Standards for Physical Education must be considered the equivalent of physical education instruction and must be accepted in lieu of physical education instruction for all purposes, provided the school district first shall submit a plan to the State Department of Education documenting that all South Carolina Academic Standards for Physical Education are met in the proposed marching band instruction and receive approval of the plan by the Department.

Mandated Fire and Safety Policies

On July 2, 2018, the Governor signed into law Act No. 256. This Act provides that the Office of the State Fire Marshal and the State Department of Education will create model fire and safety policies and program guidelines and make the guidelines available to public school districts and charter schools before the 2019-2020 school year. Further, the Act provides that school districts and charter schools shall adopt fire and safety policies and programs before the 2020-2021 school year and submit these policies and programs to the State Fire Marshal and the State Department of Education for review and comment before July 1, 2021.

Significantly, the Act states that all public schools shall conduct at least two fire drills, two active shooter/intruder drills, and two severe weather/earthquake drills each school year with at least one of each drill conducted each semester. The principal or charter school leader of each school is required to document compliance.

Court Rules Civil Rights Law Protects Transgender Students

Several cases are pending in lower courts around the nation concerning discrimination against transgender students in public schools. In a Virginia case, *Gavin Grimm v. Gloucester County School Board*, which was appealed to the United States Supreme Court but remanded back to the District Court in Virginia, a transgender high school student brought action against the school board alleging that its policy of assigning students to restrooms based on their biological sex violated Title IX, as well as the Equal Protection Clause of the Fourteenth Amendment, by precluding him from using the restroom aligned with his gender identity and subjected him to different rules, sanctions, and treatment from that of non-transgender students.

The District Court determined that Title IX, a federal law prohibiting discrimination on the basis of sex in federally-funded education programs, includes discrimination based on gender identity. Specifically, the court determined that claims of discrimination on the basis of transgender status are actionable under a gender stereotyping theory under Title IX.

Because there are several cases pending in lower courts concerning transgender students' rights in public schools and there are split decisions among the lower courts, the likelihood the United States Supreme Court will take up this issue in the near future is greatly increased.

Dyslexia Screening

On May 18, 2018, the Governor signed into law Act No. 213. This Act provides, among other things, that beginning with the 2019-2020 school year, to the extent funding is provided or approved screening tools are available at no cost, school districts shall use the universal screening process, which will be established by the State Department of Education, to screen each student, who is in kindergarten through first grade three times each school year and as needed in second grade, and any other student as required by the State Department of Education for reading difficulties, including dyslexia, and the need for intervention. If there is indication that a student is at risk for experiencing academic difficulties, including dyslexia, the district is required to notify the parent or legal guardian of the student, provide the parent or legal guardian of the student with information and resource materials so they may assist and support learning for their child, provide the student with tiered, evidence-based intervention, and monitor and evaluate the effectiveness of the intervention and the student's progress.

Unused Sick Leave Compensation

On May 15, 2018, the Governor signed into law Act No. 198. The Act allows governing bodies of public school districts and charter schools to adopt a policy allowing compensation for unused sick leave. Specifically, the policy may permit all certified and noncertified public school teachers, certified special school classroom teachers, certified media specialists, certified guidance counselors, and career specialist employed by a school district or a charter school who earn, but do not use, sick and annual leave in excess of ninety days to receive payment at the end of each fiscal year for these earned days in excess of ninety days for each excess day at a district's or charter school's established rate of substitute pay for their individual job classification, or another amount, subject to approval by the local school board or governing body of the charter school. This provision is applicable to leave in excess of ninety days accrued after July 1, 2018.

Retired Educator Teaching Certificates

The South Carolina Legislature amended South Carolina Code of Laws by adding Section 59-26-45, which enables retired educators to maintain eligible certification for the purpose of substitute teaching. This new section provides that a person is initially eligible for a South Carolina retired educator certificate if (s)he held a valid South Carolina renewable, professional educator certificate at the time of retirement, is either a retired member of the South Carolina Retirement System or current or former participant in the State Optional Retirement Program, does not hold another valid South Carolina educator certificate, has never held a valid South Carolina educator certificate that has been suspended, revoked, or voluntarily surrendered, and meets all other qualifications to serve as a substitute educator as specified in state law, regulations, and guidelines. A retired educator certificate approved and issued is valid for five years from the date of its issuance; a certificate may be renewed and, if approved, is valid for five years from the date of each issuance. Renewal of a retired educator certificate does not require completion of professional learning or renewal credits; however, an educator is not exempt from taking part in professional development as required by local school districts.

Fourth Circuit Rules that Tenured Teacher Was Not Denied Her Federal Procedural Due Process Rights Even if the Charges Against Her Lacked Specificity

On April 4, 2018, in the case of *McMillan v. Cumberland County Board of Education*, the Fourth Circuit Court of Appeals issued an opinion analyzing a teacher's procedural due process rights. Specifically, the court ruled that a pre-termination hearing did not violate a tenured teacher's Fourteenth Amendment procedural due process rights. The court concluded that the notice she was provided, although it lacked specificity, met constitutional standards.

By way of background, Bobbydyne McMillan brought this action alleging, among other things, that the school district violated her due process rights. McMillan was employed by the district from 1994 until she resigned in lieu of termination in 2012. The incident that led to McMillan's resignation involved a student ("Student A"), who McMillan allowed to stay in her home and who took prescription drugs from McMillan's home and brought them to school. Another student ("Student B") notified his teacher that Student A had hidden the prescription drugs inside the boys' bathroom. The following day, Student B's parent complained about the incident to the principal, which resulted in the principal completing an investigation into the matter including a request for a written statement from McMillan detailing what happened. Following the investigation, the superintendent was notified and McMillan was placed on administrative leave. McMillan received a letter from the superintendent notifying her of the suspension, the possibility of adverse action affecting her employment, and scheduled an administrative conference. During the conference, the superintendent asked McMillan to give her account of what occurred. After the conference, the District allowed McMillan to resign in lieu of termination.

In analyzing McMillan's due process violation claims, the Fourth Circuit determined that McMillan had notice and an opportunity to be heard. The court determined that McMillan, a tenured state employee, had a constitutionally-protected liberty interest in her employment such that she was entitled to the minimum procedural standards required by due process, which included (1) oral or written notice of the charges against her, (2) an explanation of the employer's evidence, and (3) an opportunity to present her side of the story. The court held that McMillan was provided with sufficient notice when she was notified of the actions given rise to the concern, who raised the concern, and the possible consequences. Moreover, the court held she was provided an opportunity to be heard through her statement and during the conference. The court rejected McMillan's argument that she was entitled to specification of the charges against her. Specifically, the court held that Federal due process only requires that the explanation of the charges be descriptive enough to permit the employee to identify the conduct giving rise to the dismissal and thereby enable him/her to make a response.

The Fourth Circuit's recent analysis should serve as a reminder to public school districts that districts should continue to provide employees facing adverse employment actions with, at the very least, oral or written notice of the charges against him/her, an explanation of any evidence against him/her, and an opportunity to present his/her side of the story.

Announcement

Our firm cordially invites you to a reception to visit our new home and enjoy our student art exhibit on Thursday, September 20, 2018, from 4:30 p.m. until 7:00 p.m. Our office is located at 1301 Gervais Street, Suite 1400, Columbia. A formal invitation will be forthcoming.