ADA Accommodations for Employees: Navigating the Quicksand

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NAVIGATING THE QUICKSAND: How to Approach ADA Employment Issues Facing Public Schools

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I. Introduction

With an aging workforce and advances in medical technology that increase employment opportunities for individuals with disabilities, school districts are facing challenges as they attempt to comply with both the spirit and explicit terms of the Americans with Disabilities Act. The Americans with Disabilities Act has passed its 25th anniversary. Its basic concept, prohibition of disability based discrimination, has applied to public schools since the passage of Section 504 of the Rehabilitation Act of 1973.[1] Why then, does it often feel like it would be easier to navigate quicksand than to counsel a school district about how to address a particular ADA request? For example, in one situation a caring and compassionate school principal may be accused of pressuring an employee to return to work and thereby being guilty of disability discrimination for sending flowers, a note saying, "Get well soon, we cannot function without you," and information about what is occurring in the work place. Having learned this lesson, the principal then decides to avoid even the appearance of pressure by avoiding any contact with the employee during the long-term leave period and is accused of being insensitive and trying to force the employee out. The result in many school systems is that a disability situation results in the shutdown of normal communications for fear of making a misstep that will lead to litigation, thereby creating an adversarial situation that results in a claim.

This article explores some of the unique issues school districts face in complying with the ADA and discusses how we might better prepare our clients so that they remain on solid footing when responding to ADA requests.

II. Background

Understanding and complying with the ADA is crucial for school districts, given the prevalence of disabilities in our population. According to the 2010 census, approximately 56.7 million people—or about 19 % of the population of the United States—have a disability.[2]

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1 29 U.S.C. §701 *et seq*.

2 *Census Bureau Facts for Features: Anniversary of Americans with Disabilities Act:* July 26, PR NEWSWIRE (June 2, 2016, 10:53 AM), http://www.prnewswire.com/news-releases/census-bureau-facts-for-features-anniversary-of-americans-with-disabilities-act-july-26-300278741.html; *Nearly 1 in 5 People Have a Disability in the U.S., Census Bureau Reports*, UNITED STATES CENSUS BUREAU (July 25, 2012); https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html. *see also* Disability and Functioning (Noninstitutionalized Adults 18 Years and Over), CENTERS FOR DISEASE CONTROL AND

Between 2008 and 2013, the number of disputes between employees and employers over disability claims rose sharply from 20,000/year on average from 1997 to 2008, to 26,000/year on average between 2008 and 2013.[3] In the 2015 fiscal year, 26,968 disability discrimination claims were filed with the Equal Employment Opportunity Commission (EEOC), representing approximately 30.2% of all claims filed.[4] The number of disability complaints the EEOC has received has steadily risen since 1997.[5] In 2015, $128.7 million in benefits were paid out to employees as a result of resolutions to complaints (not including awards obtained through litigation), the highest since 1997.[6]

Further, disabilities severely limit the earning power of disabled individuals. Only forty-one percent of disabled individuals ages 21 to 64 were employed in comparison to 79 percent of those without disabilities. Further, among individuals ages 15 to 64 with a severe disability, 10.8 percent "experienced persistent poverty in comparison with only 4.9 percent of those with a minor disability and 3.8 percent of those with no disability."[7]

A contributing factor to the increase in disability claims may be that our country's workforce is aging.[8] As our workforce gets older, "supporting the retention of older workers, including those with disabilities, who desire to remain productive members of the job pool of the future, will become a challenge."[9]

III. Relevant Law

A. The Americans with Disabilities Act.

"The ADA serves the important function of ensuring that people with disabilities are given the same opportunities and are able to enjoy the same benefits as other Americans. The ADA mandates reasonable accommodation of people with disabilities in order to put them on an even playing field with the non-disabled; it does not authorize a preference for disabled people generally."[10] The ADA requires that public schools "ensure that their employment practices and

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PREVENTION: NATIONAL CENTER FOR HEALTH STATISTICS (July 6, 2016), http://www.cdc.gov/nchs/fastats/disability.htm.

3 Aldo Svaldi, *Stress Leave a Rising Source of Contention for Employers*, THE DENVER POST (May 27, 2013, 2:56 PM), http://www.denverpost.com/2013/05/27/stress-leave-a-rising-source-of-contention-for-employers/.

4 *EEOC Releases Fiscal Year 2015 Enforcement and Litigation Data*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Feb. 11, 2016), https://www.eeoc.gov/eeoc/newsroom/release/2-11-16.cfm (The other categories of claims were retaliation (which represented the largest category), race, gender, age, national origin, religion, color, Equal Pay Act, and Genetic Information Non-Discrimination Act).

5 *Americans with Disabilities Act of 1990 (ADA) Charges (including concurrent charges with Title VII, ADEA, and EPA) FY 1997-FY 2015*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/statistics/enforcement/ada-charges.cfm (last visited Aug. 15, 2016).

6 *Id.*

7 *Nearly 1 in 5 People Have a Disability in the U.S., Census Bureau Reports*, UNITED STATES CENSUS BUREAU (July 25, 2012), https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html.

8 Melissa J. Bjelland, et. al., *Age and Disability Employment Discrimination: Occupational Rehabilitation Implications*, 20 JOURNAL OF OCCUPATIONAL REHABILITATION. 456-4571 (2010), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2980632/ (available through the National Institutes of Health U.S. National Library of Medicine online).

9 *Id.*

10 *Felix v. New York City Transit Auth*., 324 F.3d 102, 107 (2d Cir. 2003).

policies do not discriminate on the basis of disability against qualified individuals with disabilities in every aspect of employment, including recruitment, hiring, promotion, demotion, layoff and return from layoff, compensation, job assignments, job classifications, paid or unpaid leave, fringe benefits, training, and employer- sponsored activities, including recreational or social programs."[11] A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[12]

To make a prima facie case of employment discrimination, an employee must show that (1) he or she is regarded as disabled within the meaning of the ADA, (2) he or she is qualified to carry out the essential functions of the position, (3) he or she suffered an adverse employment action under circumstances giving rise to an inference of unlawful discrimination, (4) the employer knew or had reason to know of the employee's disability, and (5) the employer either replaced the employee or left the position open while seeking a replacement.[13] The burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for the action. The plaintiff may then rebut the defendant's justification by presenting evidence that the proffered reason is pretextual and based on intentional discrimination. [14]

A review of the case law demonstrates that among the most commonly litigated issues currently are whether an accommodation request is reasonable and whether the employer has actually provided the accommodation. It appears that there are fewer disputes as to whether an employee actually has a disability, entitling him to seek an accommodation. Further, among the most commonly litigated disabilities are anxiety and depression, where those conditions are results of the working conditions themselves.[15]

B. The Family Medical Leave Act.

Requests for accommodation of a disability often involve reference to other statutes, one of the most common being the Family Medical Leave Act. "The FMLA guarantees an eligible employee the right to take twelve weeks of unpaid leave because of, among other things, a serious medical condition that renders the employee unable to do his job."[16] The Act also makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to

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[11] The Americans with Disabilities Act Title II Technical Assistance Manual 4.3100; 42 U.S.C. § 12112(a).

[12] 42 U.S.C. § 12111(8*); Fischer v. Minneapolis Pub. Sch.*, 16 F. Supp. 3d 1012, 1016 (D. Minn. 2014), *aff'd* 792 F.3d 985 (8th Cir. 2015); *see also Howard v. Magoffin County Bd. of Educ.*, 803 F. Supp. 2d 308 (E.D. Ken. 2011); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876 (6th Cir. 1996).

[13] *Fischer v. Minneapolis Pub. Sch.*, 16 F. Supp. 3d 1012, 1016 (D. Minn. 2014), *aff'd* 792 F.3d 985 (8th Cir. 2015); *see Burchett v. Target Corp.*, 340 F.3d 510, 516 (8th Cir. 2003).

[14] *Whitfield v. Tennessee*, 639 F.3d 253, 258–259 (6th Cir.2011); *Howard v. Magoffin County Bd. of Educ.*, 803 F. Supp. 2d 308 (E.D. Ken. 2011).

[15] *See*, *e.g.*, *Domenech v. New York City Employees' Ret. Sys.*, No. 15CV2521ILGPK, 2016 WL 2644892 (E.D.N.Y. May 9, 2016); *White v. Twin Falls County*, 1:14-CV-00102-EJL-REB, 2016 WL 1275594 (D. Idaho Mar. 31, 2016); *Smith v. The Public Schools of Northborough-Southborough Mass.*, 133 F. Supp. 3d 289 (D. Mass. 2015*); Jacobs v. N.C. Admin. Office of the Courts,* 7:11-cv-169-BO, 2013 WL 4736171, at *3, *5 (E.D.N.C. Sept. 3, 2013).

[16] *Mahoney v. Ernst & Young LLP,* 487 F. Supp. 2d 780, 799 (S.D. Tex. 2006) (citing 29 U.S.C. § 2612).

exercise, any right provided [by the FMLA],"[17] and it prohibits employers from discriminating or retaliating against an employee who exercises her FMLA rights.[18] Further, it allows an employee who has taken the full 12 weeks of leave to return to the same or an equivalent position with the same terms and benefits she occupied prior to such leave.[19]

"To make out a prima facie case of retaliation [for taking FMLA leave a plaintiff] must show (1) [she] availed [herself] of a protected right under the FMLA; (2) she was adversely affected by an employment decision; and (3) there is a causal connection between the employee's protected activity and the employer's adverse employment action."[20]

After the plaintiff has made out a prima facie case of retaliation, the burden shifts to the defendant to "articulate a legitimate, nondiscriminatory reason for the action that adversely affected the employee. If the employer offers some evidence to support the stated nondiscriminatory reasons for discharge, the plaintiff must offer evidence of pretext or mixed motives."[21]

"Employers are responsible for designating leave as FMLA-qualifying, and when the employer has enough information to determine whether leave is being taken for a FMLA-qualifying reason, the employer must notify the employee within five business days whether the leave will be designated and counted as FMLA leave."[22] "In giving notice of the need for leave, an employee need not expressly invoke the FMLA. If the employee states that leave is needed, the employer will thereafter be expected to obtain any additional required information through informal means. The notice must be sufficient to make the employer aware that the employee needs FMLA-qualifying leave, the anticipated timing, and the duration of the leave."[23]

C. The ADA and the FMLA.

The interaction between the ADA and the FMLA are spelled out, in large part, under 29 C.F.R. § 825.702, which states that:

> "The purpose of the FMLA is to make leave available to eligible employees and employers within its coverage, and not to limit already existing rights and protection. An employer must therefore provide leave under whichever statutory provision provides the greater rights to employees. When an employer violates

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17 *McArdle v. Town of Dracut/Dracut Pub. Sch.*, 732 F.3d 29, 32–33 (1st Cir. 2013) (quoting 29 U.S.C. § 2615(a)(1)).

18 *Mahoney*, 487 F. Supp. 2d at 799 (citing 29 U.S.C. § 2615(a)).

19 29 U.S.C. § 2615(a)(1); *see also* 29 C.F.R. § 825.214(a).

20 *McArdle*, 732 F.3d at 35 (1st Cir. 2013) (applying the standard from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to FMLA cases).

21 *Mahoney* , 487 F. Supp. 2d at 809–810.

22 *Bradley v. Army Fleet Support, LLC,* 54 F. Supp. 3d 1272, 1277 (M.D. Ala. 2014) (citing 29 C.F.R. § 825.300(d)(1)).

23 29 C.F.R. § 825.303(b)); *see also Bradley*, 54 F. Supp. 3d at 1277–1278 (citing *Cruz v. Publix Super Markets, Inc.,* 428 F.3d 1379, 1383 (11th Cir.2005).

both FMLA and a discrimination law, an employee may be able to recover under either or both statutes."[24]

This regulation further provides that, employers must be sure to provide employees with reasonable accommodations under the ADA and her rights under the FMLA. The term "disability" under the ADA and the term "serious health condition" under the FMLA "are different concepts and must be analyzed separately."[25]

> "FMLA entitles eligible employees to 12 weeks of leave in any 12-month period due to their own serious health condition, whereas the ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation. FMLA requires employers to maintain employees' group health plan coverage during FMLA leave on the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period, whereas ADA does not require maintenance of health insurance unless other employees receive health insurance during leave under the same conditions." [26]

D. The ADA and Collective Bargaining Agreements.

Collective bargaining agreements govern the rights between teachers' unions and school districts, but they also govern the rights of teachers with respect to each other.[27] Under 42 U.S.C. § 12112(b)(2), discriminating against a qualified individual on the basis of a disability includes "participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this [statute] (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs)."

An employer is not required to violate a collective bargaining agreement to provide an employee with a reasonable accommodation, because doing so would place unreasonable burdens on employers, requiring them to defend (and potentially lose) union grievances.[28] However, an employee may show that the requested accommodation is reasonable based on

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[24] 29 C.F.R. § 825.702(a).

[25] 29 C.F.R. § 825.702(b).

[26] 29 C.F.R. § 825.702(b).

[27] *See*, *e.g.*, *Willis v. Pacific Maritime Ass'n,* 236 F.3d 1160, 1163-1165 (9th Cir. 2001) (collective bargaining agreement allocated certain preferred job assignments to employees based on their seniority); *see* also *Kralik v. Durbin,* 130 F.3d 76, 83 (3d Cir. 1997*); Foreman v. Babcock & Wilcox Co*., 117 F.3d 800, 810 (5th Cir. 1997).

[28] *See Willis*, 236 F.3d at 1164 (collecting cases: *Davis v. Florida Power & Light Co*., 205 F.3d 1301, 1307 (11th Cir.2000); *Feliciano v. Rhode Island*, 160 F.3d 780, 787 (1st Cir.1998); *Cassidy v. Detroit Edison Co*., 138 F.3d 629, 634 (6th Cir.1998); *Kralik v. Durbin*, 130 F.3d 76, 81–83 (3d Cir.1997); *Foreman v. Babcock & Wilcox Co*., 117 F.3d 800, 810 (5th Cir.1997); *Eckles v. Consol. Rail Corp*., 94 F.3d 1041, 1051 (7th Cir.1996); *Benson v. Northwest Airlines, Inc*., 62 F.3d 1108, 1114 (8th Cir.1995); *Milton v. Scrivner, Inc*., 53 F.3d 1118, 1125 (10th Cir.1995).

"special circumstances surrounding the particular case that demonstrate the [requested accommodation] is nonetheless reasonable."[29]

For example, in *Stamos v. Glen Cove School District*, a teacher requested a transfer to a middle school teaching position.[30] The Second Circuit affirmed the District Court's dismissal of her claim on the basis that the teacher could not show that there existed a middle school teaching position to which she was entitled on the basis of her seniority and qualifications.[31] The teacher also failed to show the existence of any special circumstances that would make it reasonable for the school district to disregard other employees' entitlements under the collective bargaining agreement.[32]

E. The FMLA and Collective Bargaining Agreements.

The FMLA provides that nothing therein "shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of employees."[33] Further, no employee is entitled to "any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave."[34]

The terms of a CBA can provide greater protections to employees, but the FMLA "cannot be diminished by any employment benefit program or plan."[35] "For example, a provision of a CBA which provides for reinstatement to a position that is not equivalent because of seniority (e.g., provides lesser pay) is superseded by FMLA. If an employer provides greater unpaid family leave rights than are afforded by FMLA, the employer is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA), to the additional leave period not covered by FMLA."[36]

Further, courts have held that an employer may run a paid sick leave program concurrently with an employee's unpaid FMLA leave, and may terminate an employee for failing to follow the more stringent requirements of the paid sick leave.[37] "Internal sick leave policies or any collective bargaining agreements are only invalidated to the extent they diminish the rights created by the FMLA." "Federal labor law requires employers to adhere to collective bargaining agreements; nothing in the FMLA entitles employees to variance from neutral rules."[38] "[T]here is no right in the FMLA to be 'left alone"'while on FMLA leave,[39]and nothing in the FMLA prevents employers from ensuring that employees who are on leave from work do

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29 *U.S. Airways, Inc. v. Barnett,* 535 U.S. 391, 403–04 (2002).
30 *Stamos v. Glen Cove Sch. Dist.*, 78 Fed. Appx. 776, 778 (2d Cir. 2003).
31 *Id*.
32 *Id*.
33 29 U.S.C. § 2614(a)(4).
34 *Throneberry v. McGehee Desha County Hosp*., 403 F.3d 972, 976 (8th Cir. 2005) (quoting 29 U.S.C. § 2615(a)(2)); *see also* 29 C.F.R. § 825.216(a).
35 29 C.F.R. § 825.700(a).
36 29 C.F.R. § 825.700(a).
37 *Allen v. Butler County Com'rs,* 331 Fed. App'x 389, 394 (6th Cir. 2009).
38 *Callison v. City of Philadelphia*, 430 F.3d 117, 121 (3d Cir. 2005) (citing *Diaz v. Fort Wayne Foundry Corp*., 131 F.3d 711, 714 (7th Cir.1997)).
39 *Callison*, 430 F.3d at 121.

not abuse their leave, particularly those who enter leave while on the employer's sick abuse list.[40] For example, an employee may be terminated for failing to comply with a call-in policy while on FMLA leave.[41]

It should be noted that the same is not true for unpaid sick leave programs. In those instances courts have held that the "FMLA does not permit an employer to limit his employee's FMLA rights by denying them whenever an employee fails to comply with internal procedural requirements that are more strict than those contemplated by the FMLA. Therefore, if an employee properly invokes FMLA, his employer's internal policies do not apply to the extent that they conflict with or are more stringent than FMLA requirements." [42]

IV. Providing the Scaffolding

It is inevitable that every school district will face multiple ADA questions. The best way to assist our clients through the quicksand is to help them to avoid it altogether by teaching them to recognize the issue, plan for how to respond, remain calm and rely upon the assistance of an identified expert or experts to guide them.[43]

A. Recognizing the Issue

Although there are several requirements that an individual must meet in order to establish an ADA violation, in general schools should focus most of their attention on the requests for accommodation rather than whether an individual has a disability. When enacting the ADA Amendments Act (ADAAA) Congress stated clearly:

> "[T]he primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part should not demand extensive analysis."[44]

Therefore, although the school should request information about the nature of the claimed disability, a school district is not likely to be able to challenge the existence of a disability in most cases. The expanded definition of disability in this legislation has increased the situations in which employers must offer accommodations as well as the type of accommodations that employers must offer. Hence, the school should focus on whether the person is qualified, which means can they perform the essential functions of the job with or without reasonable accommodation. This highlights the importance of current and accurate job descriptions that identify essential job functions. It is imperative that the human resources manager, or individual designated to respond to the ADA request or concern be familiar with the job requirements and

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40 *Id*.

41 *Bradley v. Army Fleet Support, LLC*, 54 F. Supp. 3d 1272, 1281 (M.D. Ala. 2014).

42 *Harrigan v. Dana Corp.*, 612 F. Supp. 2d 929, 942 (N.D. Ohio 2009).

43 See generally, *How to Get out of Quicksand*, WIKIHOW (Aug. 15, 2016), http://www.wikihow.com/Get-out-of-Quicksand.

44 29 C.F.R. §1630.1(c)(4).

engage in the interactive process in good faith. This time period should be used to conduct due diligence, including consulting an expert, with regard to what accommodations are or are not reasonable in this specific educational setting.

B. Preparation

It seems ironic that public schools, which are tasked with creating a learning climate that is inclusive and welcoming to students with disabilities, are not at the forefront in creating inclusive and welcoming environments for school staff, who would serve as role models for students, parents and the larger community. First, our clients need to stop viewing a request for an accommodation as a burden and added cost rather than an opportunity to retain an otherwise valuable employee. This highlights another common issue which is that employers are often good at finding ways to accommodate or retain valued staff but are less supportive of staff who are viewed as less valuable thus setting themselves up for a claim of different or unfair treatment.

It is essential that each school district identify a staff member who will address ADA issues in the hiring and retention of employees. This individual, most likely the human resources director must have a basic knowledge of the ADA and other legislation or contractual obligations that will affect the school's response.

It is imperative that the human resources director separate the need to address a performance problem from a request by an employee for an accommodation for a disability. Laziness in promptly addressing performance difficulties by supervisory staff can result in a commingling of these two distinct issues. Similarly, it is imperative that schools spell out the essential job functions of distinct positions rather than relying upon generic job descriptions. Although it may seem obvious that consistency of attendance is an essential function of a paraprofessional who works with a student with emotional difficulties who cannot adjust to frequent transitions, not everyone would agree. It is too late to identify this essential job function after an employee has requested intermittent leave for radiation treatment.

Our clients also would benefit greatly by identifying potential barriers for employees with disabilities. It is not enough to rely upon a handicap parking space or a curb cut to show sensitivity to employees with disabilities. The same technology that makes a classroom accessible to students with disabilities will make the classroom more accessible to a staff member with a disability. The U.S. Attorney in Connecticut, for example, has identified school compliance with the ADA as a priority enforcement area.[45] Schools need to recognize that the same claims for accommodation made on behalf of students can be made on behalf of school employees and plan accordingly. For example, many schools when building or remodeling are designing classrooms with FM and hearing assistive technologies with a focus on students. However, at this same time, schools should be addressing how these systems might be used to assist a staff member who is hearing impaired. Website design and accessibility for students and parents with disabilities is another area of focus. However, these same tools will make the workplace more functional for staff with disabilities. A school community that makes a

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[45] Jay Stapleton, *As U.S. Attorney's Panel Gears Up, School Lawyers Brace for Discrimination Claims*, CONNECTICUT LAW TRIBUNE (Mar. 10, 2015), http://www.ctlawtribune.com/id=1202720171203/As-US-Attorneys-Panel-Gears-Up-School-Lawyers-Brace-for-Discrimination-Claims?slreturn=20160718103826.

commitment to an accessible school environment on a general rather than a case-by-case basis will be in a significantly better position to address an ADA request and avoid a discrimination claim.

C. Training

A corollary to planning is training. Such training must go beyond the human resources director and include the wider school community. This training must reinforce the district's commitment to an inclusive and accommodating work environment. An essential element of such training is a discussion of the implicit bias held by many that a disability or a request for accommodation is the equivalent of admitting a performance issue or seeking special treatment not afforded to other employees. Employees need to be encouraged to identify barriers to work productivity so that such barriers can be addressed on a universal or individual basis. For example, a school-wide rule limiting the consumption of food in the classroom as a means of encouraging healthy eating habits and protecting students with food allergies would be beneficial to staff with food allergies as well. By addressing such issues on a case-by-case basis, an elementary school teacher who requests such an accommodation is viewed as undesirable or unreasonable where a global policy that is not linked to a student or teacher is more easily enforced or accepted. The tone in which such a request is addressed will also have a significant impact upon the willingness of staff to come forward with requests. Too often, a staff member will delay seeking an accommodation due to embarrassment or concern about the district's reaction until after the employee's performance has suffered. At this point, the school is often skeptical of the existence of the disability and or the requested accommodation.

D. Move Slowly and Seek Expert Guidance

Although schools are well advised to consult with legal counsel before agreeing to or denying an ADA request, schools also need to think about seeking guidance from an individual with expertise in the particular disability. Too often, the human resources director is the sole individual making the decision about whether a requested accommodation is reasonable. In the context of providing accommodations for individuals with disabilities most human resources personnel, as well as most attorneys, do not have the training to make an informed decision. Schools who would never consider making a decision about the special services needed by a student without consulting an occupational therapist, a physical therapist, an assistive technology specialist or a physician, frequently will make a decision about the reasonableness of a request for accommodation without obtaining any expert assistance.

The process of seeking advice from a neutral expert will support a school's position that it entered into the interactive process of addressing a disability claim with an open mind and often may result in a school identifying an option that would not otherwise be considered. Rather than a school dismissing a request for a therapy dog out of hand, by examining the request more fully and identifying the pros and cons, a school may find that it can accommodate the request, it can identify an acceptable alternative or that it has the information it needs to deny the request. When schools object that such a process is too slow or too costly, they need to be reminded of the costs of litigation. For example, in *Huiner v. Arlington School District*,[46] the plaintiff, a K-

[46] Civ 11-4172-KES , 2013 WL 542496 (D.S.D 2013).

12 art teacher, had no performance issues until she was assigned to teach a credit recovery course for which she felt unqualified.[47] Soon thereafter, the plaintiff began receiving negative evaluations. Subsequently, the plaintiff was diagnosed with anxiety and depression "likely stemming from her concerns about possibly getting fired."[48] During the next school year, the plaintiff lost 30 pounds, had sleep pattern deficits, and "was having difficulty caring for her children."[49] The plaintiff asked that the district, limit observations of her class, include an impartial observer in any meeting, provide her with positive reinforcement and feedback, allow her to take 10 minute breaks "to a place where she [felt] comfortable to use relaxation techniques," allow a flexible work environment with flexible scheduling, and allow her to "play soothing music."[50] Although the school ultimately obtained judgment in its favor after trial,[51] the court denied its motion for summary judgment finding that there was a factual issue about whether some of the requests for accommodation were reasonable.[52]

Too often schools decide to deny a request before conducting sufficient due diligence and rely on legal counsel to try to build a defense at the time of litigation. A school can avoid costly missteps by moving more slowly at the outset and seeking the assistance of expert guidance. However, schools should not agree to excessive or inappropriate requests for accommodation simply to avoid litigation.

E. Recognize When You Need to Move Laterally

It is important when addressing an ADA issue to recognize the need to move laterally to address other applicable statutes, agreements or policies. For example, schools frequently receive requests for disability related leave. Due to the nature of the educational environment, a teacher or support staff leave of absence is likely to be disruptive to the educational process. Requests for intermittent leave are particularly challenging. It may be impossible to find a qualified teacher who is willing to provide instruction on a temporary basis. However, the FMLA or the terms of a collective bargaining agreement may provide the staff member with the right to such leave independently of the ADA. It is essential that a school be aware of these provisions and take them into account when considering a request for an accommodation. Similarly, a school should not rely solely on what these other statutes or agreements require as in circumstances of a particular case, the ADA may require an accommodation that is different from, or more extensive than, the leave or accommodation provided under the FMLA or collective bargaining agreement.

F. Don't Get Weighed Down With Excess Baggage

Schools need to avoid putting themselves in a position that they cannot provide, or sometimes refuse to provide, a requested accommodation because of an outside factor such as a collective bargaining provision or past precedent. Schools can try to avoid such problems by

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47 *Id*. at *1.
48 *Id*. at *2.
49 *Id*.
50 *Id.* at *6.
51 *See Huiner v. Arlington School District*, Civ 11-4172-KES, 2014 WL 2152546 (D.S.D. Apr. 7, 2014) (judgment in favor of defendant).
52 *Huiner v. Arlington School District*, Civ 11-4172-KES , 2013 WL 542496, at *11 (D.S.D 2013).

creating a culture that supports disability accommodation as described above. It is important for a district to engage the union representatives in such a discussion before a specific situation arises with an individual employee. Schools need to recognize that even a seemingly benign policy may result in a discrimination claim. For example, some schools have adopted an unofficial policy of allowing employees to "donate" unused sick days to a colleague only to run into difficulties when a less popular employee seeks the same benefit and no one wants to step forward.

Some programs in a school may suffer higher rates of ADA and/or FMLA claims due to the nature of the work those programs require. For example, teachers and staff working with children suffering emotional disturbances may experience higher rates of physical injuries and mental stress than teachers and staff working in an advanced placement history course. Schools may benefit from analyzing the sources of ADA and FMLA claims and putting in place contingency plans for dealing with expected FMLA and ADA claims. Such plans might include cross-training staff to support hard-to-staff areas, rotating employees through demanding assignments if possible, and providing additional training and supports to programs that yield a higher number of ADA and FMLA claims.

G. Recognize Common "Quicksand" Areas

As referenced in the introduction, many employers are so concerned about making a misstep with regard to a disability claim that they create problems by appearing uncaring. It is important for school staff who are addressing an employee's disability issues to use common sense. Expressions of support and concern can, and should, be made without committing to an accommodation. A statement such as, "I am sorry you are experiencing these difficulties, is there anything I can do to help you?" does not commit the school to an accommodation. In contrast, a statement that the employee should "take all the time you need" might be viewed as a commitment by the school that the employee's position will be kept open indefinitely. A hospital room visit or even a phone call or e-mail is not the appropriate place to discuss the length of a medical leave that might be provided as an accommodation. It is important that school representatives understand the boundaries imposed by their supervisory positions and not engage in discussions about whether the employee should "put themselves first and consider retirement" or similar sentiments.

The failure to address the employee's continuing need for an accommodation such as return to work status also is a common area for missteps. An employer has the right to request information about when an employee expects to able to return to work. Many employers do not ask the necessary questions due to concerns that this will appear harassing.

One of the most common mistakes is the failure to document and address performance issues that may or may not be related to the disability claim. An employer who has concerns that an employee is tardy for work should not speculate that the employee had a medical appointment but should express that the late arrivals are of concern and ask how this issue will be addressed. It is up to the employee to identify that he is late because of a disability so that you can engage in the interactive process.

Finally, it is critical that the school representative engage in the interactive process in good faith, being open to discussion, but at the point that the school has made a decision about what accommodations will or will not be offered, it should communicate that information clearly to the employee. The school should also document the decision in writing.

V. Conclusion

School districts will face an increasing number of ADA requests and claims. As educational institutions, schools not only have an obligation to set an example by taking a lead in creating an inclusive work environment that supports the hiring and retention of individuals with disabilities, schools will face increased scrutiny with regard to how they address such claims. At the same time, schools have a strong, if not unique need, to provide consistency of instruction during scheduled school hours to a vulnerable population. Schools face inflexible deadlines such as college reference letters or submission of final grades for graduating seniors. Staff are not fungible. The unique requirements of educational institutions limit the accommodations that a public school reasonably can provide. Recognition of these competing goals and needs is an essential step in assisting schools in navigating the ADA process.