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Redefining student instructional days

by Meganne Trela

When the Illinois General Assembly replaced the general state aid (GSA) funding formula with evidence-based funding (EBF) in 2017, it offered school districts great flexibility in defining what constitutes an instructional day for students. Upon repealing Section 18-8.05 from the School Code (105 ILCS 5/18-8.05), the General Assembly struck from the statute the average daily attendance calculation upon which the GSA formula had been based. Gone is the typical instructional day of five hours of student attendance, along with the myriad exceptions for such events as parent-teacher conference days and in-service training days. Without any statutory definition, school districts are able to redefine the school day, calendar, and even the classroom. However, with that flexibility comes several new challenges and hurdles.

In November 2018, the Illinois State Board of Education (ISBE) issued guidance about what the lack of a statutory definition means for Illinois schools. The Guidance[1] provides that school boards and collective bargaining units should work together to define the term "instructional day" with an eye towards improving outcomes for students. The memo also explains that instruction does not need to be limited to time in a physical classroom; thus, "seat time" is no longer a factor to consider in designing a school calendar.

Student learning can include online instruction, independent research projects, and work-based learning and internships. Essentially, students can be considered 'in attendance' anywhere and at any time, as long as they are "engaged in learning." To determine when students are absent, the test will now be whether the student is engaged in learning rather than if the student is physically present. This change will give school districts more flexibility when considering services for students who are homebound or for dealing with the tricky and unpredictable Midwest weather.

The broad term "engaged in learning" opens a plethora of possibilities, but it also creates a conundrum for calendaring. While the instructional day itself is now more flexible, school districts are still required to have a minimum of 176 days of student attendance. All schools in the school district do not need to be on the same schedule, as long as all students attend for 176 days.

Prior to the elimination of Section 18-8.05, school districts were able to count days used for teacher in-service training or parent-teacher conferences toward the 176 required school days. Beginning with the 2019-2020 school year, school districts can no longer count those two days toward the 176-day requirement; students will need to actually be engaged in learning on those two days in order for them to count toward the 176 instructional day requirement. If students are not engaged in learning on those days, two additional days will need to be added to the school's academic calendar. Thus, even school districts that make no other changes and retain the five hours' seat time for each instructional day will likely

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Searching 1,700 emails not considered an undue burden under FOIA

by Ryan R. Morton

A Freedom of Information Act (FOIA) request for emails regarding two dozen entities sent over two-and-a-half years was not overly burdensome, according to a recent binding opinion from the Public Access Counselor (PAC) of the Illinois Attorney General's Office. As long as a significant public interest in the information exists, and there is no overwhelming impact on the public body, a burdensome FOIA request still must be answered.

On July 12, 2018, Ted Cox, an online journalist, submitted a FOIA request to the Governor's Office requesting "any emails sent by or to" one of seven individuals, including then-Governor Bruce Rauner and his wife, Diana. The request specified that the emails should relate to "nominations for appointment" to any of the two dozen state agency boards listed, including every public university's Board of Trustees. The request also asked for any responsive documents in those individuals' possession, beyond emails.

A week later, the Governor's Office responded to Cox, claiming that his request was "unduly burdensome" pursuant to Section 3(g) of FOIA (5 ILCS 140/3(g)), because it was "overbroad and vague." Under the Act, when a public body cites this exemption when denying a request, the requester must be given an opportunity "to reduce the request to manageable proportions." Cox did amend his request the next day, by removing his request for "any documents," leaving only his request for

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Student's lack of residency negates request for ADA accommodation

by Robert W. Steele, Jr.

The United States Court of Appeals for the Seventh Circuit recently affirmed a trial court ruling that neither Title II of the Americans with Disabilities Act (ADA) nor the Rehabilitation Act of 1973 requires a school district to permit a student who resides outside of the district to continue attending school within the district as a reasonable accommodation. *H.P. v. Naperville Community Unit School District No. 203*, 910 F.3d 957 (7th Cir. 2018).

H.P. resided with her mother within District 203 and attended Naperville Central High School (NCHS) during her freshman and sophomore years. Her mother tragically died in May 2016, at the end of her sophomore year. At that time, the student began to reside with her father in Lisle outside of the District's boundaries. District 203's policy requires students to be residents of the District in order to attend one of its schools. Yet, because the District was unaware of H.P.'s change in residency, she continued to attend school at NCHS through her junior year. Before her senior year, District 203 learned that H.P. was living outside of its boundaries in violation of its student residence requirement. Her father requested permission for her to complete her senior year at NCHS, but the District denied the request.

The father made a second request for a waiver of the residence requirement, claiming it was necessary as an accommodation for H.P.'s disability under the ADA and the Rehabilitation Act. After her parents' divorce in 2008, H.P. experienced anxiety, depression, sleep disturbances, and seizures. In 2009, she was diagnosed with epilepsy, and in early 2014 she was diagnosed with Major Depressive Disorder, Generalized Anxiety Disorder, and a seizure disorder. She was found eligible for special education and District 203 prepared an Individualized Education Program for her at the beginning of her freshman year. Yet, her family subsequently revoked consent for special education services and H.P. was a general education student for the remainder of her time at NCHS.

After District 203 denied her father's second request for a waiver of the residence requirement. H.P. enrolled at Downers Grove North High School for her senior year. Although she ultimately graduated from there, H.P. was increasingly despondent about being forced to leave NCHS. She was diagnosed with Persistent Depressive Disorder and was prescribed certain anti-depressants.

H.P., through her father, filed an action against the District for claims of discrimination under the ADA and the Rehabilitation Act. The lawsuit alleged that District 203 should have waived its residency requirement and allowed H.P. to attend NCHS even though she was no longer a resident of District 203, According to the plaintiffs, the District's failure to waive the residency requirement constituted a failure to provide the student with a reasonable accommodation. The trial court and Seventh Circuit court disagreed.

Whether H.P. even had a disability under either statute was disputed by the parties. Yet, the courts jumped straight to whether the student, assuming she was disabled, could prove causation under either statute. To prove causation, H.P. would have to prove that 'but for' her disability, she would have been able to access the services available within District 203. She could not prove such causation since District 203's residency requirement would also preclude an identically situated person *without* a disability from attending NCHS.

The trial court cited *C.S. v. Ohio High School Athletic Association*, 2015 WL 4575217, as factually similar to this case. In *C.S.*, a student lived with his parents in Kentucky but attended a school in Ohio for "better educational services to accommodate [his] disability." The student and his parents sought to have him play soccer in Ohio, but the Ohio state athletic association's rules required the student's parents to reside in Ohio.

Relying on Seventh Circuit Appellate court opinions, the *C.S.* court concluded that the association's residency rule rendered the student ineligible to play in the state, even if he was not disabled. Additionally, similar services accommodating his disability were also available at a Kentucky school. Due to the factual similarities, the trial court in *H.P.* adopted much of the analysis from *C.S.*

On appeal, the Seventh Circuit principally agreed with the lower court in holding that the student failed to establish causation. To the Seventh Circuit, "the only reason H.P. could not attend NCHS is because she resided outside the District—a fact unrelated to her disability."

The *H.P.* decision does not mean that a school district never needs to modify a policy to accommodate a student with a disability. Circumstances do exist that would require a school district to adjust an established policy in order to ensure equal access to a student with a disability. For example, a policy that prevents students from eating or drinking in class would need to be waived for a student with a medical condition requiring sustenance during class time. Should you receive a request for a waiver of a board policy due to a student's disability, contact an attorney at Ottosen Britz to assist you in analyzing the situation under the ADA, the Rehabilitation Act, and other applicable laws. ■

Burden under FOIA

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emails. He also removed four of the boards from his list and told the Governor's Office that he would work with the office to set out a "reasonable timeline for production."

Despite these attempts to reduce the burden, the Governor's Office still denied Cox's FOIA request, again citing Section 3 (g). In its denial, the Governor's Office stated that a preliminary search of emails yielded 44,536 emails that might be responsive to Cox's request, though many would likely be irrelevant. Every email would need to be manually reviewed for responsiveness and redactions, which would be unduly burdensome, the office claimed.

Cox then asked the PAC to review the denial. The PAC provided a relatively quick response on October 9, 2018, and determined that the Governor's Office violated FOIA by not providing the emails Cox requested. (Public Access Opinion 18-013) In reaching that conclusion, the PAC considered (1) the scope of the request; (2) the search conducted by the Governor's Office; and (3) the burden on the public body.

Scope of Request

One of the Governor's Office's objections to the FOIA request was that it was "overbroad and vague," partly because Cox did not identify any search terms to be used to find responsive emails. The Governor's Office claimed that without specific names of appointees or other search terms, the office would need to cast too large a net to find emails that might be responsive. Without those terms, it had no way of knowing if an email was directly or indirectly related.

The PAC pointed out that several courts interpreting FOIA have stated that the Act only requires that public records be "reasonably identified" so an agency can determine what records are being requested. In requesting emails, Cox identified the (1) senders or recipients, 2) topic of conversation, and 3) specific boards involved. That was a sufficiently narrow request. FOIA does not require that the requestor provide search terms in his request. The requestor only needs to provide enough information so that the public body can determine the appropriate terms.

Search of Records

When a public body searches for records, it "must use search terms that are reasonably calculated to locate all responsive records," according to the PAC. The Governor's Office found 44,536 potentially responsive emails by searching each individual's emails for 40 keywords, including the names of the boards both spelled out and abbreviated. The PAC determined that since Cox's request was narrowly tailored, this initial search was unreasonably broad, yielding thousands of irrelevant results.

However, the Governor's Office also conducted a second search, adding the word "appoint," which resulted in only 1,783 responsive emails that might be responsive. The Governor's Office argued that this subsequent search was still too broad, as "appoint" could be referring to appointments to other boards, or calendar appointments. At the same time, the search might leave out responsive emails, where only "nominate", or some similar word, was used.

The PAC determined this was not a sufficient excuse to deny the request. First, public bodies are not required to locate every responsive record; they only need to perform a reasonable search. Second, after reviewing that smaller batch of emails, the Governor's Office would be able to remove any inapplicable records. Therefore, the 44,536 number was greatly inflated to support the Section 3(g) exemption.

Burden of the Request

To determine whether a narrowed FOIA request is still "unduly burdensome" under Section 3(g), courts consider whether "the burden on the public body outweighs the public interest in the information." The Governor's Office argued that searching through 44,536 emails for responsive records and privileged information would negatively impact the performance of its other office duties.

The PAC did not buy this argument, however. Although responding to FOIA requests can be burdensome, that burden must be met unless there is a clear reason why it would be undue. The PAC reiterated that the actual number of emails is 1,783—not 44,536—thus creating a much lower burden for the public body. Conversely, "there is a significant public interest in the disclosure of information concerning appointments to governmental bodies that perform important public functions." Therefore, the Governor's Office failed to show how its burden outweighed that important public interest.

School districts often receive lengthy FOIA requests involving many types of public records, including emails. With so many buildings and employees—as well as unique privacy concerns that require tailored redactions—it might be tempting for school officials to simply use the "unduly burdensome" exemption. This PAC opinion, however, makes it clear that requestors will often receive the benefit of the doubt, as courts and the Attorney General err on the side of disclosure. If you are uncertain about how to best respond to a FOIA request, your attorney will be able to provide you with strategies to potentially limit both you your district's time and liability in responding to FOIA requests. ■

Student instructional days

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need to add two additional student attendance days to their school calendar.

School districts that wish to make changes to where or when students learn will face many issues, including: will teachers now have to work two additional days? If school districts engage in remote learning via technology on the conference/in-service days, teachers may be engaged in additional work on top of their in-service or parent-teacher conference duties. Likewise, if additional school days are added to the calendar, teachers will need to be in attendance for additional time.

If students are expected to be engaged in learning remotely on the two additional days, how would special education students receive the services listed on their IEPs on those days? If students may work remotely on two or more days, does that reduce the need for bus drivers, cooks and support staff on those days? Such reductions in scheduling would implicate the collective bargaining process for unionized employees. Clearly, the potential changes necessary to allow school districts to meet the 176-day requirement will certainly become a challenging topic of collective negotiations in the upcoming year.

On a positive note, when school districts submit calendars to ISBE, the number of minutes in an instructional day do not need to be noted and half days do not need to be coded. Furthermore, a school district will not be required to make up interrupted instructional days, such as snow days, provided that student learning has occurred on that day. Thus, on snow days, if the necessary technology is available, school districts can opt to engage students in remote online learning opportunities. The logistics of such remote online activities may take some advance planning, but some schools in Illinois have already piloted such programs successfully.

For school districts with school issued technology, remote learning, or e-learning could be considered a solution. Students unable to attend classes due to a snow storm could participate in an online assignment rather than attending school. The same could be done on days students are off for holidays or parent-teacher conferences. Those solutions also come with their own set of consequences, including whether teachers would be required to participate, and what, if any, issues collective bargaining units may have with the non-traditional approach to learning. If teachers are required to check in on students, upload coursework, or participate in e-learning on holidays, weekends, or other time outside of the traditional school day, is the District obligated to pay additional money? Unions will likely argue that teachers should receive additional compensation for such work, but that is likely not practical for most school districts.

Given the flexibility presented by EBF, school districts need to start considering (1) the definition of an "instructional day;" (2) incorporating technology into the "instructional day;" (3) changing the obligations of teachers and staff, including any collective bargaining ramifications; (4) how special education services are affected by the changing landscape of the instructional day; and (5) how to make-up for conference/in-service days that were credited towards the calculation of instructional days.

Several bills have recently been introduced in Springfield to re-insert the Section 18-8.05 instructional definition back into the School Code. For questions regarding the redefined "instructional day" and the current status of the pending legislation, contact an attorney at Ottosen Britz. ■

[1]The Guidance can be found at the Illinois School Board of Education's website: https://www.isbe.net/Documents/Instructional-Day-Memorandum.pdf

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