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LEGAL ISSUES RELATED TO THE EDUCATIONAL NEEDS OF CHILDREN IN FOSTER CARE

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Across the nation, educational outcomes for children in foster care significantly lag behind typical outcomes for the general student population. Furthermore, children in the foster care system are significantly more likely to drop out and less likely to graduate than other students. If a youth in foster care does graduate, he or she is less likely to be prepared for and continue on to higher education. Moreover, children in foster care are more likely to be placed in alternative education programs or special education than the general student population.

Children placed in foster care experience numerous educational challenges, even

beyond their personal histories of abuse or neglect. These challenges include high mobility, leading to set backs in learning as well as loss of course credit; extended absences and enrollment delays during school transitions, often attributable to difficulty accessing and sharing appropriate records; and a lack of adequate interventions, including special education services. This article discusses legal requirements applicable to foster children and youth that affect school districts. A careful consideration of these requirements will hopefully enhance the education experience and outcome for such students.

Inquiry & ANALYSIS

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School Stability

Is the Child Homeless?

A child removed from his or her home and taken into the custody of the state is often placed in a temporary living arrangement and later a foster home that is not located near the school the child was attending at the time of the removal. In some instances, state law and the federal McKinney-Vento Homeless Assistance Act will require school districts to provide for school stability. A child who is awaiting foster care placement meets the Act's definition of homeless. 42 U.S.C. § 11432(g)(3)(A)(i). A homeless child has a right to remain in his or her school of origin, which is the school in which the child was last enrolled or the school attended when last permanently housed. Transportation to the school of origin must be provided by the school district either for the duration of the child's homelessness or through the end of the academic year.

The interpretation of *awaiting foster care placement* varies from state to state. In Texas, this provision is understood to include any child in a shelter, as well as children who are "doubled up" with extended family or staying temporarily in a child welfare office. After a child is placed in foster care, however, the child no longer will be considered homeless, unless he or she otherwise lacks a "fixed, regular, adequate nighttime residence," as may occur if the child runs away from the foster care placement. 20 U.S.C. § 6399; 42 U.S.C. § 11434a. Other states have adopted state-level definitions of *awaiting foster care placement* that would afford all students in foster care the protections of the McKinney-Vento Act.

Child Welfare Agencies Must Plan for Educational Stability

In October 2008, Congress passed the Fostering Connections to Success and Increasing Adoptions Act of 2008, which amended portions of the Social Security Act, in part to address the needs of children and youth in foster care. The law seeks to promote educational stability for foster children by requiring that child welfare agencies include a plan for ensuring educational stability in every child's case plan.

In accordance with Fostering Connections, a state child welfare agency must:

- Ensure that the child's placement

takes into account the appropriateness of the current educational setting and the proximity to the school in which the child is enrolled. 42 U.S.C. § 675(1)(G)(i).

- Coordinate with appropriate local educational agencies to ensure that the child remains in the school in which the child is enrolled at the time of placement, unless it is in the child's best interest to enroll elsewhere. 42 U.S.C. § 675(1)(G)(ii).

In addition, Fostering Connections increased the types of federal funds available to cover the cost of transportation to a child's school. If they have not already, school districts can expect to hear from child welfare agencies regarding where students in foster care should be enrolled.

Is Changing Schools in the Child's Best Interest?

As mentioned above, as part of the Fostering Connections amendments to the Social Security Act, child welfare agencies must include in every child's case plan a plan for ensuring the educational stability of the child while in foster care. If remaining in the school of origin is not *in the best interest of the child*, the child welfare agency and the local educational agency must: (1) ensure that they provide immediate and appropriate enrollment in a new school; and (2) ensure the child's educational records are provided to the new school. 42 U.S.C. § 675(1)(G)(ii) (emphasis added).

Guidance from the U.S. Administration of Children and Families directs states to require that an education stability plan be a written part of each child's case plan and be reviewed every six months. See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, GUIDANCE ON FOSTERING CONNECTIONS TO SUCCESS AND INCREASING ADOPTIONS ACT OF 2008 (2010), available at http://www.acf.hhs.gov/programs/cb/laws_policies/policy/pi/2010/pi1011.htm. The child welfare agency may invite school personnel, agency attorneys, guardians ad litem, and youth to discussions about the education stability plan. The agency is encouraged to develop standard and deliberate processes for determining the child's best interest and properly document the steps taken to make the determination.

The best interest determination must be made quickly. Fostering Connections requires assurances by the state agency and local education agencies to provide *imme-*



diate and appropriate enrollment in a new school, with all of the education records of the child provided to the school. 42 U.S.C. § 675(1)(G)(ii) (emphasis added). State law may specify a time for enrollment. For instance, in Texas, a child must be enrolled in school within three days from the time the child was taken into protective custody.

Education Records

What Records are Needed to Enroll the Child?

Most states have specific requirements regarding enrollment, including requirements for who can enroll a child and what proof will be required of the child's identity, the enrolling person's identity, and the residency of the child. State law may provide flexibility or waiver of these requirements for children and youth in foster care. For example, an individual presenting a child for enrollment in Texas must show: (1) the child's birth certificate or other proof of identity; (2) the child's records from the school most recently attended; and (3) immunization records.

However, in Texas, all students presented for enrollment are to be immediately enrolled and may not be kept from attending school pending the receipt of academic records from the previous school. 19 TEX. ADMIN. CODE § 74.26(a)(1)(g). Likewise, in Texas, if a child is in child protective custody, the school district must accept the child for enrollment without the required documentation for up to 30 days. TEX. EDUC. CODE § 25.002(g).

What Records are Needed to Serve the Child?

Child welfare advocates and school officials alike express dismay over often lengthy delays in receiving past educational records from a prior school district. Delays in the transmittal of records cause innumerable educational problems, including loss of credit, inappropriate student placements, loss of special education or other services, and more.

In Texas, state law is quite clear: education records must be transmitted to a receiving school district within 10 business days of a request. TEX. EDUC. CODE § 25.002(a-1). Districts are required to use an electronic records exchange system to facilitate prompt transmittal of educational records. In reality, this quick turnaround time is rarely met. The reasons for the delay are not entirely clear, but the following may be contributing factors:

- **Undue caution due to FERPA:** The federal Family Educational Rights and Privacy Act (FERPA) protects the confidentiality of students' educational records. Absent consent from a parent or guardian, educational records can be released only in accordance with certain specified exceptions, including a court order. 20 U.S.C. § 1232g; 34 C.F.R. § 99.3. Some child welfare advocates report that school staff are hesitant to release records to anyone but a parent. FERPA's confidentiality protections should not be an impediment to providing records for children in foster care, however. First, child welfare agencies may be able to seek and receive parental consent from a

parent whose parental rights have not been terminated. If consent is not available, child welfare can rely on FERPA exceptions. Enrollment by a student in another school district constitutes authority for the original school district to release the education records of that student, regardless of whether parental authority has been received. 20 U.S.C. § 1232g (b)(1)(B); 34 C.F.R. §§ 99.31(a)(2), 99.34. Moreover, the caregiver or other person authorized by the child's legal guardian (i.e., the child welfare agency) should have access to educational records. FERPA regulations define a *parent* to include a natural parent, guardian, or an individual acting as a parent in the absence of a natural parent or guardian. 34 C.F.R. § 99.3. Finally, FERPA permits school districts to release records in compliance with a court order or subpoena. 20 U.S.C. § 1232g(b)(1)(J).

- **Hasty exits without formal withdrawal:** When children are taken into protective custody, the change often occurs abruptly, with no opportunity to formally withdraw from the previous district. The fact that the previous district has not been informed of the child's departure, or the fact that the receiving district may not know where the child was previously enrolled, may contribute to confusion and delay in transmitting records. Another complicating factor may be that transitions rarely coincide neatly with semester breaks. As a result, the receiving district may be asking for current records before grades are available.

- **Absence of child welfare records:** While ideally education records would transfer promptly from an old school to a new school, child welfare agencies with complete copies of education records can assist in getting necessary information to the new school quickly. Additionally, other documents, like immunization records or health records may need to come directly from the child welfare agency. Title IV-E of the Social Security Act requires that the case plan of a child in substitute care include health and education records, including information on health and education providers; school records; assurances that the child's placement in care takes into account proximity to the school of origin; immunization records; known medical issues and medication; and any other relevant health and education information. 42 U.S.C. § 675. Unfortunately, however, these compilations of records called for in the law are rarely complete. Given

the haste with which children are often removed from their homes, deficiencies in record keeping may be a persistent problem for child welfare agencies.

Who Makes Educational Decisions for the Child?

When a child enters the child welfare system, a number of individuals begin to share responsibility for advocating on behalf of the child. Discerning who among these individuals has final decision-making authority will vary depending on the child's case and the nature of the educational decision. Naturally this is baffling to school staff who need to know on a practical level to whom routine school correspondence should be directed and who has the power to sign off on decisions as minor as permission to attend a field trip or as monumental as consent for special education services.

- **Natural or adoptive parent:** The fact that a child is taken into protective custody impairs, but does not formally terminate, parental rights. Accordingly, a child's natural or adoptive parent may still have access to school records and have opportunities to influence, if not control, educational decisions.
- **Child welfare case worker:** Depending on state law or the court order placing a child in protective custody, the child welfare agency may have authority to make education decisions for the child. Consequently the state, acting through a child welfare case worker, may have authority over major decisions, like the best interest decision of where the child should enroll in school.
- **Foster parent:** Even if a case worker has decision-making authority for a child, it is the child's foster parent who is present at school, interacting with school staff. All involved may find it much easier for the foster parent to receive routine school correspondence, review and sign grade reports and permission slips, and otherwise stand in parental relation to the child in all but the most fundamental educational decisions.
- **Attorneys and guardians ad litem:** State law may make provision for an attorney or guardian ad litem in suits involving the parent-child relationship. These individuals provide representation either for the child or the child's best interests or both. While they do not have decision-making authority for the child, they can be important advocates on the child's behalf.

Are the Child's Special Needs Being Addressed?

Statistically, foster children are far more likely than other students to be identified as needing special education services. The federal Individuals with Disabilities Education Act (IDEA) specifically includes "wards of the State" and "highly mobile children" as populations for whom school districts have a child find duty, meaning a duty to identify, locate, evaluate, and serve children who are eligible for special education services. 20 U.S.C. § 1412(3)(A). IDEA does not require parental consent for an initial evaluation for a ward of the state if, despite reasonable efforts, the school cannot locate the parents or parental rights have been terminated or abrogated by a court order. 34 C.F.R. § 300.300(a)(2). This regulation allows an initial evaluation to begin even before a surrogate parent is appointed. 20 U.S.C. § 1415(b)(1)(B).

IDEA includes the following in the definition of *parent*:

- A natural, adoptive, or foster parent;
- A guardian, but not the state if the child is a ward of the state;
- An individual acting in the place of a natural or adoptive parent, including a relative with whom the child lives or another person legally responsible for the child; or
- An individual assigned to act as a surrogate parent for the child.

20 U.S.C. § 1402(23); 34 C.F.R. § 300.30.

Generally speaking, IDEA as reauthorized in 2004 shows a preference for final decision-making authority to be vested in someone standing in parental relation to the child; a stranger to the child should be appointed as a surrogate only if no qualified adult with a relationship to the child is available. In fact, IDEA defines "ward of the State" as a child in foster care or in the custody of a child welfare agency, but the term specifically *excludes* a foster child with a foster parent who meets the definition of "parent." 20 U.S.C. § 1402(36); 20 U.S.C. § 1402(23). Moreover, IDEA gives the power to designate a person with IDEA decision-making authority not only to school officials, but also to judges, who are likely to know a child better than a receiving school district. 20 U.S.C. § 1415(b)(2)(A)(i); 34 C.F.R. § 300.30(b).

The procedures required for special education evaluations and placements—complex in the best of circumstances—are complicated further by the mobility of students in the foster care system. For a student making a school transition during the special education evaluation process, the sending and receiving school districts must coordinate to ensure prompt completion of the evaluation. 20 U.S.C. § 1414(b)(3)(D). Under IDEA, an initial evaluation must be completed within 60 days. IDEA contains an exception if a child enrolls in a new school during the 60 day timeframe, but only if the evaluation is completed promptly and the school district and parent agree to a new deadline for completion of the evaluation. 34 C.F.R. §§ 300.301(d)(2); 300.301(e).

If a child moves within the same state after an individualized education program (IEP) has been established, the receiving district must provide appropriate special education services, including services comparable to those described in the previous IEP, until the new district can assemble the IEP team to revisit the child's IEP. The receiving district may choose to perform a new evaluation before establishing an IEP, but must provide comparable services during that time. 34 C.F.R. § 300.323(e).

Essential to providing *comparable* services is knowing what services were being provided at the previous school district. The need for prompt transmittal of educational records is heightened in the special education context. 34 C.F.R. § 300.323(g).

Conclusion

This article describes only a few of the significant barriers children in foster care must navigate in public schools. Often policies and procedures that work well for other children do not adequately support this special population. Interdisciplinary dialogue between judges, school districts, and child welfare advocates is an essential starting place for increasing awareness, alleviating barriers, and ultimately improving educational outcomes for children in foster care. For more information generally on legal issues for foster care children that relate to schools and more information specifically on Fostering Connections, visit the American Bar Association's Legal Center for Foster Care and Education at http://www.americanbar.org/groups/child_law/projects_initiatives/education.html. 

IRS TEMPORARILY SUSPENDS HEALTH INSURANCE NONDISCRIMINATION RULES

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Nondiscrimination Rules and (2) if, in fact, the modifications to the Nondiscrimination Rules being considered actually will be included in the final IRS regulations.

The purpose of this article is to: (1) describe how the Nondiscrimination Rules will impact public schools if they are not altered in the final regulations and (2) describe the modifications to the Nondiscrimination Rules being considered by the IRS and how they would impact public schools if included in the final regulations.

Nondiscrimination Rules as Included in Health Care Reform

The Nondiscrimination Rules originally included in Health Care Reform define a "highly compensated employee" broadly, to include any employee who is among the highest-paid 25% of all employees.⁷ There is a limited exemption from the Nondiscrimination Rules for employers with "grandfathered" health plans.⁸ However, it is relatively difficult to qualify for the grandfathered plan exemption and many districts' health plans do not qualify.⁹

As applied to most public schools, these Nondiscrimination Rules appear to mean that a school could no longer pay for a higher percentage of the cost of a health insurance plan for its superintendent, business manager, or any other employee who is among the highest paid 25% of all employees, than the percentage paid for full-time rank and file employees with the same plan. For example, under the Nondiscrimination Rules School District X could no longer pay 100% of the cost of a family plan for its superintendent if it only paid 50% of the cost of a family plan for its full-time, non-highly compensated employees, such as central office staff. Rather in this example, the Nondiscrimination Rules appear to require School District X to pay at least as high a percentage of the cost of health insurance for its full-time central



In March 23, 2010, the Patient and Protection Affordable Care Act (Health Care Reform) was signed into law.¹ One of the more controversial aspects of the law is a provision that prohibits employers from discriminating in favor of "highly compensated employees" when providing health benefits to their employees under a group health insurance plan (the Nondiscrimination Rules).² Prior to the enactment of Health Care Reform, the Nondiscrimination Rules only applied to self-insured health plans.³ The new Nondiscrimination Rules call for an employer penalty of \$100 per day, per non-highly compensated employee discriminated against.⁴ This means that if a school district violates the Nondiscrimination Rules and the school district has 50 employees that are considered non-highly compensated employees, the school district could be assessed a penalty of \$5,000 per day of non-compliance. For schools with health plan years that run from July 1 – June 30, the

Nondiscrimination Rules were scheduled to become effective July 1, 2011.

As applied to public school districts the Nondiscrimination Rules appeared to mean that, as of July 1, 2011, a school district could no longer pay for a greater percentage of the cost of health insurance for its superintendent and other "highly compensated employees" than it does for its other full-time employees.⁵ Needless to say, the Nondiscrimination Rules call for a huge change to the way most schools provide health insurance.

The good news is that in January of 2011, the Internal Revenue Service (IRS) announced that it is *temporarily* suspending any enforcement of the Nondiscrimination Rules and that it is *considering* issuing regulations that would eliminate or greatly reduce the impact of the Nondiscrimination Rules on school districts.⁶ The bad news is that at this time we do not know for sure: (1) when the IRS will begin enforcing the

office staff as it does for its superintendent. This would mean School District X would either have to lower the percentage received by the superintendent for the cost of his or her health plan from 100% to 50% or it would have to raise the percentage received by central office staff to the percentage received by the superintendent.

If School District X decided to lower the percentage received by the superintendent to 50%, the school could make up for the superintendent's lost health insurance benefit in a couple of ways. First, the district could increase the superintendent's salary in the amount of his or her new required health insurance contribution. If school district X had a cafeteria plan in place, the superintendent could then set aside this additional salary on a pre-tax basis to fully cover his or her new health insurance contribution.¹⁰ For example, if a family plan costs \$10,000 and as a result of the Nondiscrimination Rules school district X now requires the superintendent to pay for 50% of the cost of his or her family plan, School District X could make up for his or her lost health insurance benefit by increasing his or her salary by \$5,000. Provided School District X had a cafeteria plan in place, the superintendent could then set aside the extra \$5,000 in salary on a pre-tax basis to fully pay for his or her new health insurance cost.¹¹ If it is unfeasible to increase the superintendent's salary, for political or other reasons, School District X also could consider making up the superintendent's lost health insurance benefit by making a tax-free contribution to his or her 403(b) account.¹² Curiously, Congress has exempted public school districts from the nondiscrimination rules that generally apply to employer contributions to 403(b) accounts.

Also, under the Nondiscrimination Rules it is unclear whether the employees covered under a collective bargaining agreement would be exempted from the Nondiscrimination Rules.¹³ If such employees are not exempted this would mean that in the previous example, if School District X also paid for 75% of the cost of health insurance plans for its teachers under the terms of the collective bargaining agreement and some of the teachers were among the highest paid 25% of School District X employees, it appears that these teachers could be

considered "highly compensated employees." School District X therefore would be prohibited from paying for 75% of the cost of these teachers' health insurance plans if it only paid 50% for the same plans for its other full-time staff.

Needless to say, the Nondiscrimination Rules call for some drastic changes to the ways most schools provide health insurance to their employees.

IRS Suspends Enforcement of Nondiscrimination Rules and Considers Significant Modifications

Fortunately for school districts, in January of 2011 the IRS announced that it was suspending enforcement of the Nondiscrimination Rules until it issues additional regulations governing these rules.¹⁴ The IRS also announced that once the new regulations are issued, employers will be allowed a grace period before they have to comply with the new Nondiscrimination Rules.¹⁵ Although it is not entirely certain, the IRS announcement means that it is unlikely that school districts will have to comply with the new Nondiscrimination Rules for highly compensated employees during the July 1, 2011 – June 30, 2012 school year.

The IRS announcement also describes a number of modifications to the Nondiscrimination Rules that it is considering including in the final regulations. If the IRS does include these modifications in its final regulations, they would eliminate or greatly reduce the impact of the Nondiscrimination Rules on school districts. Some of the changes to the Nondiscrimination Rules the IRS is considering including in the final regulations are as follows:

1. *Exempting health insurance from the Nondiscrimination Rules.* The IRS is considering exempting employer contributions to the cost of employees' health insurance from the Nondiscrimination Rules.¹⁶ If included in the final regulations, this change would allow school districts to continue to pay a higher percentage of the cost of health insurance for its superintendents, business managers, and other "highly compensated" employees than it does for rank-and-file full-time employees.

2. *Changing the Definition of "Highly Compensated Employee."* Another modification the IRS is considering is to change the definition of "highly compensated employee" from any employee who is among the highest-paid 25% of all employees, to anyone who, in 2011, earns more than \$110,000.¹⁷ The \$110,000 figure could be increased in future years to reflect inflation. This would mean that any school district that did not have an employee who earned more than \$110,000 per year (or the amount as adjusted in future years for inflation) would be exempted from the Nondiscrimination Rules. The change also would mean that schools would only have to comply with the Nondiscrimination Rules with respect to those employees whom it paid more than \$110,000. If for example, only the superintendent of School District X was paid more than \$110,000 per year, the superintendent would be the only highly compensated employee in the district, and School District X would only have to make sure that the Superintendent did not receive a greater contribution for the cost of his or her health insurance plan than any other full-time employee received for the same plan. School District X could make up for the superintendent's lost health insurance benefit by providing the superintendent with additional salary and/or additional contributions to his or her tax-sheltered annuity account, as discussed above.
3. *Exempting Highly Compensated Employees Who Pay Income Tax on Health Insurance.* The IRS also is considering allowing employers to pay for a greater percentage of the cost of health insurance for its highly compensated employees provided the added cost is included as a taxable benefit on these employees' Form W-2. This would mean, for example, that if coverage under School District X's family plan cost \$10,000 a year and if School District X paid for 100% of the cost of the superintendent's family plan but only 50% of the cost of its other employees' family plans, the superintendent would have to pay only income tax on the

additional \$5,000 in employer provided health insurance coverage.

The potential changes to the Nondiscrimination Rules included in the IRS announcement are not an exhaustive list. It is also possible, for example, that the final regulations will completely exempt public school districts from the Nondiscrimination Rules, similar to how Congress exempted public school districts from the Employee Retirement Income Security Act (ERISA) and from the nondiscrimination rules that generally apply to employer contributions to 403(b) plans. NSBA, with the help of a committee of members of the Council of School Attorneys, wrote comments to the IRS seeking a total exemption for school districts and, in the alternative, supporting the IRS's suggested modifications. NSBA's comments may be downloaded at: <http://www.nsba.org/SecondaryMenu/COSA/Updates/NSBA-IRS-Non-Discrimination-Letter.pdf>.

Conclusion

The Nondiscrimination Rules included in Health Care Reform contain controversial provisions that call for significant changes to the way school districts provide health insurance to their employees. The good news is that the IRS has temporarily suspended enforcement of these rules and has announced that it is considering significant changes to the Nondiscrimination Rules that, if included in the final IRS regulations, would eliminate or drastically reduce the impact of the Nondiscrimination Rules on public schools. However, at this time nobody knows for sure when the IRS will resume enforcement of the Nondiscrimination Rules and if the modifications being considered by the IRS actually will be included in the final regulations. **I&A**

End Notes

1. Patient and Protection Affordable Care Act (PPACA), Pub. L. No. 111-148.
2. Section 10101 of the PPACA added § 2716 to the Public Health Service Act, which states that group health plans, other than self insured health plans, must satisfy the requirements of § 105(h)(2) of the Internal Revenue Code (Code).
3. 26 U.S.C. § 105(h).
4. IRS Notice 2010-63, 2010-41 I.R.B. 420.
5. Section 105(h)(2) of the Code, made applicable to

group health plans under PPACA § 10101, requires in part that "benefits" provided under an employer's health plan cannot discriminate in favor of highly compensated employees. It appears that an employer contribution to the cost of an employee's health insurance would be considered a "benefit" under a health plan and employers therefore would be prohibited from contributing more to the cost of highly compensated employees' health insurance than non-highly compensated employees.

6. IRS Notice 2011-1, 2011-2 I.R.B. 259.
7. PPACA § 10101 added § 2716(b)(2) to the Public Health Service Act, which states that a "highly compensated individual" has the meaning given in § 105(h)(5) of the Code. Section 105(h)(5) of the Code defines a highly compensated individual to include an individual who is among the highest paid 25% of all employees.
8. 26 C.F.R. § 54.9815-1251T(c).
9. If a district is not sure whether its health plan is "grandfathered" and therefore exempt from the Nondiscrimination Rules it should contact its health plan provider. If a district's health plan is "grandfathered," the district's health plan can lose its grandfathered status if the district makes certain changes to the terms of the health plan. See 26 C.F.R. § 54.9815-1251T(g) for changes to the terms of a health plan causing the health plan to lose its grandfathered status. Once a health plan loses its grandfathered status, it cannot regain it.
10. A cafeteria plan allows employees to set aside money on a pre-tax basis to pay for their portion of health insurance costs. See 26 U.S.C. § 125.
11. If School District X did not have a cafeteria plan in place, the superintendent would have to pay for his or her new health insurance contribution on an after-tax basis and School District X would have to increase his or her salary by more than the amount of his or her new health insurance contribution so that he or she had sufficient after-tax dollars to pay for his or her new health insurance contribution. For example, if the superintendent's combined tax rate was 40% and School District X did not have a cafeteria plan in place, it would have to increase the superintendent's salary by \$8,333 so that the superintendent had \$5,000 remaining on an after-tax basis ($\$8,333 \times .6 = \$5,000$). Therefore, all school districts who require employees to contribute to the cost of their health insurance coverage should seriously consider adopting a cafeteria plan, if they do not already have one.
12. In order to make an employer contribution to the superintendent's 403(b) plan, the Code requires, among other things, that the district have a written 403(b) plan document in place and that the plan document specifically allows for discretionary employer contributions.
13. For *self-insured* health plans, § 105(h)(3) of the Code provides an exemption from the nondiscrimination rules for certain employees covered under a collective bargaining agreement. For *fully-insured* health plans, PPACA § 10101 amended § 2716(b)(1) of the Public Health Service Act to state that fully insured health plans are subject to rules "similar" to those in § 105(h)(3) of the Code. However, PPACA did not provide

additional details on the application of § 105(h)(3) of the Code to fully insured health plans and it therefore is unclear whether the § 105(h)(3) exemption for employees covered under a collective bargain agreement will apply in full force in the context of fully-insured health plans.

14. IRS Notice 2011-1, 2011-2 I.R.B. 259
15. *Id.*
16. In the announcement the IRS indicated that it is considering providing that an employer contribution to the cost of employees' health insurance will not be considered a "benefit" that is subject to the Nondiscrimination Rules.
17. The IRS indicated that it is considering allowing employers to use the "highly compensated employee" definition in § 414(q) of the Code instead of the definition in § 105(h)(5) of the Code. Under § 414(q) of the Code a "highly compensated employee" is defined to include certain employees who, for 2011, receive compensation in excess of \$110,000.

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<http://www.nsba.org/SchoolLaw/COSA/Search/AllCOSAdocuments/School-Board-Attorney-and-News-Media.pdf>

Farm Animals in School?

<http://www.nsba.org/schoollaw/cosa/search/allcosadocuments/school-law-practice-farm-animals-at-school-volume-5-number-2-may-2011.pdf.aspx?Site=nsba>

School Law Practice articles also are available for purchase to non-members in the e-Docs store. An index of all articles has been created in the COSA "members only" resources section at <http://www.nsba.org/SchoolLaw/COSA/Resources/School-Law-Practice>.

COSA's Annual Notices Document

Numerous federal (and state) laws require school districts to provide students, parents, and/or the public with notices, many of which must be provided at the beginning of the school year.

Updated this year: in 2010 the Department of Education updated its *Notice of Non-Discrimination* guidance document to include an annual notice about equal access to Boy Scouts and other designated youth groups under the Boy Scouts of America Equal Access Act. Here is a link to COSA's annual notice document which contains a list, description, and samples of annual notices required by federal law:

<http://www.nsba.org/SchoolLaw/COSA/Updates/2011-Annual-Notices.pdf>.

KASB/NSBA Patricia E. Baker 2011-2012 Scholarship

Applications are now being accepted for the 2011-2012 **Pat Baker Scholarship**. The "Baker Fellow" will receive complimentary registration and travel assistance to either 2011 School Law Practice Seminar in New Orleans or the 2012 School Law Seminar in Boston. Application deadline is **September 1, 2011**.

Eligible individuals must:

- Be an attorney representing public school districts and a member in good standing with their state attorneys' council and COSA
- Submit a complete application for the scholarship to COSA by September 2, 2011
- Demonstrate a commitment to "excellence and equity" for public school children and be an advocate for public education
- Demonstrate professional leadership

Information and application available at <http://www.nsba.org/SchoolLaw/COSA/Updates/Scholarship.pdf>.

Registration Now Open for 2011 School Law Practice Seminar!

Register by September 1 and save 10%. Discounts also are available for multiple registrants from the same firm!

Plan to join your colleagues for two and a half days of small workshops and interactive sessions on October 13-15, 2011, at the **Hilton New Orleans Riverside Hotel, New Orleans, Louisiana**. Earn up to 10 hours of CLE, including one hour of ethics credit.

Complete program and registration is available at <http://www.nsba.org/cosa2/practice/2011/>.

Schedule at a Glance

Thursday, October 13 ◊ 11:00 am – 3:00 pm State Association Counsel Luncheon Meeting

Thursday, October 13 ◊ 2:00 – 3:00 pm Two Concurrent Sessions

Thursday, October 13 ◊ 3:30 – 6:00 pm Opening General Session

Thursday, October 13 ◊ 7:00 – 9:00 pm Dine Around New Orleans

Friday, October 14 ◊ 8:45 am – 12:00 pm General Session

Friday, October 14 ◊ 12:00 – 1:15 pm In House Counsel Luncheon Meeting

Friday, October 14 ◊ 1:30 – 4:00 pm Three Concurrent Sessions

Friday, October 14 ◊ 4:30 – 5:30 pm Reception sponsored by the Hammond & Sills Law Offices and the Louisiana Council of School Attorneys

Saturday, October 15 ◊ 8:30 am – 12:00 pm General Sessions

Hotel Information

Single/double rate is \$149 + 13% tax and \$3 per day occupancy fee. The hotel has an AAA Diamond rating and is conveniently located near the Riverwalk Marketplace overlooking the Mississippi River and just three blocks from the historic French Quarter. <http://www.nsba.org/cosa2/practice/2011/hotel.htm>

Sign up for a golf outing after the seminar at the home of the Zurich Classic of New Orleans at the TPC. More information available soon.