

# Inside School Law

Volume 2, Issue 2  
Winter 2001

Sensible strategies and preventive practices for NSBA National Affiliates

## EEOC Issues Compliance Guidance on Employee Benefits

By Julie Lewis, NSBA Staff Attorney

A new set of guidelines from the Equal Employment Opportunity Commission (EEOC) spells out how employers—including school districts—should administer employee benefits. Part of EEOC's project to update its entire compliance manual, this new chapter covers such benefits as life insurance, health insurance, long-term disability benefits, disability retirement benefits, pensions, and early-retirement incentives in terms of discrimination under the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964, and the Equal Pay Act (EPA). This new compliance chapter supercedes several EEOC policy documents on related subjects.

The bulk of the chapter covers the application of the ADEA to employee benefits, explaining the circumstances under which an employer may provide different benefits to workers in different age groups. Under the equal cost/equal benefit rule, EEOC says, an employer can avoid an ADEA violation by providing equal benefits to older and younger workers or by spending the same amount of money to purchase benefits, even if the benefits are not equal. However, employers can use the equal-cost defense only if:

1. the benefit is one that becomes more expensive as people age;
2. the benefit is part of a benefit plan

that requires the reduction of benefits as employees get older;

3. the employer has spent an equal amount for each employee, regardless of age; and

4. the employer has reduced the benefit for older workers only as much as is necessary to equalize the cost of the benefit for each worker.

Examples of benefits that meet these

Employers may offer early-retirement incentives as long as participation is voluntary and the plan is nondiscriminatory.

requirements vary from state to state, depending on state law. Special rules apply to health insurance benefits and to long-term disability benefits.

The ADEA also authorizes employers to draw from certain benefits to offset other benefits older workers receive. Three types of offsets are permitted:

1. deducting certain pension benefits from long-term disability benefits;
2. deducting certain retiree health benefits, or extra pension benefits, from severance pay; and

3. deducting certain amounts from pension benefit accruals if the employee either works past normal retirement age or begins to receive pension payments while still working.

Under the ADEA, employers may offer early-retirement incentives as long as participation is voluntary and the plan is nondiscriminatory. The employer does not necessarily have to provide equal early-retirement benefits to all employees, regardless of age.

For example, an employer may offer to eliminate the reduction in benefits it would normally make when an employee retires before normal retirement age. This would be

National School Boards Association

1680 Duke Street

Alexandria, VA 22314-3493

(703) 838-6722

Fax: (703) 683-7590

E-mail: [info@nsba.org](mailto:info@nsba.org)

<http://www.nsba.org>



# Inside School Law

Sensible strategies and preventive practices for NSBA National Affiliates

*Inside School Law* is published periodically by the NSBA National Affiliate Program in cooperation with the NSBA Council of School Attorneys and the NSBA Office of General Counsel. Copyright 2001, NSBA.

*Executive Director:* Anne L. Bryant

*Deputy Executive Director:* Harold P. Seamon

*General Counsel:* Julie Underwood

*Staff Attorneys:* Edwin Darden, Naomi Gittins, and Julie Lewis

*Associate Executive Director, Constituent Services:* Don E. Blom

*Assistant Executive Director, Marketing & National Affiliate Programs:* Marilee Rist

*Director, Council of School Attorneys:* Susan R. Butler

*Manager, National Affiliate Program:* Bonita Metz

## About NSBA

The National School Boards Association is the nationwide advocacy organization for public school governance. NSBA's mission is to foster excellence and equity in public elementary and secondary education in the United States through local school board leadership. Founded in 1940, NSBA is a not-for-profit federation of state associations of school boards across the United States and the school boards of the District of Columbia, Guam, Hawaii, and the U.S. Virgin Islands.

## About the National Affiliate Program

The National Affiliate Program extends NSBA's services directly to local school districts. School districts are eligible to join provided they are members in good standing of their state school boards association.

## About the Council of School Attorneys

The Council of School Attorneys provides information and practical assistance to attorneys who represent public school districts. It offers legal education, specialized publications, and a forum for exchange of information, and it supports the legal advocacy efforts of the National School Boards Association.

a greater benefit to younger workers, who stand to lose more by retiring early.

The ADEA also permits employers to offer Social Security supplements to employees who retire before they are eligible to receive Social Security benefits, and it allows age-based reductions in early-retirement benefits provided to tenured faculty by colleges and universities. In the EEOC's view, the ADEA does not otherwise permit employers to reduce or terminate early-retirement benefits to older workers based on their age.

Employers do have flexibility in designing their pension plans, however, according to the EEOC. Employers may set normal and/or early-retirement age limits for the receipt of bene-

fits; require a certain number of years of service, or a certain time period, before an employee is eligible to retire; and set limits on the total amount of benefits provided by the plan. In the EEOC's view, an employer may not stop or reduce accruals in, or contributions to, an employee's pension benefits based on the employee's age.

The agency also says that an employer may not exclude an employee from participating in the plan simply because the employee is close to the plan's normal retirement age when hired.

The entire benefits compliance chapter is available on the EEOC web site at <http://www.eeoc.gov/docs/benefits.html>.

## Are Your Early-Retirement Incentive Plans Compliant?

EEOC field offices have launched an enforcement initiative affecting most Minnesota and Wisconsin public schools, as well as others. The EEOC asserts that voluntary early-retirement incentive programs, or ERIPs, are discriminatory and in violation of the ADEA if the amount of the early-retirement incentive is linked directly with the retiree's age. In many cases, the EEOC is seeking double damages (double the amount of money lost) to be paid by school districts to all individuals who were eligible for early-retirement benefits but chose not to take them.

Most often, early-retirement incentive plans are collectively bargained provisions, and any changes to the plan present significant complications. The following questions and answers provide an update on the situation:

**Question:** Will a new Administration affect whether the EEOC continues to pursue compliance with the recently issued guidelines?

**Answer:** Probably not. The EEOC has five commissioners and a general counsel, all of whom are appointed by the President and confirmed by the Senate. Commissioners are appointed for five-year staggered terms; two positions are currently vacant, as is the general counsel position. The five-member commission makes policy on equal employment

opportunity and approves most related litigation. The current commissioners are all Clinton appointees. Most likely, the personnel in the field offices will not change. In addition, the guidelines have already been issued.

**Question:** What is NSBA doing?

**Answer:** NSBA General Counsel Julie Underwood and Staff Attorney Julie Lewis have been working with Diana Waterman of Waterman and Associates, a government relations firm in Washington, D.C., to create a legislative fix to this problem. They have been conducting research, developing their case, and educating others and will launch a strategic effort in the early days of the 107th Congress to get a legislative amendment enacted. In addition, two proposed resolutions seeking to address this problem will be considered at the NSBA Delegate Assembly meeting in San Diego, Calif., March 23, 2001. If a resolution is enacted, it will become one of approximately 20 top legislative priorities for NSBA in this Congress.

**Question:** What can I do?

**Answer:** If your district has been audited, is being audited, or is involved in litigation involving ERIPs, please share this information with Julie Lewis. You can contact her by telephone (703-838-6703), e-mail ([jlewis@nsba.org](mailto:jlewis@nsba.org)) or fax (703-548-5613).

# To Tape Or Not To Tape?

## *Privacy Rights and Video Cameras in Schools and on Buses*

By Julie Lewis, NSBA Staff Attorney

Many school districts use video cameras for security purposes in school buildings and on buses.

Depending on what the tapes contain, they may be categorized in one of two ways. Generally, videotapes are considered education records. Tapes that merely show students walking down a hallway, however, would be considered “directory information.”

Directory information is defined as including the student’s name, address, and telephone listing; date and place of birth; major field of study; participation in officially recognized activities and sports; weight and height (for members of athletic teams); dates of attendance; degrees and awards received; and the most recent previous educational agency or institution the student attended (U.S. Code, Title 20, Section 1232g(a)(5)(A)).

Schools should make clear in their annual notice to parents what constitutes directory

information. Although most schools include the term “photographs,” which can include videotape images, schools should be specific and state that both photographs and videos are directory information.

Directory information may be disclosed without parental consent if the school has met certain requirements under the Family Education Rights and Privacy Act (FERPA). First, the school must give public notice to parents of students (and to eligible students) of the types of personally identifiable information the school has designated as directory information.

The school must also give notice of the parent’s or eligible student’s right to refuse to let the school designate any or all of those types of information as directory information.

Finally, the school must specify the period of time within which a parent or eligible student must notify the school in writing that he or she does not want any or all of those types of information about the student designated as directory information (see Code of Federal Regulations, Title 34, Section 99.37).

Nonetheless, the classification of certain situations captured on videotape can easily change from directory information to education record. For example, if a fight is captured on videotape, the video will be considered an education record and will be subject to the provisions under FERPA. However, if the videotapes are maintained by a school law-enforcement unit, and are created and maintained by that unit, the video becomes a law-enforcement record and is therefore outside of FERPA (see U.S. Code, Title 20, Section 1232 g(a)(4)(A)(ii)).

You should also check to see if your state has a statute that allows videotaping. For example, a Texas statute allows videotaping in common areas without parental consent (Texas Education Code 26.009). However, the statute carefully explains that the videotape must be used only for “purposes of safety, including the maintenance of order and discipline in common areas of the school or on school buses; a purpose related to a co-curricular or extracurricular activity; or a purpose related to regular classroom instruction.”

If your state does not have a specific statute on videotaping, your board should adopt and implement a policy that carefully

explains the reason for videotaping. If its purpose is to maintain safety and order, video surveillance should pass constitutional muster. The policy should be included in your district’s student handbook, so as to put students on notice that they will be videotaped, and also distributed to parents. In addition, the policy must be adhered to—that is, videotaping should be used only for the stated purpose.

## What If ... ?

How should you handle videotaped incidents? Here are some hypothetical situations, all of which assume that the videotapes in question are not law-enforcement records.

**Situation:** A teacher/school security officer shoves a student, and the push is caught on videotape. There are also other students on the tape. Can you show the tape to the father of the student who was pushed?

**Response:** Yes, you can show the tape to the father, so long as the other students on the video are merely walking down the hall, going to their lockers, or otherwise not involved in the incident.

**Situation:** A local television station is demanding release of a videotape of students fighting on a school bus. Should you give it to them?

**Response:** The TV station cannot have the tape unless the parents of all of the students involved give their consent, and unless the school district wants to give the tape to the station. This is true even if you black out or otherwise obscure the identity of the students: Their identity is easily traceable because many people will know about the fight and who was involved. Your school district can exercise its discretion as to whether or not it wants to release the tape, but if for some reason you do want to release the tape, you need to get parental permission in advance.

**Situation:** A videotape shows a security officer shoving a student in order to get to other students who are fighting with knives. Can you show the tape to the father of the student who is being shoved out of the way?

**Response:** No. The videotape is a record of more than one student, and you cannot separate the incidents. As such, you cannot show it to the father without the consent of the parents of the other students. If you cannot get consent, you can tell the father what is on the tape. (Of course, if litigation arose from the incident, the tape could be subpoenaed.)

## Sample Video Surveillance Policy

The board authorizes the use of video cameras on district property to ensure the health, welfare, and safety of all staff, students, and visitors to district property, and to safeguard district facilities and equipment. Video cameras may be used in locations as deemed appropriate by the superintendent.

The district shall notify staff and students through student/parent and staff handbooks that video surveillance may occur on district property.

Students or staff in violation of board policies, administrative regulations, building rules, or law shall be subject to appropriate disciplinary action. Others may be referred to law-enforcement agencies.

Video recordings may become a part of a student’s educational record or a staff member’s personnel record. The district shall comply with all applicable state and federal laws related to record maintenance and retention.

Source: Oregon School Boards Association

# Guidance on Sexual Harassment

*OCR's revised guidelines differ from court rulings*

By Julie Underwood, NSBA General Counsel

The Office for Civil Rights (OCR) of the U.S. Department of Education has issued revised guidance on sexual harassment, outlining OCR's position on the responsibilities of federally assisted educational institutions to take appropriate action when students are sexually harassed by school employees, other students, or third parties. The revised guidance, which can be found online at <http://www.ed.gov/ocr/shguide/index.html>, largely reaffirms OCR's 1997 guidance on sexual harassment, with modifications in light of recent Supreme Court cases. The new document also clarifies that the guidance applies to the agency's administrative requirements as opposed to private lawsuits for money damages.

## The 1997 Guidance

OCR's 1997 guidance provides information about the Title IX standards that OCR uses to investigate and resolve allegations of sexual harassment of students. As the 1997 document explained, a school that receives federal funds must take prompt and appropriate corrective action in response to sexual harassment. When employees use the authority of their position to sexually harass a student, and the harassment limits or denies the student's ability to participate in or benefit from the school's program on the basis of sex, the school is responsible for taking action to stop the harassment, prevent its recurrence, and remedy its effects.

In the case of harassment by employees outside this context, or by other students or third parties, the school is responsible—once it knows or reasonably should have known of the problem—to stop the harassment and prevent it from recurring. If the school fails to take prompt and appropriate action, it is also responsible for remedying the effects of harassment due to its failure to act.

## Supreme Court Decisions

Two subsequent Supreme Court decisions—*Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), and *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999)—established standards for schools' liability for monetary damages in

private lawsuits brought under Title IX for sexual harassment.

The Court held in *Gebser* that a school can be liable in private lawsuits for money damages if a teacher sexually harasses a student and a school official who has authority to address the harassment has actual knowledge of the harassment and is deliberately indifferent in responding to it. The Court in *Davis* extended these liability

standards to cases involving harassment of a student by another student.

In light of the Court's decisions, OCR has removed the 1997 section on liability standards from the new document. However, the agency has reaffirmed its previous position with regard to the school's responsibilities to take preventive and corrective action with respect to sexual harassment of students.

OCR's administrative enforcement standards differ significantly from those established by the court for private actions for money damages brought under Title IX. Some of these differences are outlined below.

## Distinctions Between OCR Enforcement and Private Lawsuits

**Notice.** In both *Gebser* and *Davis*, the Court held that actual notice of the harassment is necessary to hold the school district liable for money damages. Under OCR's guidance, actual notice is not required to trigger a school district's responsibility to respond to sexual harassment. When an employee harasses a student in the context of providing aid, benefits, or services to students, the school is responsible to stop the harassment, prevent its recurrence, and remedy its effect immediately after it happens. For harassment by an employee outside this context, by another student, or by a third party, the school district is responsible if it knew, or in the exercise of reasonable care should have known, of the harassment.

**Responsible person.** The Court's ruling in *Gebser* indicates that the notice must be to a responsible school employee with authority to take corrective action to end the harassment. OCR expands this definition for the purposes of administrative enforcement to include those school employees who have a duty to report the harassment and those individuals whom a student might reasonably believe have this authority or duty.

**Definition of harassment.** In *Davis*, the Court ruled that to state a claim for money damages under Title IX, a student

must allege that he or she was subjected to sexual conduct that is "severe, pervasive and objectively offensive." Whether the harassment rises to an actionable level depends on "a constellation of surrounding circumstances, expectations, and relationships." Only harassment that denies the student an equal educational opportunity or benefit will support a claim for monetary relief. OCR's guidance says that the harassment must be "sufficiently serious that it denies or limits a student's ability to participate in or benefit from the school's program." To evaluate the severity and pervasiveness of the conduct, the agency will consider "all relevant circumstances." This could include gender-based, but non-sexual harassment. In remarks explaining its revised guidance, OCR asserts that its definition for administrative compliance purposes is consistent with the Court's despite the differences in language.

**School 's response.** The Court explained in *Davis* that "[s]chool administrators will continue to enjoy the flexibility they require" in responding to sexual harassment as long as they are not deliberately indifferent or the response is not "clearly unreasonable in light of the known circumstances." OCR's guidance requires school districts to "take steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again." In other places, the guidance states that the response must be "appropriate," "prompt," and "effective."