LEGALROUTES™

Your roadmap to pupil transportation law and compliance™

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With ADA Amendments, "Reasonable Accommodation" Efforts Will Grow

On June 25, 2008, the House of Representatives approved the ADA (Americans with Disabilities Act) Amendments Act of 2008, H.B. 3195. The Senate is expected to pass it with little or no change to the house version. Look for it to be signed into law later this summer.

In a letter submitted for consideration during the debate, employee and disability advocacy groups who supported the bill wrote, "Narrow court interpretations have restricted ADA coverage for people with disabilities, including epilepsy, serious heart conditions, mental disabilities, and even cancer." The bill aims to meet this concern.

What's the same?

H.B. 3195 maintains the ADA requirements that a physical or mental impairment substantially limit one or more major life activities, and that the employee demonstrate s/he is qualified for a position.

What's different?

"Substantially limits" is redefined. The bill redefines the phrase "substantially limits" to mean "materially restricts," which, itself, is undefined under the current ADA, and remains undefined in H.R. 3195. It is generally believed by employment lawyers who have commented in the professional media that this change means that an impairment need not have as extensive an impact on a major life activity for a person to be protected against discrimination under the ADA. That would mean you'd need to offer reasonable accommodations to more employees.

Mitigating measures don't count. In addition, the bill further provides that the determination of whether an individual has an impairment that limits a major life activity would be made without regard to the positive effect of various "mitigating measures" like medications. It would however allow for consideration of corrections or improvements in vision obtained through the use of "ordinary eyeglasses or contact lenses."

This change is intended to significantly limit the impact of 1999 U.S. Supreme Court cases that considered the effect of medicine, compensating behaviors, etc. that an individual might use in coping with various conditions.

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More Job Applicants Covered

The new legislation's approach would be that if an employee's impairment materially restricts his or her ability to perform one or more major life activity (like, for example, working, breathing, walking, etc.), any improvement experienced after taking medications — or learning to make bodily or mental adjustments — would be irrelevant in determining if the employee qualifies for protection — including reasonable accommodations — under the ADA.

Inteviewing techniques and job descriptions will become more significant under the amended legislation, if enacted.

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No discrimination against those perceived as having a disability. And, the bill provides that an individual is "regarded as" having a disability if the employee establishes that s/he has been discriminated against because of an actual or perceived physical or mental impairment.

However, the "regarded as" language would not apply to transitory and minor impairments where the impairment is expected to last less than six months. In addition, the legislation makes clear that employers will not be required to provide a reasonable accommodation to individuals that are "regarded as" disabled.

The lessons

Employment lawyers also believe that interviewers will more often have to assume that an applicant has a disability, and accommodate if possible. This is true simply because more employees will be "disabled" under the Act.

Employment lawyers also believe that interviewers will more often have to assume that an applicant has a disability, and accommodate if possible. There are important training implications here for managers and interview teams.

In order not to discriminate against people with actual or perceived impairments, job descriptions will be more important than ever. Work closely with your human resources personnel to be sure they're relevant and updated.

California Agency Puts Brakes on Parental Preference

You probably had at least one during the last school year, and you're bound to have another come August or September. I'm referring to that parent who just won't be reasonable, no matter how hard you try to please, to accommodate, and to be professional. There are few school districts or bus companies that, despite having gone that extra mile for a student with disabilities, haven't experienced an occasion when they just can't satisfy a certain parent. In the California State Educational Agency decision in favor of *Los Angeles Unified School District* (May 15, 2008), the school district's thoroughness paid off in the end.

The facts

A student with multiple disabilities, including cortical blindness, developmental delays across all areas, and autism, was 10 years old at the time of the original due process hearing. He attended a special education center 15 miles from his home. Although his mother accompanied him on public transportation to the center for a while, his escalating inability to tolerate noise and crowds, and increasingly disruptive behavior, necessitated a change in transportation arrangements.

Ms. Woods was assigned as a one-on-one bus aide, and the boy's mother was very happy with the result. The aide and the mother got along famously. But Ms. Woods' schedule required that a second aide attend the student on certain days. The boy responded poorly to the split schedule, and his mother requested assignment of a full-time aide.

Approximately two weeks after the change, on January 22, 2007, a serious behavior episode resulted in the bus driver's pulling over, and calling dispatch in accordance with established procedure. The boy's mother picked him up at the dispatcher's request. The boy did not return to school for the better part of the second semester, and did not access the extended school year services in place for him during the summer. In May 2007, Mother filed a request for due process. She asserted that the district had failed to provide a free appropriate public education (FAPE) to her son. Moreover, she wanted a voucher for the boy to take a taxi cab to school with a one-to-one aide.

When the boy returned to school in late October 2007, he had a one-to-one aide, Mr. Ogola.

The evidence

Mother testified at the hearing that, after the January 22, 2007 incident, the dispatcher told her that it would be best if her son stayed off the bus for a couple of days. The evidence demonstrated that mother reported to the boy's grandmother that the boy had been suspended. Mother testified that she'd never said that, but the Agency did not find her testimony credible. In fact, the Agency found much of the mother's testimony unbelievable.

In contrast, Mr. Ogola "demonstrated his deep compassion and devotion to disabled pupils," and, "from his demeanor and tone it was apparent that his testimony was not scripted…and was based upon his very personal and direct experience with Student and Mother." Mr. Ogola said that the boy's mother refused to approach the bus to receive him, and that she "remained silent with her hands crossed across her chest." He was upset about her treatment of her son.

The evidence showed that the boy's mother had established a good relationship with Ms. Woods, but, thereafter, constantly thwarted the district's efforts to make transportation successful.

The decision

The California State Educational Agency was asked to rule that the only appropriate transportation for the boy is a taxi where he can ride with a one-on-one aide. Instead, the Agency determined that the Student failed to carry his burden of proof that the district denied him FAPE. The Agency found that the preponderance of the evidence established that the transportation services provided by the district were designed to meet the student's unique needs, and to assist him to benefit from special education.

In all states but New York and New Jersey, the U.S. Supreme Court's ruling in *Schaffer v. West* (January 2006 *Legal Routes*, p. 1 *ff.*) that parents/students bear the burden of proof when challenging a school district's provision of FAPE, means that the school district will prevail if the parent/student doesn't convince the hearing officer, appellate agency, or court, of his or her position.

The lessons

The language of the opinion sets forth a number of reasons that led to this favorable outcome for Los Angeles Unified School District:

- **"District had in place a protocol to handle Student's behavioral breakdowns and to ensure Student's safety or the safety of other pupils riding the bus."**

When a student exhibits conduct related to his or her disability which is likely to impact the safety or learning of himself or others, the IEP team is obligated to address it. The reference in the case to "protocol" suggests a formal procedure known to everyone who is in a "need to know" situation. The idea is that everyone involved can rely on the relevance and appropriateness of the procedure.

- **"District has a well-trained and experienced staff. Staff members are provided with on-going training in safety and the special needs of pupils, and are provided support by a behavioralist."**

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Training is critical. The best of behavior intervention plans will not work if those who must implement them do not know what to do. If your district has a behavior specialist, that person can be key in helping you to work with a difficult student with disabilities. If you're unsure if this help is available, discuss with the Director of Special Education how your drivers and attendants can get the on-going support they need. If this is not forth-coming in your own district, it may be available at the state level.

- **"Bus drivers are vetted with criminal background checks and must be specially certified to drive a school bus."**

The driver's background was really never an issue in this California decision. And that's the point. Be in a position to demonstrate that you've made appropriate hiring decisions in the first place.

- **"District's school buses are well-equipped for foreseeable emergencies."**

This factor really demonstrates that when your transportation decisions or methods are challenged, all aspects of your program are on trial. Review the status of your operations regularly, and know how you'll appear to the finder of fact prior to any agency investigation, due process hearing, or court decision.

Permanent Decertification of NY Bus Driver Shocks Court

The New York State Department of Education permanently revoked a school bus driver's state certification when the driver, who had an unblemished, 8-year long record, failed to take a random drug test on the appointed day.

The facts

Frances Gomez kept a previously scheduled appointment with her doctor rather than going immediately to the laboratory for a drug test. When she went to the Queens lab the next morning, her test was negative.

The decision

The court found that even if Gomez' failure to take the test until the next morning was a "refusal" to take the test, in light of the fact that neither the district's rules nor the DOE regulations and policies provided for permanent decertification as a bus driver for this offense, the penalty was arbitrary and capricious as a matter of law.

Here, the NY DOE applied a harsher penalty for the driver's failure to appear for a drug test than would have been permitted under the rules if she had taken the test and failed.

The lesson

There's a difference between a particular employer taking adverse action, and loss of state certification, which would preclude an individual from ever doing that job. As you know, the Department of Transportation (DOT) does have rules around drug and alcohol testing. In January 2008, DOT created a handbook for employers of safety-sensitive workers, such as school bus drivers, who must have DOT drug and alcohol tests. The Handbook includes information on: (1) DOT program implementation and regulations; (2) identifying employees needing to be tested; (3) program policies and assigning responsibilities; (4) selecting service agents; (5) employee and supervisor education; (6) drug and alcohol testing requirements; (7) employer actions when employees violate the rules; (8) record keeping; and (9) program compliance and inspections. You can quickly find and download the entire PDF manual at the link on Peggy's website, www.educationcompliancegroup.com (Resources page).

Immediate Collection Must Follow Notification

DOT mandates:

"When an employee is notified of random selection, he or she must proceed immediately to the collection site. Contrary to the *urban legends* circulating among some employees, *immediately* does not mean two hours. *Immediately* means that after notification, all the employee's actions must lead to an immediate specimen collection. *Why?* For the integrity of the testing process!"

And, best practices suggest:

"1. If possible, *accompany* employees to collection sites.
2. Do not allow employees to go *unescorted* to their lockers, personal vehicles, or work stations after notification.
3. When possible, arrange to have collectors and BATs (Breath Alcohol Technicians) come to the work site to collect specimens — without alerting employees to their presence.
4. If collections are off site and unescorted, establish an expected time of arrival."

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Your recourse depends on your policies and contracts. DOT rules don't determine whether you can fire an employee who tests positive or refuses a test. Instead, what DOT requires is that no one who violates a rule can perform safety-sensitive functions again until successfully completing the SAP's (Substance Abuse Professional's) return-to-duty process. Employer policies define available employer action, subject to applicable rules.

U.S. Supreme Court to Decide School Bus Harassment Case

The U.S. Supreme Court will hear an appeal from a case that received front page status in the January 2008 issue of *Legal Routes* (*Fitzgerald v. Barnstable School Committee*). Jacqueline Fitzgerald, a Massachusetts kindergartner, complained that she suffered repeated harassment on the school bus from a third-grade boy. The First Circuit Court of Appeals had held that the school district satisfied its obligation under Title IX to avoid "deliberate indifference" to Jacqueline's well-being once appropriate officials became aware of the complaint — even though the school district did not suspend the boy from riding the bus.

Despite thorough investigation, neither school officials nor law enforcement officials were able to confirm that harassment had occurred. In light of that fact, the school principal offered to change the girl's bus. The Fitzgeralds were dissatisfied with this proposal, and legal action followed.

The Supremes will be focusing on the legal context in which student-to-student claims can be brought. If lawsuits can be brought under only Title IX, plaintiffs are not entitled to punitive damages. That means, they could only get an award of money in an amount that a jury determines will compensate the victims, rather than an amount calculated to punish wrong-doers. The First, Second, Third, and Seventh Circuits have all held that such cases can only be brought under Title IX, and cannot be brought as constitutional claims under Section 1983, which allows punitive damages. The Sixth, Eighth, and Tenth Circuits all allow plaintiffs to bring both Title IX and Section 1983 constitutional claims for the same conduct.

Despite this focus on law and remedy rather than the specific school bus issues involved, the case is likely to have important ramifications for how we respond to peer harassment on the school bus. The high court will hear oral arguments during its next term, which begins in October, 2008.

The last time the U.S. Supreme Court decided a case with significant direct impact on school transportation was on March 3, 1999 (*Cedar Rapids Community School District v. Garret F.*) The court's decision that students with disabilities who need special medical care during the school day are entitled to it at public expense continues to have far-reaching implications.

We'll keep you posted on the outcomes of the *Barnstable School Committee* case!

Sexual Harassment an Issue Despite Law's 36th Anniversary

June 23, 2008 marked the 36th anniversary of Title IX, the landmark federal law that prohibits sex discrimination in federally funded education programs. Over the years, federal guidance and legal cases have provided rather clear direction to school districts about addressing student claims of sexual harassment by other students. Nevertheless, significant cases arise regularly. (See these issues of *Legal Routes* for reports: July 2003, pp. 7-8; September 2003, pp. 3-4; May 2005, pp. 4-5, November 2005, p. 4; March 2006, p. 3; May 2006, p. 8; November 2006, pp. 8-9; September 2007, pp. 1-4, p. 6; November 2007, p. 7; January 2008, pp. 1-3, pp. 4-5; March 2008, pp. 1-3).

Multiple Jobs, Multiple Issues

When we talk about employment issues at conferences or in-service sessions, colleagues often ask questions about legal aspects of the litany of tasks each of you, and your staff members, must do. Concerns that typically surface surround the potential for litigation and liability if you terminate an employee who can no longer perform one of the functions of his or her position. For example, you might require that a mechanic have a commercial driver's license — in case you need to have him drive — and now, because of a disability, he can no longer qualify. Or, perhaps, a bus attendant has a lifting limitation, and you're worried about bus evacuation.

While these examples suggest the potential for disability-based discrimination claims, other scenarios seem to implicate age. For example, in *Cox v. South Barber Unified School District 255*, (September 2006 *Legal Routes*, p. 6 *ff.*), comments made by a Superintendent prior to a driver/custodian's loss of job through Reduction in Force (RIF) showed possible age-bias where the board of education's

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RIF criteria were unclear.

If you're facing either employee termination or RIF decisions, you'll be thinking about the importance of each of the functions one of your multi-tasking employees may have to perform. As you're increasingly forced to reduce staff or otherwise combine positions, I urge you to think of the "what if's" in advance. A new U.S. Supreme Court ruling and a recent case from the 7th Circuit Court of Appeals add some wrinkles to our analysis of some of the legal ramifications of employment decision-making when you're dealing with staff members who must be multi-functional.

Look for these issues

I want to tell you the "punch-line" right up front, because these are complicated cases. When paring down staff is necessary; or you can't find qualified applicants to fill positions; or emergencies or other contingencies require that employees must be able to move relatively seamlessly into different functional arenas, minimize challenges by documenting these contingencies in your job descriptions and hiring policies. As you read through the facts and decisions of the two cases, think about the following possibilities, just by way of example:

- If you're unable to hire an adequate number of relief drivers, do you need to plan for the eventuality that a staff member in another job classification may have to sub for the regular driver?
- If you assign bus attendants to supervise potentially dangerous students on the bus, does your back up plan (in the event of an attendant's absence) necessitate someone else's being able to step in and perform all necessary tasks?
- If budget cuts were to require you to eliminate positions, would you have the ability to consider criteria other than seniority in deciding who stays and who goes?

With these questions in mind, think about the facts, decisions, and lessons of these two new cases.

The facts – U.S. Supreme Court case

Meacham v. Knolls Atomic Power Laboratory, decided on June 19, 1008 (http://www.supremecourtus.gov/opinions/07pdf/06-1505.pdf) involved a reduction in force (RIF). Approximately 100 employees accepted a buy-out proposal; another 31 were subject to the involuntary RIF. To select those who would be laid off, Knolls told managers to score their staff on three scales: performance, critical skills, and flexibility. Knolls also factored years of service into total scores. These totals dictated who would stay and who had to be let go. Of the 31 salaried employees laid off, 30 were at least 40 years old.

The performance score was based on the employees' two most recent performance appraisals. This proved to be no issue since it was purely objectively determined. The "critical skills instruction" read: "How critical are the employee's skills to continuing work in the lab? Is the individual's skill a key technical resource for the naval reactors program? Is the skill readily accessible within the lab or generally available from the external market?" Determination of this factor was up to the individual managers.

The flexibility instruction read as follows: "Rate the employee's flexibility within the laboratory. Can his or her documented skills be used in other assignments that will add value to current or future lab work? Is the employee retrainable for other lab assignments?" This measurement, too, was purely subjective.

Twenty-eight employees sued Knolls under the Age Discrimination in Employment Act (ADEA) alleging the criteria used and the decisions that resulted had a disparate — read that, "unfair" — impact on older workers.

The facts – 7th Circuit Court of Appeals case

Dargis v. Sheahan, May 16, 2008, (http://caselaw.lp.findlaw.com/data2/circs/7th/052575p.pdf) was a lawsuit brought by a corrections officer who suffered a stroke while on duty in February 2000. When Dargis attempted to return to work in July 2001, the Sheriff's Office of Cook County declined to reinstate him due to physical restrictions imposed by Dargis's physician, placing him, instead, on leave without pay. After exhausting his administrative remedies, Dargis filed suit in federal court against the County, the Sheriff, and other executive directors.

Dargis admitted that he could not perform traditional correctional officer duties, but claimed he was qualified to have a desk job. Moreover, he asserted that his employer, Cook County, should create such a job for him — one which maintained his position as a corrections officer, but required no contact with inmates. His doctor's limitations would have allowed him to perform a desk job. But, most of the situations within the performance expectations of a corrections officer required inmate contact. And that was the County's argument: Correctional officers must be able to rotate through all positions in order to respond to emergencies. Perhaps this notion of emergency response resonates with you as a transportation professional.

The two decisions

Age as an issue where multiple jobs. Once an employee identifies a specific employment practice that adversely impacts people aged 40 and older, the employer must show a reasonable basis — other than age — for this practice. The Supreme Court held that the lower courts had not properly placed the burden of proof on Knolls Laboratory to prove that reasonable basis. The case was sent back to the federal court of appeals for determination of this issue.

The court also returned to the lower appellate court the question of whether Knoll's practice of conferring

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broad discretionary authority upon individual managers to decide which employees to lay off during a RIF constituted a "reasonable factor other than age."

It is not unusual for an employer to be vulnerable to challenge — and vulnerable to loss — where highly subjective factors used to make employment decisions raise the specter of some form of discrimination.

Disability as an issue where multiple jobs. In *Sheahan*, the ADA case, the court ruled in the favor of the employer. The 7th Circuit held that, if an employee in a particular job classification can be reasonably expected to rotate through multiple jobs, an individual with a disability will not be qualified under the ADA unless he or she can perform enough of these duties to conclude that the employee is able to perform the essential functions of the position with or without a reasonable accommodation.

The County had demonstrated to the court's satisfaction that the sum of the jobs assigned to corrections officers was significantly more important than the ability to perform any one of the jobs alone.

The lessons

Underlying both of these employment cases are some very important messages for those of you who require your employees to perform multiple tasks.

- **Anticipate that you will occasionally need** to have employees work outside of, or in addition to, their primary positions. Include that likelihood in written communications.
    - o This is another way of telling you to have good back-up plans, and to communicate them clearly — even before you have to actually implement them. Think about reflecting in handbooks and hiring documents that staff members may have to, occasionally, step into another employee's shoes to substitute for him or her in a pinch.
- **Be prepared** to demonstrate that employees could be, and in fact were, reasonably expected to perform *each* of those additional duties on a *recurring* basis. This showing supports the idea that the ability to perform these duties is part of the essential functions of a staff member's job.
    - o Keep records of each time and each situation in which employees have to perform different duties.
- **Apply consistent criteria** in actually assigning the extra tasks.
    - o Select the employees who are assigned to multi-task according to such characteristics as identified skill level, experience, availability, willingness to perform — and/or whether it's their turn in a certain rotation. This protocol will substantiate that you haven't been arbitrary and capricious in your decision-making.
- **Use objective terms** as much as possible to describe those factors you'll use in deciding who stays and who goes when these hard decisions become necessary. Measurable criteria make you less vulnerable to challenge.
    - o Think about the skill sets and specific capabilities that are tied to each of the functions your employees perform.
    - o Formal assessments or ratings can be helpful. Have rubrics to show what each rating represents. Human resources professionals can be helpful here.

Please note well — these aren't the only issues to think about when employees perform multiple jobs. For example, don't overlook the impact of the Fair Labor Standards Act in any week that you require a staff member who is nonexempt from FLSA to work more than 40 hours — in one or more jobs, for one or more department.

Audio Recordings Hit the Courts Again

In *State of Wisconsin v. Duchow*, decided June 10, 2008 (See *Legal Routes*, January 2008, p. 6 *ff.*), the Supreme Court of Wisconsin reviewed an unpublished court of appeals decision regarding the secret recording of a bus driver's statements to a disabled student aboard a public school bus. The boy's parents had placed a voice-activated tape recorder in the child's backpack.

The court relied on the same list of "non-exclusive factors" used by the lower court in attempting to discern whether the driver's expectation of privacy in his oral statements was objectively reasonable. The lower court had determined the tape was inadmissible in the criminal proceeding because it violated the state's eavesdropping law. But, this time around, the result for driver Duchow was different.

The decision

Duchow was decided under Wisconsin state law, and the key issue was whether his tape-recorded statements met the statutory definition of "oral communication." Under the state's Electronic Surveillance Control Law, the statements were inadmissible as evidence only if they constituted "oral communication." The Wisconsin court found "the overwhelming abundance of federal case law that interprets 'oral communication' incorporates a reasonable expectation of privacy." The court held that school bus drivers have a diminished expectation of privacy inside the school buses they operate, so that even if the driver did expect his communication to be private, he was not reasonable in that expectation.

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The lesson

The state of jurisprudence regarding school bus surveillance systems is no less murky after this decision. And, cases are more often decided informally, in the court of public opinion as represented by the media, than they are by authoritative judges.

The point is that the issue remains in flux nationally. Proceed with caution and with due regard for your state's laws, regulations and attorneys general opinions.

Our Turn to Ask: Should You Lead a Policy "Tune-Up?"

When was the last time you took a good hard look at the policies that can support you or come back to haunt you? As you wind down before you wind up for the next school year, undertaking a policy tune-up is something to consider.

The written pronouncements of your school district, bus company, and/or department are the cornerstones for action. They're also the documents to which you'll be held in such potentially tense matters as employment actions and student discipline decisions.

If you're new to your position, you may wonder how you can make change without stirring up trouble. If you're a veteran of your organization, you may be dealing with outmoded policies and procedures that haven't been dusted off in a long time. Here is a checklist to use when undertaking a policy tune-up. This isn't intended to be exhaustive. We'd welcome hearing about your additions to this list.

Why consider a change in the first place?

- The Scottish philosopher Thomas Carlyle (1795-1881) said, "By nature, man hates change." Can you identify and articulate potential value to be derived from a process that is always difficult at best?
- Does the change need to be made because law, state board or federal regulation or industry standards have changed? What can you do to get on top of these earlier in the future?
- Does the change need to be made to eliminate conflict between school district/organization policy and departmental policy?
- Are you changing policy to match what's really going on? Is it truly policy that should change, or should actual practice?
- Do you have the authority to make the change you're contemplating, or is this the school board's, superintendent's, schools', or other department's domain?

What might be the unintended consequences of making change?

- Even when change is ultimately favorable, people may push back. A change that is beneficial in some ways may create cost, or problems, in another. How can you improve your chances of anticipating and weighing the consequences of this change?
- Will employees perceive that they have fewer benefits? How will they react? Is this a "hill to die on?"

Is this an opportunity for shared decision-making, rather than just sharing your decision?

- Can you give employees a chance to provide input before you make change? Don't do this unless you fully intend to take that input into consideration.
- How can you most effectively document what's likely to happen?

How will you communicate the new policy?

- Have you identified who needs to know? Are you clear as to who needs to do what under the new policy? Perhaps you should orient your communications around an emphasis on the roles of various folks in enforcing the policy.
- Policy is, often, inherently boring. How will you capture people's attention for the changes?
- Does the content or timing of your training programs need to be changed as a result of the new policy?

What processes will you put in place for on-going review and assessment?

- Saying that things will be different doesn't make them different. That can be especially true where institutional memory — "We've always done it this way" — threatens to sabotage change. While policy review and evaluation is always important, it may be especially important after you've changed the policy.

What is a "Policy"?

While "policy" may connote to you only those pompous documents voted by the board of education that have alphabetical gobbledy-gook in the upper corner, your policy tune-up should consider all written pronouncements of the district, company, and transportation department. In addition to board policies and procedures, ponder collective bargaining agreements; employee handbooks; operations manuals; job descriptions; and superintendent procedures.

Publisher's Note: *To have your question considered for Since You Asked, e-mail your question to myroadmap@legalroutes.com or send it to Legal Routes, PO Box 6053, McLean, VA 22106.*

