

OFFICE OF THE SUPERINTENDENT

Millburn Public Schools

INFORMATION ITEM

November 3, 2010

To: Board of Education Members

From: Ellen E. Mauer, PhD

Subject: First Reading-Temporary Illness or Temporary Capacity-5:180

This policy updated to include that employees may be required to submit to a physical exam if the exam is job-related and is at the district's expense. Legal references are updated to include most recent ADA requirements.

We ask that you use this as your first reading period and then put this on the next BOE meeting agenda for a second reading and approval.

General Personnel

Temporary Illness or Temporary Incapacity ¹

A temporary illness or temporary incapacity is an illness or other capacity of ill-being that renders an employee physically or mentally unable to perform assigned duties. During such a period, the employee can use accumulated sick leave benefits. ² However, income received from other sources (worker's compensation, District-paid insurance programs, etc.) will be deducted from the District's compensation liability to the employee. The School Board's intent is that in no case will the employee, who is temporarily disabled, receive more than 100 percent of their gross salary.

Those insurance plans privately purchased by the employee and to which the District does not contribute, are not applicable to this policy.

If illness, incapacity, or any other condition causes an employee to be absent in one school year, after exhaustion of all available leave, for more than 90 consecutive work days, such absence may be considered a permanent disability and the Board may consider beginning dismissal proceedings subject to State ³ and federal law, including the Americans with Disabilities Act. ⁴ The

The footnotes are not intended to be part of the adopted policy; they should be removed before the policy is adopted.

¹ State or federal law controls this policy's content. This policy contains an item on which collective bargaining may be required. Any policy that impacts upon wages, hours, and terms and conditions of employment, is subject to collective bargaining upon request by the employee representative, even if the policy involves an inherent managerial right.

This policy is consistent with the minimum requirements of State law. The local collective bargaining agreement may contain provisions that exceed these requirements. When a policy's subject matter is superseded by a bargaining agreement, the board policy can state, "Please refer to the current [insert name of CBA]."

² Temporary mental or physical incapacity as determined by a medical examination is not cause for dismissing a teacher (105 ILCS 5/10-22.4 and 5/24-13). A teacher's contractual continued service status (tenure) is also not affected by a temporary illness or incapacity (105 ILCS 5/24-13).

³ Section 24-13 of The School Code grants school boards the power to define, through policy, temporary illness or incapacity. School Dist 151 v. ISBE, 507 N.E.2d 134 (Ill.App.1, 1987); Elder v. School Dist. No.127 1/2, 208 N.E.2d 423 (Ill.App.1, 1965). Elder is good law for this rule only.

Important: a board should consult its attorney to ensure the language of this paragraph provides a sufficiently explicit definition about when a temporary disability has/may become permanent. A board should also consult its attorney before determining that an employee's temporary illness or incapacity became permanent for the purpose of being a cause of dismissal by application of this paragraph.

The Illinois appellate court, decision cited above, upheld a board policy designating when a temporary [illness or] incapacity becomes permanent for the purpose of being a cause of dismissal. The court approved using 90 days of absence due to illness, after the exhaustion of sick days, as the point at which the district considers termination. The court held, however, that section 24-13 of The School Code would not permit the board's policy to be over a 2 year period because the 2 year period had the effect of allowing the school board to define a temporary illness or incapacity out of existence; e.g., making it impossible for a teacher to qualify for such an absence. Thus, the IASB sample policy limits the relevant period to a school year. To avoid abuse, the sample policy allows the superintendent to recommend this paragraph's use when circumstances strongly suggest that the employee returned to work intermittently in order to avoid this paragraph's application.

⁴ The Americans with Disabilities Act (ADA), prohibits employers from discriminating against individuals with a disability who can perform the essential functions of a job with or without reasonable accommodation (42 U.S.C. §12102, as amended by the ADA Amendments Act (ADAAA), Pub. L. 110-325). The ADAAA makes significant changes to the ADA's definition of disability that broadens the scope of coverage and overturns a series of U.S. Supreme Court decisions that made it difficult to prove that impairments were a disability. On June 17, 2009, the Equal Employment Opportunity Commission (EEOC) voted to approve a proposed Notice of Proposed Rulemaking (NPRM) to conform its current ADA regulations to the ADAAA. The EEOC has stated that it may immediately begin using the positions set forth in its proposed regulations for its litigation and enforcement proceedings because it views ADAAA as restorative to ADA. The latest information about the NPRM to the ADA regulations is available at: www.eeoc.gov/ada/amendments_notice.html.

Superintendent may recommend this paragraph's use when circumstances strongly suggest that the employee returned to work intermittently in order to avoid this paragraph's application.

Any employee may be required to have an examination, at the District's expense, by a physician who is licensed in Illinois to practice medicine and surgery in all its branches, an advanced practice nurse who has a written collaborative agreement with a collaborating physician that authorizes the advanced practice nurse to perform health examinations, or a physician assistant who has been delegated the authority by his or her supervisor to perform health examinations if the examination is job-related and consistent with business necessity. ⁵

LEGAL REF.: Americans with Disabilities Act, 42 U.S.C. §12102.
105 ILCS 5/10-22.4, 5/24-12, and 5/24-13.
Elder v. School Dist. No.127 1/2, 208 N.E.2d 423 (Ill.App.1, 1965).
School District No. 151 v. ISBE, 507 N.E.2d 134 (Ill.App.1, 1987).

CROSS REF.: 5:30 (Hiring Process and Criteria), 5:185 (Family and Medical Leave), 5:250 (Leaves of Absence), 5:330 (Sick Days, Vacation, Holidays, and Leaves)

Important: increased scrutiny of policies that contain concrete cut offs for leaves of absence is expected due to ADAAA. A board should consult its attorney regarding the district's descriptions of the essential and nonessential functions of all jobs within the district, when reasonable accommodations for an employee may become undue hardship to the district, and how the ADAAA impacts the school board's determination that an employee's temporary illness or incapacity became permanent for the purpose of being a cause of dismissal by application of this paragraph.

Certificated and noncertificated employees are treated alike in the sample policy because the laws prohibiting discrimination based on disability apply to both classifications. A board wanting to treat noncertificated and certificated employees differently should consult its attorney.

⁵ The State law (105 ILCS 5/24-5), allowing boards to require physicals of current employees "from time to time," has been superceded by the Americans with Disabilities Act (ADA), 42 U.S.C. §12112(d)(4). The ADA allows medical inquiries of current employees only when they are job-related and consistent with business necessity or part of a voluntary employee wellness program (Id.). Districts may deny jobs to individuals with disabilities who pose a direct threat to the health or safety of others in the workplace, provided that a reasonable accommodation would neither eliminate the risk nor reduce it to an acceptable level (42 U.S.C. §12113; 29 C.F.R. Part 1630.2(r). See footnote 4 above for more discussion and an explanation regarding the ADA Amendments Act (ADAAA).

Note that while examination by a spiritual leader/practitioner is sufficient for leaves, the statute does not authorize an examination by a spiritual leader/practitioner for district-ordered physicals of an employee. The difference may present a constitutional issue; contact the board attorney for an opinion if the employee wants to use an examination by a spiritual leader/practitioner.

General Personnel

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Those insurance plans privately purchased by the employee and to which the District does not contribute, are not applicable to this policy.

After 90 consecutive school days in a school term of illness or incapacity, or exhaustion of sick leave, whichever is greater, such illness or incapacity shall be considered a permanent disability and the Board of Education may begin dismissal proceedings subject to the provisions of The School Code and the Americans with Disabilities Act.

LEGAL REF.: Americans with Disabilities Act, 42 U.S.C. § 12102.
105 ILCS 5/10-22.4, 5/24-12, and 5/24-13.
Elder v. Board of Education of School District No. 127 1/2 Cook County, 208 N.E.2d 423 (1st Dist. Ill. 1965).
Board of Education of School District No. 151, Cook County v. Ill. State Board of Education, 507 N.E.2d 134 (1st Dist. Ill. 1987).

CROSS REF.: 5:185 (Family and Medical Leave), 5:250 (Leaves of Absence), 5:330 (Sick/Personal Leave, Vacation, Holidays, and Other Leaves)

ADOPTED: May 20, 2002