DATE

Via Certified Mail

CC:PA:LPD:PR (REG-147196-07)

Room 5203,

Internal Revenue Service,

P.O. Box 7604

Ben Franklin Station

Washington, DC 20044

Re: Bona Fide Sick Leave Plans under the Proposed 457 Regulations

Dear Sir or Madam:

This letter is to comment on behalf of [name of school district] the proposed regulations under Code section 457, in particular the provisions for bona fide sick and vacation leave plans.

Specifically, the preamble to and the body of the proposed regulations state that whether a sick or vacation leave plan is a bona fide sick or vacation leave plan, and therefore treated as not providing for the deferral of compensation under Code section 457(e)(11)(A)(i), is determined based on the facts and circumstances, and lists several factors to be considered, including:

* Whether the amount of leave provided could reasonably be expected to be used by the employee in the normal course before the cessation of services);
* limits, if any, on the ability to exchange unused accumulated leave for cash or other benefits and any applicable accrual restrictions (for example, where permissible under applicable law, the use of forfeiture provisions often referred to as use-or-lose rules);
* the amount and frequency of any in-service distributions of cash or other benefits offered in exchange for accumulated and unused leave;
* whether the payment of unused sick or vacation leave is made promptly upon severance from employment (or, instead, is paid over a period of time after severance from employment); and
* Whether the sick leave, vacation leave, or combined sick and vacation leave offered under the plan is broadly applicable or is available only to certain employees.

Our School District has over [number of teachers or employees]. We, and we believe school districts generally, may have a different approach to sick leave than is common in the private sector. It is common for school districts to be generous in terms of sick leave, so that schoolteacher who are truly sick will not come to the school and potentially create a health risk for students and colleagues. At the same time, the common practice of “use it or lose it” in the private sector would encourage teachers to take all their leave and result in classrooms without teachers for more days each year, resulting in additional cost to the public of substitute teachers and likely less effective learning. We believe that these unique and valid circumstances should be recognized in considering whether unused sick leave programs for teachers are bona fide under the final regulations.

Moreover, uncertainty is created by virtue of the question of sick leave being bona fide being one of facts and circumstances. Given the significant consequences of running afoul of Code sections 457(f) and 409A and the potential cost to taxpayers, we request more certainty for these types of school district programs, and suggest that a safe harbor would be appropriate.

For example, we would propose that a sick leave program of a public school district be treated as be a bona fide sick or vacation leave plans under Code section 457(e)(11) and thus not subject to 457(f) , if :

**Based on plan design the maximum dollar amount deferred (not includable in income by March 15 of each year) for the same employer and over the employee’s tenure for that employer, does not exceed $54,000.** (For expediency, and not to add another limit, it is indexed to Section 415(c)(1)(A) $54,000. HOWEVER the amount is NOT an annual limit, it is a cumulative limit for the same employer.)

We believe such a safe harbor would allow school districts to maximize teacher classroom time while preventing abuse of the Code section 457(e) (11) exception.

Please let us know if you would like to discuss this further.

Sincerely,