
FOR YOUR INFORMATION

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News For School Clients

Locker Room Privacy

Over the past several years, lawmakers, as well as the courts, have become more mindful of the need to protect individuals against what are now known as “video voyeurs,” particularly in areas where an individual has a reasonable expectation of privacy, such as in locker rooms. In 2004, for instance, Congress passed the Video Voyeurism Prevention Act of 2004, 18 U.S.C. § 1801, which makes it a crime for persons on federal property to record by any means, or disseminate, an image of an individual’s “private areas” without consent, under circumstances in which the individual has a reasonable expectation of privacy, whether the individual is in a private or public location. In February 2008, the U. S. Court of Appeals for the Sixth Circuit ruled in *Brannum v. Overton County School Board* that the constitutional right to privacy includes the right to shield one’s body from exposure to viewing by the opposite sex.

In *Brannum*, a concern for heightened security led to surveillance cameras being installed in the boy’s and girl’s locker rooms at one of the district’s middle schools. The surveillance cameras transmitted the images to a computer terminal in the assistant principal’s office where they were displayed and stored on the computer’s hard drive. The images were also accessible via remote internet connection and the evidence submitted to the court indicated that the system where the images were stored was accessed 98 different times through internet services located in different localities. When the camera in the girl’s locker room was noticed by members of a visiting middle school’s basketball

team, officials from the middle school contacted the Overton County Tennessee Director of Schools. The Director of Schools immediately accessed the security system from his home and viewed the recorded images. School employees removed the locker room cameras later that day. The Director of Schools later stated that in his opinion “the videotapes of the 10-to-14 year old girls contained ‘nothing more than images of a few bras and panties.’”

In holding that the principal and assistant principal, who were personally involved in determining the location of the cameras, were liable for invading the privacy of the affected students, the court commented: “Some personal liberties are so fundamental to human dignity as to need no specific explanation in our Constitution in order to ensure their protection against government invasion. Surreptitious videotaping of the plaintiffs in various states of undress is plainly among them. . . . [T]eenagers have a sensitivity about their bodily privacy that [is] at the core of their personal liberty and that [is] grossly offended by their being surreptitiously videotaped while changing their clothes in the school locker room.”

While the vast majority of school administrators would not even think of placing video surveillance cameras in school locker rooms, protecting the privacy of students from the omnipresent cell phone camera has proven to be a troublesome problem. According to a February 2004 article in *Education Week*, camera phones hit the U.S. market in 2003 just as some school

districts began to loosen or discard policies that prohibited students from carrying cell phones on school property, in part caused by post 9/11 concerns about interfering with contacts between students and parents during emergencies.

Responding to the widespread use of camera phones among students and adults and reflecting increased sensitivity over individual privacy rights, the Wisconsin Legislature passed 2007 Wisconsin Act 118, which provides that as of April 4, 2008, whoever, while present in a locker room, intentionally captures an image of a nude or partially nude person in the locker room is guilty of a Class B misdemeanor (with a fine not to exceed \$1,000 or incarceration up to 90 days or both) and, further, whoever exhibits or distributes the image of a nude or partially nude person taken while that person is in a locker room is guilty of a Class A misdemeanor (with a fine up to \$10,000 or incarceration up to 9 months or both). Importantly for school districts, Act 118 requires that, as of October 1, 2008, the owner or operator of a locker room must have a written policy that does all of the following: (a) specifies who may enter and remain in the locker room to interview and seek information from any individual in the locker room; (b) specifies the recording devices that may be used in the locker room and the circumstances under which they may be used; (c) reflects the privacy interests of individuals who use the locker room; and (d) specifies that no person may use a cell phone to capture, record, or transfer a representation of a nude or partially nude person in the locker room.

A “nude or partially nude person” is defined in Wis. Stat. § 942.08(a) to mean any person who

has less than fully covered genitals, pubic area or buttocks, as well as any female whose “breast below the top of the nipple” is uncovered and any male “with covered genitals in a discernibly turgid state.”

Although Act 118 does not require it, one option that boards may consider is simply banning cell phones with picture-taking features from being taken into locker rooms. If a district chooses to ban camera phones from being taken into locker rooms, appropriate signage should be placed outside locker rooms clearly informing everyone of the ban. Another option is to allow cell phones with built-in cameras to be taken into locker rooms but require that the cell phones be turned off the entire time. Anyone using the cell phone in the locker room, regardless of the purpose, would be subject to discipline. The rationale for banning cell phones or cell phone use in the locker room, rather than just prohibiting use of the camera feature, is that it is difficult to detect when someone might be using the camera feature of the phone while appearing to be merely conversing.

There are no prescribed penalties for not having a policy or for not enforcing one that has been adopted. The risk to school districts in not enforcing a policy designed to protect locker room privacy is that it could subject the district to liability if someone whose picture is taken in the locker room while he or she is in a state of undress decides to sue. A district could be found constitutionally liable for being deliberately indifferent to a deprivation of one’s right to privacy in a school locker room if the district fails to adopt or enforce a locker room privacy policy.

This FYI was prepared by members of the Lathrop & Clark LLP School, Municipal, Labor and Employment Law Team. If you have any questions regarding this topic, please call any of the following members:

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