ASSOCIATION OF WISCONSIN SCHOOL ADMINISTRATORS

High School Principals Conference

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LEGAL ISSUES IMPACTING HIGH SCHOOL PRINCIPALS

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I. PUPILS AND CURRICULUM

A. **Student/Student Harassment.** A kindergartener told her parents that a third-grade boy was bullying her on the bus to lift up her skirt when she wore a dress. Her parents immediately complained to the principal of the girl's school. After identifying the male student, school officials questioned him and the boy promptly denied any wrongdoing. Officials also spoke with the bus driver and a number of students who frequently rode the bus. The majority of the people interviewed could not corroborate the young girl's story. The police, conducting an independent investigation, determined that there was insufficient evidence to charge the young male criminally. The principal similarly decided that the case lacked sufficient evidence to impose any disciplinary measures against the student. Instead, he proposed to place the young girl on a different bus or to assign different sections of seating to the younger and older students, leaving a few rows of empty seats between the kindergartners and the older children. Unhappy with this solution, the girl's parent filed a Title IX claim against the school committee and the superintendent, alleging that they were liable for peer sexual harassment. The lower court dismissed the parents' claims determining that Title IX liability only attaches after a school district receives actual notice of harassment and the district then causes the victim to be subject to further harassment. Though the First Circuit affirmed the decision on appeal, the appellate court took issue with the lower court's reasoning, asserting that the court's deliberate indifference analysis was not broad enough. The appellate court stated that in order for a student to prevail on a Title IX claim, the student must prove that severe, pervasive and objectively offensive harassment occurred; that the harassment deprived the student of educational opportunities or benefits; that the educational institution had actual knowledge of the harassment; and, finally, that the institution's deliberate indifference caused the student to be

subjected to the harassment. The court held that because the school district took immediate steps to identify the perpetrator, investigate the purported behavior, and propose possible solutions, the court could not sustain a Title IX action against the school. Even though the parents rejected the school's proposed solutions to the problem, the court noted that Title IX does not require institutions to take "heroic measures, perform flawless investigations, craft perfect solutions, or adopt strategies advocated by parents." To find a school liable, its response must be so deficient as to be clearly unreasonable. The response in this case could not be characterized as such. *Fitzgerald v. Barnstable School Committee*, 504 F.3d 165 (1st Cir. 2007), cert. granted, 128 S. Ct. 2903 (2008).

B. **Student Rights & Discipline (Search/Seizure).** After an eighth-grade female student was implicated in providing prescription drugs to her classmates in violation of school rules, the vice principal ordered that the girl be searched for pills in the nurse's office. The student subsequently brought an action against the school district, alleging that the search violated her Fourth Amendment rights. In granting the school district's motion for summary judgment, the district court determined that officials had complied with the requirements for a reasonable search of a student as set forth by *New Jersey v. TLO,* 469 U.S. 325 (1985). The court held that the search was both justified at its inceptions and permissible in its scope. On appeal, the Ninth Circuit Court of Appeals reversed the grant of summary judgment in part. The court ruled that the defendants violated the student's Fourth Amendment right to be free from an unreasonable search. The strip search of the student was neither justified at its inception nor reasonable in scope to the circumstances giving rise to its initiation. The vice principal, who directed the search, was not entitled to qualified immunity, but the school nurse and administrative assistant who followed the vice principal's instruction were entitled to summary judgment. *Redding v. Safford Unif. Sch. Dist*., 531 F.3d 1071 (9th Cir. 2008).

C. **Student Speech (Off-Campus).** Middle school student J.S. created a fake MySpace profile to James McGonigle, the principal of Blue Mountain Middle School (BMMS). The profile did not identify Mr. McGonigle by name, but it identified him as a principal and included a photograph of him from the school district's website. The personal profile section depicted him as a pedophile and sex addict. Although the profile was created at J.S.'s home, word of its existence spread the next day at school. Mr. McGonigle learned of it and called J.S. into his office. J.S. initially denied any involvement, but then she admitted creating the provide with another student. Mr. McGonigle determined that J.S. had violated the school discipline code, which prohibited the making of false accusations against school staff members, and had violated the district's computer use policy, which informs students that they cannot use copyrighted material without permission from the agency or website from which they obtain it. J.S received a ten-day suspension, and then later sued the school district alleging that the district violated her First Amendment rights by excluding her from classes for a profile that was non-threatening, non-obscene and a parody. The court rejected the claim, concluding that J.S.'s speech was akin to the lewd and vulgar speech that

the U.S. Supreme Court ruled in *Bethel School District v. Fraser*, 478 U.S. 675 (1986) was not protected by the First Amendment, noting that the profile contained derogatory expletives. The court concluded that, even though the profile did not cause an on-campus disruption, the totality of the circumstances showed that the lewd and vulgar off-campus speech had an effect on-campus. *J.S. v. Blue Mountain Sch. Dist.*, 2008 U.S. Dist. LEXIS 72685 (Md. Pa. Sept. 11, 2008).

D. **Distribution of Materials by Students.** Michael Lucas, a student at Jefferson Middle School, engaged in several pro-life activities on campus. The school, however, prohibited Michael from distributing literature during the school day, except for distributing them during the lunch hour at a table and posting them in the hallways and bulletin boards in connection with an event. Michael, however, still wanted to distribute materials in the hallway. As a result, he sued the District, arguing that the District's restrictions violated his First Amendment rights. He asserted that, although the school can place reasonable restrictions on the time, place, and manner of distribution on non-school sponsored literature, the district failed to demonstrate the likelihood that the distribution of these materials would result in a material disruption. The District insisted, however, that its policy's content-neutral time, place, and manner restrictions were reasonable. The United States Court of Appeals for the Sixth Circuit concluded that the district's restrictions on distribution of materials did not violate the student's free speech rights because they were reasonable. The court noted that school areas such as hallways constituted nonpublic forums, and therefore, the District was justified in imposing time, place, and manner restrictions on hallway speech. The court noted that there was no evidence to show that the school's regulation was based on a desire to suppress Michael's anti-abortion viewpoint. *M.A.L. v. Kinsland*, 543 F.3d 841 (6th Cir. 2008).

E. **Speech (Student Dress).** Heidi Zamecnik and Alexander Nuxoll, students at Neuqua Valley High School, were prohibited from wearing T-shirts bearing the legend "Be Happy, Not Gay," which school officials characterized as an offensive interference with the rights of other students and a risk of disruption. Heidi and Alexander had planned to wear the shirts during the "Day of Truth," an event promoted by the Alliance Defense Fund as a counter-demonstration to the Gay, Lesbian, and Straight Education Network's annual "Day of Silence," which promotes tolerance of gays. They sued Indian Prairie School District No. 204, alleging that their free speech right to express their religious views and their right to free exercise of religion were violated. The district court declined to issue a preliminary order to force the district to allow the shirts. On appeal, the U.S. Court of Appeals for the Seventh Circuit unanimously concluded that the school's actions could not be justified as a foreseeable "substantial disruption" under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508 (1969). The court ordered the school district to allow the high school students to wear the T-shirts. While the court recognized that student speech is governed, with some exceptions, by the *Tinker* substantial disruption standard, it concluded that a school meets that standard by presenting "facts which might reasonably

lead school officials to forecast substantial disruption." Avoiding violence is not the only type of substantial disturbance; the court noted "if there is reason to think that a particular type of student speech will lead to a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school—symptoms therefore of substantial disruption—the school can forbid the speech." In this case, however, the slogan "Be Happy, Not Gay" was only "tepidly negative" rather than "derogatory" or "demeaning." To regulate speech, the Seventh Circuit stated that a school must only present facts which might reasonably lead school officials to forecast substantial disruption. The school need not prove that serious consequences would in fact occur. The Court stated that if there is reason to think that a particular type of student speech will lead to a substantial disruption, such as a decline in student's test scores, an upsurge in truancy or other symptoms of a "sick school", the school can forbid the speech. The Court noted that high school students are not adults, schools are not public meeting halls, children are in school to be taught by adults rather than to practice attacking each other with wounding words, and school authorities have a protective relationship and responsibility to all the students. The Court stated that it is highly speculative that allowing students to wear a t-shirt that says "Be Happy, Not Gay" would have even a slight tendency to provoke incidents of harassment of homosexual students or poison the educational atmosphere. Therefore, the Seventh Circuit enjoined the District from enforcing its rule against a student who wears a t-shirt that says "Be Happy, Not Gay." *Nuxoll v. Indian Prairie Sch. Dist.,* 523 F.3d 668 (7th Cir. 2008).

F. **FERPA Regulations.** The Department of Education has issued final regulations implementing provisions of the final Family Educational Rights and Privacy Act (FERPA). The final regulations clarify permissible disclosures to parents of eligible students and conducts that apply to disclosures in health and safety emergencies; clarify permissible disclosures of student identifiers as directory information; allow disclosures to contractors and other outside parties in connection with the outsourcing of institutional services and functions; revise the definitions of attendance, disclosure, education records, personally identifiable information, and other key terms; clarify permissible redisclosures by state and federal officials; and update investigation and enforcement provisions. The significant changes from the new regulations as initially proposed include (1) the addition of a requirement that an institution that makes a disclosure under FERPA's health or safety emergency exception record the circumstances of the emergency and (2) the addition of a requirement that an institution record a disclosure not make under that exception. The regulations became effective January 8, 2009.

G. **Athletics.** Two different sets of parents complained about their daughters' high school softball coach to school officials on several occasions. The parents alleged as a result of their complaints that the coach suppressed the softball skills of their daughters by limiting their play time, that the coach did not ask the parents to participate in the booster club, and that school officials failed to respond to requested for meetings regarding their dissatisfaction with the coach. The parents filed a 42 U.S.C. Section 1983 claim contending that their First Amendment

rights were violated when they experienced retaliation for complaining about the coach. Affirming the district court's motion for summary judgment, the Seventh Circuit Court of Appeals did not find enough evidence to demonstrate retaliation in this instance. The court reasoned that the parents offered no documents, statements or any other proof of retaliation in this case. The court also ordered that the parents show cause as to whey they should not be sanction for filing a frivolous lawsuit. *Springer v. Durflinger*, 518 F.3d 479 (7th Cir. 2008).

II. EMPLOYMENT AND LABOR

A. **Freedom of Speech (Public Employees).** The plaintiff, Gregory Samuelson, was a teacher employed by LaPorte Community School Corp. (LCSC) and head coach of the girls high school varsity basketball team. LCSC has a "chain of command" policy that directs all staff members to "refer matters requiring administrative action to the person in charge of the department, who shall refer such matters to the next higher authority, when necessary." That policy is supplemented by a bylaw that acknowledges the right of staff members to speak out on matters of public concern and instructs employees doing so to "clearly [state] that his/her expression represents personal views and not necessarily those of the School Corporation." The athletic director and principal recommended nonrenewal of Mr. Samuelson's coaching contract based on: (1) complaints and unrest among players, parents and coaches; (2) Mr. Samuelson's poor fundraising and unauthorized spending of team funds; and (3) his coaching ability. The superintendent passed the recommendation on to the school board, which approved it. In his resulting lawsuit, Mr. Samuelson cited four instances where he claims to have engaged in protected speech on a matter of public concern: (1) his speaking to the school board about the treatment of the girls' sports programs as compared to the boys' programs; (2) his voicing disapproval about the selection and hiring of a middle school principal; (3) his speaking to board members about proposed changes in the school's computer platform; and (4) his speaking to a board member about his objections to a proposed school redistricting plan. The district court granted summary judgment to LCSC, holding that that the "chain of command" policy was not an unconstitutional prior restraint and that LCSC had not retaliated against Mr. Samuelson's exercise of a First Amendment right because, even if the district had been motivated partially by speech that was protected, he had not shown that its stated reasons for the nonrenewal were pretextual. The U.S. Court of Appeals for the Seventh Circuit affirmed and ruled that the teacher failed to establish that the nonrenewal of his coaching contract was in retaliation for his having exercised his free speech rights. The court also ruled that the school district's "chain of command" policy did not constitute impermissible prior restraint on his speech. It covered only "speech grounded in the public employee's professional duties," which the U.S. Supreme Court's ruling in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), has made clear is not protected by the First Amendment. The court then concluded that none of speech cited by Mr. Samuelson supported his claim of retaliation. "Even assuming, *arguendo*, that these instances were not a product of his employment duties, and thus were protected by the First Amendment, Mr. Samuelson has failed to show that his

nonrenewal as coach was motivated by any of these instances." Although Mr. Samuelson pointed to that the fact that his nonrenewal came two days after he asked the superintendent an e-mail about the proper procedure for filing a Title IX complaint and one day after the superintendent ordered him not to speak to board members without following the chain of command, the court found no evidence that the board saw or considered the e-mail exchange. *Samuelson v. LaPorte Community School Corporation*, 526 F.3d 1046 (7th Cir. 2008).

B. **First Amendment Rights.** Bradley Johnson, a math teacher in the Poway Unified School District had for years displayed two banners in his classroom, one with the phrases "In God We Trust," "One Nation Under God," "God Bless America" and "God Shed His Grace On Thee," and the other with the phrase "All Men Are Created Equal, They Are Endowed By Their Creator." Under its policy allowing teachers to display personal messages on classroom walls, the District had allowed materials such as rock band posters, posters of professional athletes, posters with Buddhist and Islamic messages, and Tibetan prayer flags. Although no one complained about Mr. Johnson's banners, his principal ordered him to remove them. Mr. Johnson sued the school district, alleging in part that the District violated his First Amendment rights. The District Court concluded that Mr. Johnson's claim was subject to a forum analysis, which is often used to evaluate free speech cases. The court viewed the classroom walls as constituting a "limited public forum" because the District had intentionally opened its property to expressive conduct by its faculty. The court noted that the District's policy permitted teacher speech as long as the wall display did not material disrupt school work or cause substantial disorder or interference with the classroom. Having created a limited public forum, the District could not exclude speech where its distinction is not reasonable in light of the purposes served by the forum. The court found that the District impermissibly restricted Mr. Johnson's speech based on viewpoint, rather than based on a content-neutral reason or the boundaries the District had set for itself when it created the forum. *Johnson v. Poway Unified Sch. Dist.*, No. 07-783 (Cal. S.D. Sept. 4, 2008).

C. **FMLA Regulations.** The Department of Labor has issued final regulations under the Family Medical Leave Act of 1993. The final regulations are over 200 pages long and cover numerous topics that affect school districts including: the definitions of serious health condition; continuing treatment and chronic condition; use of intermittent leave; substituting paid leave for unpaid FMLA leave; consequences for interfering with FMLA rights; waiver of FMLA rights; employer notices; consequences of employer's failure to designate leave as FMLA leave; medical certifications; and fitness for duty requirements. The final regulations also address the new military leave entitlements which provide additional leave to employees who provide care to covered service members with a serious injury or illness or because of qualifying exigencies arising out of a covered servicemember's call to active duty. The final rule became effective January 16, 2009.

D. **<u>FMLA Interference / Retaliation.</u>** Anthony Martin was employed by Brevard County Public Schools (BCPS) as a payroll supervisor. Although he received the highest possible rating on his 2001, 2002, and 2003 evaluations, in 2004 he was placed on an improvement plan after receiving a significantly lower evaluation rating on an interim performance review. During that period Mr. Martin's daughter, Brittany, who was an Army reservist received notice that her unit would be deployed overseas. Mr. Martin submitted a request for FMLA leave to provide care for his granddaughter, Hannah, who is Brittany's daughter, citing his *in loco parentis* status. BCPS Assistant Superintendent of Finance Michael Degutis approved the leave request to run through the end June when Mr. Martin's contract expired. During the FMLA leave, Mr. Degutis' recommendation that Mr. Martin's contract not be renewed was approved by BCPS. BCPS subsequently informed Mr. Martin by letter of its decision, which BCPS concedes amounted to terminating Mr. Martin. Mr. Martin filed suit in federal district court against BCPS, alleging violation of FMLA rights and retaliation for exercising those rights. The district court granted BCPS's motion for summary judgment.

The U.S. Court of Appeals for the Eleventh Circuit vacated the lower court's decision and remanded the case, concluding that Mr. Martin stated valid claims for interference with his rights under the Family Medical Leave Act (FMLA) and retaliation for exercising his FMLA rights. It pointed out that in order "to prove FMLA interference, an employee must demonstrate that he was denied a benefit to which he was entitled under the FMLA." The appeals court found that the right asserted by Mr. Martin was the right "to be restored by the employer to the position of employment held by the employee when the leave commenced or to an equivalent position." It rejected BCPS's argument that Mr. Martin was terminated for a reason wholly unrelated to his FMLA leave. Instead, it found "the record is unclear: whether Martin would have been retained and his contract renewed if he had been able to complete the final three-plus weeks of his improvement plan is a matter of speculation." It, therefore, concluded that a genuine issue of material fact remained regarding whether BCPS interfered with Mr. Martin's right to reinstatement. The Eleventh Circuit also examined the retaliation claim and concluded that the close proximity in time between his leave and termination was "more than sufficient to create a genuine issue of material fact of causal connection." Given that Mr. Martin had established a *prima facie* case of retaliation, the Eleventh Circuit stated that in order for BCPS to prevail on a motion for summary judgment it was required to present a legitimate non-retaliatory reason for terminating him, which a reasonable jury would not find was pretextual. It concluded that BCPS had not met that burden because there was evidence on which a reasonable juror could find pretext, such as BCPS's warning to Mr. Martin about the ramifications of his taking FMLA leave and the close temporal proximity between Mr. Martin's FMLA leave and termination. *Martin v. Brevard County Pub. Sch.*, No. 07-11196 (11th Cir. Sept. 30, 2008).

E. **<u>ADA Amendments.</u>** On September 25, 2008, President George Bush signed into law the ADA Amendments Act of 2008 ("the Act"). In the findings section of the Act, Congress explained that the purpose of the law is to restore the intent and

protections of the Americans with Disabilities Act of 1990 ("ADA"), following a series of U.S. Supreme Court decisions that narrowed the ADA's definition of disability. With the new Act, Congress intends to carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection under the ADA. Among other changes, the Act adds to the definition of "disability" in several ways. The ADA's definition of disability with respect to an individual is still defined as (a) a physical or mental impairment that substantially limits one or more major life activities of such individual; (b) a record of such an impairment; or (c) being regarded as having an impairment. The new amendments now enumerate a list of major life activities that were previously addressed in the regulations promulgated by the United States Equal Employment Opportunity Commission (EEOC) and by interpretations of the courts. The list of major life activities, which is not exhaustive, incorporated into the ADA by the Act, includes "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." The Act is effective on January 1, 2009. The EEOC is evaluating the impact of these changes on its regulations and official publications concerning the ADA, as well as the informal opinions and advice provided by the agency. It is expected that the EEOC will provide further guidance about the impact of the Act in the near future. These changes are likely to impact not only employees, but also eligibility determinations of students, as qualified persons with a disability under Section 504 of the Rehabilitation Act of 1973, which has the same disability definition as the ADA.

F. **Educator Sexual Misconduct.** The Department of Education has released a publication that discusses taking an all-hazards approach to educator sexual misconduct focusing on prevention, preparedness, response and recovery. Specifically, it defines educator sexual misconduct and then discusses what is known about the individuals who commit this type of abuse, the prevalence of the problem, and what can be done to address this problem in schools. Finally, the publication provides a sample list of school district behavioral guidelines governing adult-student interactions and an outline of the three phases of adult educator sex offender exploitation.

G. **Immoral Conduct.** Christopher Lehto, an elementary school teacher employed by Caesar Rodney School District (CRSD), became involved with a 17-year-old high school student whom he formerly had taught. When the relationship was discovered, Mr. Lehto was charged with fourth-degree rape, but the criminal charge was dropped "for lack of prosecutive merit." However, the Caesar Rodney Board of Education notified Mr. Lehto that it intended to terminate him on the grounds of immorality and/or misconduct in office. After a hearing, the board did so, for immorality. Mr. Lehto appealed to a state trial court, asserting that neither the evidence nor the law supported the board's decision. He argued that the student did not attend a school in CRSD, that he had not engaged in criminal

activity, and that the relationship had not affected his professional duties. The trial court rejected his claims, holding that the weight of the evidence supported the board's decision. The state supreme court affirmed. The court acknowledged that the state statute under which Mr. Lehto was terminated left the term "immorality" undefined, but the court drew on case law to find that the term is "construed in the context in which it appears in this [statute] to refer to such immorality as may reasonably be found to impair the teacher's effectiveness by reason of his unfitness or otherwise." The court then concluded that the law also requires that "a nexus exist between the off-duty conduct and a teacher's duties before allowing termination of the teacher based on immorality." *Lehto v. Board of Educ. of the Caesar Rodney Sch. Dist.*, No. 175, 2008 (Del. 2008).

H. **Employment Discrimination Based on Military Service.** 2007 Wisconsin Act 159 prohibits an employer (and certain others) from refusing to hire, employ, admit, or license a person (or take other specified action) based on the person's military service. "Military service" is defined as service in the U.S. armed forces, the state defense force, the national guard of any state, or any other reserve component of the U.S. armed forces. The prohibition against discrimination because of military service pertains if the person is, or applies to be, in military service or if the person performs, has performed, applies to perform, or has an obligation to perform military service. Under Act 159, it is not employment discrimination because of military service to refuse to hire (or take other specified action against) a person who has been discharged from military service under a bad conduct, dishonorable, or other than honorable discharge, or under any entry-level separation, where the circumstances of the discharge or separation substantially relate to the circumstances of the particular job or licensed activity.

III. GOVERNANCE

A. **Suicide Prevention Information.** Under current law, the Department of Public Instruction (DPI) is required to develop and conduct training programs in suicide prevention for the professional staff of public and private schools. 2007 Wisconsin Act 220 now requires each school board and the governing body of each private school to annually inform their professional staff of the resources available from DPI and other sources regarding suicide prevention. In addition, the Act requires DPI to annually provide school boards and governing bodies of private schools with a model notice that describes the suicide prevention services that is has developed and how staff may access these services and that school boards and governing bodies of private schools may use to inform their professional staff. This Act took effect on April 22, 2008.

B. **Use of Cameras and Other Recording Devices in Locker Rooms.** 2008 Wisconsin Act 118 requires owners and operators of locker rooms to adopt a written policy relating to interviews conducted in the locker room and use of recording devices in the locker room and creates penalties for capturing the image of nude or partially nude person in a locker room and for exhibiting or distributing such an image. The Act provides that any person, including the state, that owns

or operates a locker room must adopt a written policy that does all of the following: (1) specifies who may enter and remain in the locker room to interview or seek information from any individual in the locker room; (2) specifies that recording devices that may be used in the locker room and the circumstances under which they may be used; (3) reflects the privacy interests of individuals who use the locker room; and (4) 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. Act 118 took effect on April 4, 2008, except that the provision requiring the owner or operator of a locker room to have a written policy, as required by the Act, took effect on October 1, 2008.

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