

ASSOCIATION OF WISCONSIN SCHOOL ADMINISTRATORS

Associate Principals Conference

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LEGAL HOT TOPICS

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I. STUDENT SEARCHES

- A. **Strip Searches.** 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. She was ordered to pull her bra out and shake it and to pull the elastic out on her underpants. No pills were found. The student subsequently brought an action against the school district, alleging that the search violated her Fourth Amendment rights. The district court found that there was no Fourth Amendment violation and determined that officials had complied with the requirements for a reasonable search of a student. The Court of Appeals for the Ninth Circuit reversed and ruled that the student's Fourth Amendment right to be free from an unreasonable search was violated. The Court of Appeals also held that 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 immune. The United States Supreme Court used a "reasonable suspicion" standard as set forth by *New Jersey v. TLO*, 469 U.S. 325 (1985) to determine that the student's Fourth Amendment rights were violated. Under this standard, the search needs to be justified at its inception and permissible in its scope. The knowledge component of the test requires that the administrator believes there is a moderate chance of finding evidence of wrongdoing. In this case, 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 Court stated that a search of her outer clothing would have been justified, but there was no evidence that indicated that the drugs were concealed in her underwear. *Redding v. Safford Unif. Sch. Dist.*, 129 S.Ct. 2633 (U.S. 2009). [Note: § 118.32, Wis. Stats., prohibits any official, employee, or agent of a school district from conducting a strip search of any pupil.]

- B. The Use of Drug Dogs in Searches.** After a student survey revealed that there may be a drug problem at the school, the Contoocook Valley School District implemented a drug sweep using drug-sniffing dogs at the school. The students were not alerted that it was a drug sweep, but rather were told it was a drill. The students were forced onto the football field and were told to leave their personal items in the school. Meanwhile, the dogs alerted to eight different bags, none of which yielded to an illegal substance. A group of parents sued the school district, alleging a violation of the students' Fourth Amendment freedom from unreasonable searches and that holding them on the field was an unreasonable seizure. The U.S. District Court for the District of New Hampshire held that there was no unreasonable search conducted. It stated that existing precedents "leave little doubt that the mere use of trained drug dogs on school grounds to sniff students' personal items does not qualify as a search within the meaning of the Fourth Amendment." The court further emphasized that the dogs were not sniffing the students, which would be more intrusive, but rather the dogs were sniffing their personal belongings. Regarding the unreasonable seizure, the court stated that the traditional definition of seizure is not applicable in a school setting, where "students are generally not at liberty to leave the school building when they wish;" the students' rights must be viewed in that context. In order for the action to qualify as a seizure, "the limitation on the student's freedom of movement must significantly exceed that inherent in every-day, compulsory attendance." Confining the students to the football field was not such a limitation because students were periodically confined when emergency evacuation drills were conducted. Lastly, the court noted that the evacuation was not done in a stigmatized manner because no student or group of students was singled out. *Doran v. Contoocook Valley Sch. Dist.*, 616 F.Supp.2d 184 (D.N.H. 2009).
- C. Searches of Students' Vehicles.** School officials at Homestead High School were alerted by an anonymous informant that a student, Schloegel, was in possession of drugs on school grounds. Schloegel had been arrested for possessing marijuana on school grounds three years prior to this incident. Based on the tip, two assistant principals, with assistance of the school liaison officer and a Mequon police officer, conducted an investigation and called Schloegel into the office. Schloegel consented to searches of his person and book bag, however no contraband was found. A locker search revealed no contraband either. An assistant principal asked Schloegel if he would mind if they looked in his car. He had received a student handbook at the beginning of the year that contained a parking form that included a "consent to search" clause. Upon a search of his car, the assistant principal found marijuana, a pipe, Oxycontin, and cash. The school liaison officer asked a series of questions, which led to the school liaison placing Schloegel under arrest and taking him to the police station, where he was read his *Miranda* rights.

Schloegel asked the court to suppress his statements to the school liaison officer because he did not inform Schloegel of his *Miranda* rights before asking him questions. The court refused the request and noted that *Miranda* warnings are

required only when a person is “in custody.” To determine whether someone was “in custody,” the court looks to whether the suspect was formally arrested or suffered restraint or freedom of movement to the degree associated with a formal arrest. Here, the court said Schloegel was not in custody for the following reasons: the investigation was conducted primarily by the assistant principal rather than by the school liaison officer or the police officer; no more than fifteen minutes passed between the time Schloegel was summoned to the office and when the drugs were discovered; questions were asked in the school parking lot rather than a squad car or police station; and Schloegel was not cuffed.

Schloegel also asked to suppress the items discovered during the search of his car. The court refused this request after applying the standard for searches on school grounds by public school officials from *New Jersey v. TLO*, 469 U.S. 325 (1985). The standard states that a school search is legal when it satisfies the following two-prong test: (1) the search must be justified at its inception and (2) be reasonably related in scope to the circumstances which justified the interference in the first place. Regarding the first prong, the courts have accepted a student handbook regarding vehicle searches and a student’s consent to search the car as a condition of being allowed to park in the school parking lot as evidence of reasonableness. The court ultimately concluded that the search was reasonable at its inception in light of Schloegel’s prior drug arrest record and because the school officials were put on alert that Schloegel possessed drugs. Further, the court concluded that the search of Schloegel’s car was reasonably related in scope to the search of contraband. Students have many places to stash drugs, so after unsuccessfully searching the student, his book bag, and his locker, the next step was to search his car. *State v. Schloegel*, 2009 WI App 85.

- D. Searches of Students’ Cell Phones.** School officials confiscated a high school student’s cellular telephone because he displayed it during school hours in violation of school policy. While the school officials had the telephone, they accessed the student’s phone directory and began making telephone calls with the student’s telephone. They called nine other high school students listed in the directory to determine whether they too were violating the school’s cellular telephone policy. The officials also accessed the student’s voicemail and text messages and conducted an instant message conversation with the student’s brother without identifying themselves as being anyone other than the primary user of the telephone. Based on these actions by the school officials, the student and his parents filed a ten-count complaint in federal district court against the school district, superintendent, assistant principal, and teacher alleging several federal and state claims. Included in the complaint were allegations that, by accessing the student’s telephone directory, voicemail, and text messages and by using the cellular telephone to call individuals listed in the directory, the school officials violated the student’s federal and state constitutional right to be free from unreasonable searches and seizures. The school officials asked the court to dismiss these allegations in the complaint, claiming, in part, that they were entitled to immunity from such lawsuits. The court, however, denied the school

district's request and permitted the student and his parents to proceed with their lawsuit on this claim. The federal court concluded that the school officials were justified in seizing the cellular telephone because the student had clearly displayed it at school, violating the school's policy prohibiting the use or display of cell phones during school hours. However, the court decided that the school officials failed to meet the reasonableness standard that is required when they accessed the telephone directory, voice mail, and text messages and called other students. According to the court, the school officials did not have any basis for initiating a search because they had no reason to suspect that such a search would reveal that the student himself was violating another school policy. Instead, the court concluded that the school officials were unlawfully conducting a search to find evidence of other students' misconduct. The court also found that the school officials violated the Pennsylvania state wiretap law by accessing stored voicemail and text messages, and that such accessing of stored messages was outside the scope of a reasonable *T.L.O.*-type search. *Klump v. Nazareth Area School District*, 425 F. Supp. 2d 622 (E.D. Penn. 2006).

II. STUDENT DISCIPLINE

- A. **Providing Services to Expelled Students.** In a Dane County Circuit Court decision, a judge ordered the Madison Metropolitan School District to provide educational services to a student who was expelled and is under a juvenile court order to continue his education. Students who are expelled from the District are typically given no services unless they are eligible for special education. However, Circuit Court Judge David Flanagan decided that the District remained obligated under state law to formulate an educational plan for a 16-year-old student who was expelled after his arrest on a misdemeanor drug charge. In his decision, the judge stated that state law permits him to issue orders to persons who contribute to the condition of a juvenile by any act or omission. In this case, the District's refusal to try to find some educational opportunity for the boy was ruled an omission which contributed to the delinquency of the boy. *In the Interest of M.D.T.*, Case No. 09 JV 419, (Order dated Oct. 19, 2009).
- B. **Student Expulsions and Police Reports.** A pupil appealed an order of expulsion for a student who engaged in conduct while at school that endangered the property, health, or safety of others (possession of marijuana with intent to deliver). The order was reversed after the Department of Public Instruction concluded that the expulsion was based solely on information provided within a law enforcement officer's records. DPI stated that, based on a review of the record, it was clear that the board was provided only the police reports and the testimony of the officer at the hearings. In addition, the principal's information was based on the report filed by the police officer and nothing internally had been brought to his attention. As a result, the district violated Wis. Stat. § 118.126(5)(b) and did not comply with all of the procedural requirements of Wis. Stat. § 120.13(1)(c). *In the Matter of D.P.*, Appeal No. 09-EX-22 (Oct. 20, 2009).

III. TECHNOLOGY ISSUES INVOLVING STUDENTS

- A. **“Sexting.”** “Sexting,” according to Wikipedia, “is the act of sending sexually explicit messages or photos electronically, primarily between cell phones.” Recent examples in the news have included teenage girls sending racy photos of themselves to their teenage boyfriends, girls taking semi-nude photos of each other and sending them to others at school, and teenage boys being criminally charged for being in receipt of such photos. *See, e.g.,* Martha Irvine, *Porn charges for 'sexting' stir debate*, Associated Press (Feb. 4, 2009); *Castalia police look into complaint of nude photos sent by cell phone*, Sandusky Register (Mar. 20, 2009).

School officials must take extreme care in the manner in which they respond to incidents of “sexting” that are discovered in the school. School officials should *not* copy such images onto school computers for preservation as evidence, but instead should work with local law enforcement if they desire to initiate a referral to social services or for criminal prosecution. In one case, an assistant principal at Freedom High School in Loudon County, Virginia, was criminally prosecuted for possession of child pornography after he was assigned the task of investigating rumors of sexting at his Virginia high school. When he found such an image on a male student’s phone, the principal instructed the vice principal to preserve a copy on an office computer, which he did by first sending the photo to his own cell phone, and then copying to the computer. Although the judge ultimately dismissed the charges (after a year and \$150,000 in legal fees), the case stands as a stark warning to school officials (and even to students) of the risks of possessing such “sexting” images. *See, e.g.,* Ting-Yi Oei, *My Students. My Cellphone. My Ordeal*, The Washington Post (April 19, 2009).

- B. **Cell Phone Video and YouTube.** Another recent development is the attempt by students to use their cell phone cameras to secretly capture teachers in compromising or embarrassing situations, with the goal of posting the content on YouTube. Examples in the media have a teacher angered that a student’s cell phone rang in class taking and smashing the student’s phone, a sex ed. teacher attempting to use humor to demonstrate the dangers of unsafe sex, and included a student capturing on video a band teacher jokingly pretending to sleep in class, a cheerleading coach doing a cheer in an effort to excite her students for Spirit Week that some viewed as inappropriate or sexually suggestive, and an angry teacher forcing a child to stand during the National Anthem by yanking the student’s chair out from under him. *See, e.g.,* Lisa Grace Lednicer, *Sex ed teacher tries humor; student posts video on YouTube*, The Oregonian (Feb. 12, 2009); Kellie Hayden, *YouTube, cell phones, and teachers*, Suite101.com (Sep. 27, 2008).
- C. **Cell Phones and Cyber Bullying.** Cyber bullying, which has become increasingly prevalent among students via e-mil and websites such as Facebook, also may occur via cell phone, when students send harassing or threatening text

messages or e-mails to another from their cell phones. In Wisconsin, certain such activities may be criminal under Wis. Stat. § 947.0125. The following activities, among others, may constitute criminal activity under the law: (1) sending a message to a person on an electronic mail or other computerized communication system that threatens to inflict injury or physical harm to any person or a person's property, with intent to frighten, intimidate, threaten, abuse or harass another person; (2) sending a message to another person on an electronic mail or other computerized communication system that uses obscene, lewd or profane language or suggests any lewd or lascivious act, with intent to frighten, intimidate, threaten, abuse, harass, annoy, or offend another person; (3) sending a message to another person on an electronic mail or other computerized communication system while intentionally preventing or attempting to prevent the disclosure of one's own identity, with intent to frighten, intimidate, threaten, abuse or harass another person; or (4) sending repeated messages on an electronic mail or other computerized communication system, with intent solely to harass another person.

- D. Student Free Speech and the Internet.** A middle school student created a fake MySpace profile for James McGonigle, the principal of Blue Mountain Middle School. The profile did not identify 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 the student's home, word of its existence spread the next day at school. McGonigle learned of it and called the student into his office. The student initially denied any involvement, but then she admitted creating the profile with another student. McGonigle determined that the student 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. The student 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 the student'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. 2008).

IV. TECHNOLOGY ISSUES INVOLVING STAFF

- A. **Staff Use of MySpace.** The U.S. District Court in Connecticut has ruled that school district's decision not to renew a nontenured teacher's employment contract after investigating complaints about his MySpace profiles did not violate his First or Fourteenth Amendment rights. Jeffrey Spanierman, an English teacher at Emmett O'Brien High School (EOHS) in Ansonia, created a MySpace profile page on which he communicated with students regarding school-related and nonschool-related matters. After being tipped off about the profile by another teacher, EOHS guidance counselor Elizabeth Michaud viewed the profile and concluded that it contained inappropriate comments and "peer-like" discussions between Mr. Spanierman and students. When Ms. Michaud spoke to him about his profile, he deactivated it. However, shortly afterward he created a new profile, which was also discovered and reported. Mr. Spanierman's contract was not renewed for the following school year. Mr. Spanierman sued the superintendent, assistant superintendent, and principal, claiming violation of his rights to procedural and substantive due process, equal protection, free speech, and free association. The defendants moved for summary judgment all claims, seeking dismissal of the suit.

The district court granted the motion. The court rejected all of Mr. Spanierman's arguments. In particular, with respect to his free speech argument, the court found that it was clear Mr. Spanierman was not acting pursuant to his duties as a teacher when using MySpace, so that the Supreme Court's holding in *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline," was not applicable. The court then examined whether Mr. Spanierman was expressing his views as a private citizen or as a public employee, concluding that almost none of the contents of the MySpace profile was on a matter of public concern except a poem about the Iraq war. Without question, the teacher suffered an adverse employment action, the court found, but he "presents no evidence of retaliatory animus, and there is nothing in the record to indicate that the Defendants intended to retaliate against the Plaintiff because of the political views expressed in his poem." As a result, the court found he failed to establish a direct causal connection, and the time between the exercise of the alleged protected right and the adverse action was too attenuated to establish an indirect connection. *Spanierman v. Hughes*, 576 F.Supp.2d 292 (D. Conn. 2008).

- B. **Restrictions on Staff Social Networking.** A newspaper in Mississippi has reported that school districts across the state are telling students not to text their teachers or communicate with them on social networking sites. Noting an inappropriate "casual rapport" between students and teachers, the Lamar County School Board prohibited teachers and students from communicating via text messages or social networking sites. Other districts are taking similar steps. For

the last two to three years, the Mississippi School Boards Association has been advising districts to develop policies. The state Department of Education's Office of Safe and Orderly Schools has encouraged districts to do the same, telling them that such communication isn't secure and is easily misconstrued. LaRaye Brown, *Jackson Clarion-Ledger*, July 27, 2008.

V. EMAIL AND CONFIDENTIALITY UNDER STATE RECORDS LAWS

- A. **Public Policy of the Wisconsin Public Records Law.** In recognition of the fact that a representative government is dependent upon an informed electorate, the Legislature has declared that the public policy for the Public Records Law is that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. The Legislature has also declared that providing persons with such information is an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. The Public Records Law shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access is generally contrary to the public interest, and only in an exceptional case, may access be denied. Wis. Stat. § 19.31.
- B. **Definition of Record.** A record is “[a]ny material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority.” Wis. Stat. § 19.32(2). A record “includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes (including computer tapes), computer printouts and optical disks.” A record does not include drafts, notes, preliminary computations and like materials prepared for the originator’s personal use or prepared by the originator in the name of a person for whom the originator is working. A record also does not include materials which are purely the personal property of the custodian and have no relation to his or her office.
- C. **Access To Personal Emails.** On April 16, 2007, Vesper resident Don Bubolz requested e-mail messages to and from five Wisconsin Rapids teachers between March 1 and April 13, 2007. In March 2008, Adams County Circuit Court Judge Charles Pollex ruled that all e-mail messages were public records and subject to disclosure. The teachers unsuccessfully attempted to block the release of these records based in part on the alleged personal nature of the e-mails. According to the attorney for the teachers, there were a handful of e-mails from the teachers to their spouses, kids, neighbors, and friends that had nothing to do with school business, and were purely personal in nature. The court of appeals stated that this issue, whether and to what extent personal e-mails of public employees are subject to open records law, is a question of first impression in Wisconsin; because of that, the Court of Appeals decided the question should be left up to the

Wisconsin Supreme Court. The Supreme Court agreed to hear the case. *Schill v. Wis. Rapids Sch. Dist.*, No.2008AP967-AC, 2009 Wisc. App. LEXIS 408 (April 30, 2009).

- D. Private Email Accounts and Public Records Law.** An e-mail regarding school district business that is created or kept by a school district employee within a private e-mail account, rather than a school district e-mail account, probably does not change the conclusion that such e-mail is a record. The statutory definition only looks at whether the e-mail is created or kept by an authority and whether it relates to the affairs of the school district. In an informal opinion, the Wisconsin Attorney General's office concluded that the requirement to maintain e-mail applies "to home computers as well as office computers, if the topic of the email is the business of the governmental unit, rather than personal communications." See Wisconsin Attorney General Informal Opinion (March 12, 2004); see also Wisconsin Attorney General Informal Opinion, (Sept. 25, 2006).
- E. Restrictions On Access To Records.** The Public Records Law limits access to certain information under various state and federal statutory exemptions. Statutory exemptions are to be narrowly construed. Further, redaction of the record may be required if a record contains information that is subject to disclosure and information that is not subject to disclosure. Wis. Stat. § 19.36(6). The balancing test may limit access to public records. The balancing test examines the public interest in maintaining the confidentiality of the record against the public interest in disclosing the record. Evidence of such an overriding interest may be found in state or federal statutory law, case law, and other similar sources of the public policy.
- F. Pupil Records and Confidentiality.** "Pupil records" are defined as all records relating to individual pupils maintained by a school. Wis. Stat. § 118.125(1)(d). All pupil records maintained by a public school shall be confidential except as provided in the pupil records law. One exception states that pupil records shall be made available to persons employed by the school district which the pupil attends who are required by the department under s. 115.28 (7) to hold a license and other school district officials who have been determined by the school board to have legitimate educational interests, including safety interests, in the pupil records. Wis. Stat. § 118.125(2)(d).

The Family Educational Rights and Privacy Act (FERPA) applies to public and private educational institutions, including those offering post-secondary education, that receive federal funds through most programs administered by the federal Department of Education. 34 CFR §§ 99.1 and 99.3. No funds may be made available under any applicable program to an educational institution with a policy or practice of allowing disclosure of education records (or personally identifiable information contained therein except for directory information) without the written consent of parents except as permitted by FERPA. An educational institution may disclose personally identifiable information from an

education record without written consent if the disclosure meets certain conditions. One condition allows for disclosure if the disclosure is to other school officials, including teachers, whom the institution has determined to have legitimate educational interests.

Based on the above, teachers and other school officials must be cautious in disclosing confidential student information, especially through email, to only those who are entitled to such information under state and federal law. No penalties for violation of Wis. Stat. § 118.125 are set forth in the statute. Under Wis. Stat. § 939.61(1), however, a person convicted of an act or omission prohibited by statute for which no penalty is stated is subject to a forfeiture of up to \$200. Additionally, disclosure of Pupil Records, or information regarding pupils, could give rise to a violation of Wisconsin's Privacy Statute, Wis. Stat. § 995.50, if the disclosure is of a type that would be highly offensive to a reasonable person and the defendant acted reasonably or recklessly as to whether there was a legitimate public interest in the matter. Persons may file complaints with the federal Family Policy and Regulations Office in the Department of Education. The Office investigates alleged violations of FERPA. If violations are found, the Office grants the educational institution a reasonable time in which to come back into compliance. If the institution does not comply voluntarily, the Office may issue cease and desist orders or initiate termination of federal funding to the institution.

- G. Laws Governing Other Confidential Information Related to Students.** State statutes also restrict other information related to pupils in certain circumstances. A school psychologist, counselor, social worker or nurse, plus any teacher or administrator designated by the school board who engages in alcohol or drug abuse program activities, must keep confidential information received from a pupil that the pupil or another pupil is using or is experiencing problems resulting from the use of alcohol or other drugs. The identified persons can disclose information if they have reason to believe there is serious and imminent danger to the health, safety, or life of another and disclosure will alleviate such danger. No more information than necessary to alleviate the danger may be disclosed. The information may also be disclosed if the pupil experiencing the problems resulting from the use of alcohol or drugs consents in writing to disclosure of the information. The information may also be disclosed if it is required to be reported under Wis. Stat. § 48.981. Wis. Stat. § 118.126(1).

School districts are allowed to disclose information about dangerous students to school personnel. If a school district determines there is reasonable cause to believe a student may engage in behavior at school or while under the supervision of a school authority that is physically harmful to another individual, the school district may provide information concerning the student's physically harmful behavior to the student's teachers and to any other school district official who has a legitimate educational or safety interest in the information. Such a determination is based on evidence that a student engaged in behavior that

seriously physically harmed another individual within the previous 12 months or that a student has engaged in a pattern of behavior causing serious physical harm to another individual. The information to be provided must be limited to information reasonably necessary to meet the educational needs of the people, and safety needs of other students and school personnel. A teacher or other school district office is prohibited from disclosing the information provided to him or her under this provision to any other person. Wis. Stat. § 118.128.

VI. DISCIPLINE OF STAFF

- A. **Reassignment and Discrimination.** A Hispanic female public school teacher, who was reassigned to teach English primarily to seventh grade students, instead of twelfth grade students, brought an action against the school for discrimination and breach of contract. The District Court granted the school's motion for summary judgment and the teacher appealed. The U.S. Court of Appeals for the Seventh Circuit held that the teacher's reassignment was not a materially adverse employment action that would support the teacher's retaliation claims under Title VII and Title IX against the school. The reassignment did not dissuade other teachers from making or supporting charges of discrimination and the teacher did not suffer a cut in pay, benefits, or privileges of employment. Furthermore, the personal preference of the teacher for teaching high school students rather than junior high school students, was not sufficient to establish an adverse employment action for purposes of her retaliation claim under Title VII and Title IX. The Court determined that the Principal's decision that a white male teacher was better suited to teach English to high school students, and that the Hispanic female was better suited to teach English to seventh grade students, was reasonable, and thus, the female teacher's reassignment to teach primarily seventh grade English, instead of twelfth grade English, did not violate the school's "reassignment policy." *Lucero v. Nettle Creek School Corporation*, 566 F.3d 720 (7th Cir. 2009).
- B. **School District Liability for Teacher's Misconduct.** A teacher at Hamilton Southeastern High School engaged in a sexual relationship with a student. After the relationship was discovered, the teacher resigned and pled guilty to sexual battery. The student brought a Title IX claim for teacher-student sexual harassment against the school district. The student argued that the standard for finding liability is whether the school district "knew or should have known" of the misconduct. The U.S. Court of Appeals for the Seventh Circuit rejected that standard and followed a different standard. When a Title IX claim for damages against the school district is for a teacher's conduct, the student would have to prove that a school official who could have taken corrective measures had notice of the teacher's misconduct and was deliberately indifferent to it. In this case, the student failed to present evidence that any school officials had actual knowledge of the teacher's misconduct. Once informed, the school took immediate action. *Hansen v. Bd. of Trs. of Hamilton Southeastern Sch. Corp.*, 551 F.3d 599 (7th Cir. 2008).

VII. OTHER DEVELOPMENTS

- A. **School District Liability.** After getting injured while doing a stunt, a Holmen cheerleader sued both the spotter and the school district for negligence. The court ultimately determined that the spotter was not liable. A Wisconsin statute grants immunity to any participant in a recreational activity that involves physical contact in an amateur sport as long as the participant did not act recklessly or with intent to injure. The court held that cheerleading is a physical contact sport, and participants will have immunity where there is no evidence of recklessness or intent to injure. Furthermore, the court held that there is no requirement that the sport be a competitive sport. Another Wisconsin statute provides immunity for municipalities and its officers and employees; discretionary acts are immune, whereas ministerial duties are not. In determining that the district also had immunity, the court held that the district is immune because no ministerial duty was violated by the cheerleading coach, and there was no known and compelling danger that gave rise to a ministerial duty. *Noffke v. Bakke*, 2009 WI 10.
- B. **Liability for Student Injuries.** A student, Andrew Heuser, cut himself while using a scalpel to dissect a flower during an 8th-grade science class. He was the third student that day to so injure himself. Andrew sued the school district, which asserted immunity. Andrew claimed that the known-and-compelling-danger exception obviated immunity; the school district replied that the exception was inapplicable because the conduct fell within the teacher's discretion. The circuit court ruled in Andrew's favor, finding the exception did not apply. The court of appeals affirmed. First, the court of appeals held that the circuit court properly concluded that the school district was negligent. The court concluded that the fault lied in the teacher doing nothing in the face of personal knowledge that using the scalpels raised a safety issue. The teacher could have exercised her discretion in any number of ways. She could have taken her own advice and used scissors. She could have gone from table to table and done the dissecting for the students. She could have closely supervised each student. She could have instructed them from A to Z, starting with how to take off the cover and ending with how to put the cover back on, which is what the trial court was alluding to in its decision. Second, the school district did not have immunity in light of the negligent conduct. The court noted that it was self-evident that another student could get hurt from the flower dissection lab unless the activity was changed. Under those circumstances, the teacher had a ministerial duty to stop the activity the way it was presently conceived. *Heuser v. Community Ins. Corp.*, 2009 WI App 151.
- C. **Religion.** Parents of school-aged children challenged a Texas law that required a moment of silence to be observed in schools every day, alleging that the law violated the First Amendment's Establishment Clause. During the mandatory minute of silence, students may "reflect, pray, meditate, or engage in any other silent activity that is not likely to interfere with or distract another student." The U.S. Court of Appeals for the Fifth Circuit looked to the three-prong test

articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Lemon* has three prongs: (1) “the statute must have a secular legislative purpose;” (2) “its principle or primary effect must be one that neither advances nor inhibits religion;” and (3) “the statute must not foster an excessive government entanglement with religion.” The court noted that the state had advanced three secular purposes: (1) fostering patriotism; (2) providing a period for thoughtful contemplation; and (3) protecting religious freedom. The court found that the statute’s text served the first two purposes, but the third purpose did not appear on the face of the statute and had been addressed by a different law. Under the second prong of the *Lemon* test, the court determined that the parents had focused too narrowly on the addition of the word “pray” in the statute; the statute also gives students the option of “any other silent activity,” so there is nothing in the record to suggest that the primary effect of the statute was to promote religion. Lastly, the court stated that this is not an excessive entanglement with religion, and therefore the law did not violate the First Amendment. *Croft v. Perry*, 562 F.3d 735 (5th Cir. 2009).

D. School Board’s Authority to Remove Books. After a complaint from a Cuban exile and a former political prisoner, the Miami-Dade County School Board voted to remove the book *¡Vamos a Cuba!* and the other twenty-three books in the series. The books portrayed a distorted picture of Cuba by ignoring the repressive nature of Cuba’s totalitarian political regime. The American Civil Liberties Union brought both First Amendment and Due Process claims. The Court of Appeals for the Eleventh Circuit stated that school officials may not remove books “simply because they dislike the ideas contained in the books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” In this case, there was no evidence that the removal of the books was for that reason, but rather the evidence suggests that the removal was due to factual inaccuracies. It was held that the school board has authority to remove books based on educational unsuitability, and factual inaccuracy for a nonfiction book makes books educationally unsuitable. *ACLU v. Miami-Dade County Sch. Bd.*, 557 F.3d 1177 (11th Cir. 2009), *cert. denied* 2009 U.S. LEXIS 8349 (U.S. 2009).

E. Student Speech (Student Newspaper). School officials refused to allow student editors to use a sexually-explicit cartoon with an article about sex education. The cartoon had a teacher pointing to a blackboard drawing of stick figures in sexual positions; the cartoon was to be placed under an article regarding how sex is being taught in class. The students subsequently created an independent newspaper, however, school officials did not allow the students to distribute the paper, stating that the cartoon was unfit. The students sued the school district and school officials, alleging several causes of action under the First Amendment. The U.S. District Court for the Northern District of New York determined that the school had created a limited public forum, and it was entitled to make reasonable viewpoint-neutral rules governing its content. It also said that the cartoon sends a contradictory message to students about the seriousness of risky sexual behaviors. Further, the school newspaper was school-sponsored speech because the school

was providing funding, supervision, and some editorial control. The court determined that the school officials' decision was viewpoint-neutral and reasonable because the officials acted out of concern for the students and to prevent disruption. *R.O. v. Ithaca City Sch. Dist.*, No. 05-695 (N.D.N.Y. 2009).

- F. **Student Speech (On-Campus).** During "All About Me" week, a kindergarten teacher invited parents into class during their child's designated week. Parents were supposed to "share a talent, short game, small craft, or story" with the class. Busch, a mother of a student, wanted to read the Bible to her son's class. The principal did not allow this, stating it would be against the law. Busch and her son brought free speech, establishment, and equal protection claims against the Marple Newtown School District. The Court of Appeals for the Third Circuit entered judgment in favor of the school district. It stated it was not unreasonable for the school district to restrict the mother's speech. The court stated that classrooms are reserved for teaching students in a structured environment, and speech occurring during activities may be regulated under different standards in order to maintain the structured environment. The appropriateness of the expression depends on several factors, including the type of speech, the age of the audience, the school's control, and whether the school solicits individual views from the students during the activity. Further, the court stated that generally, the younger the students, the more control the school can have. Lastly, the court held that the restriction on speech did not violate the Establishment Clause because the restriction was motivated by a permissible purpose to comply with the Establishment Clause. It did not evidence any hostility towards the mother's faith, and it is not excessively entangled with religion. *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89 (3d Cir. 2009).
- G. **Duty to Provide Information to the Union.** The employer violated its duty to bargain when it failed to provide information to the union for the employer's investigative file prior to the pre-disciplinary due process *Loudermill* hearing. The employer could have limited the required disclosure if it had demonstrated confidentiality concerns specific to the particular situation. *State of Wisconsin*, Dec. No. 32239-B (WERC, 8/09). The employer has appealed this decision to the circuit court.
- H. **Grievance Arbitration and Fair Share During Contract Hiatus.** 2009 Wisconsin Act 21 provides that it is a prohibited practice under the Municipal Employment Relations Act (MERA) for a municipal employer, after a collective bargaining agreement expires and before another collective bargaining agreement takes effect, to fail to follow any grievance arbitration agreement or fair-share agreement in the expired collective bargaining agreement. The Act also provides that it is a prohibited practice under MERA for a municipal employee, after a collective bargaining agreement expires and before another collective bargaining agreement takes effect, to fail to follow any grievance arbitration agreement in the expired collective bargaining agreement. The Act took effect on June 23, 2009.

- I. **Preparation Time.** 2009 Wisconsin Act 34 requires school districts to bargain collectively with respect to preparation time, that is, time spent during the school day, separate from pupil contact time, to prepare lessons, labs, or educational materials, to confer or collaborate with other staff, or to complete administrative duties. This Act becomes effective with collective bargaining agreements that cover any period that begins after June 30, 2011.

- J. **Teacher Evaluations.** 2009 Wisconsin Act 60 now allows school boards to use the results of standardized student examinations for the evaluation of teacher performance under certain conditions. School boards continue to be prohibited from using the results of standardized student examinations to discharge, suspend, or formally discipline a teacher, or as the reason for the non-renewal of a teacher's contract. In order to use the results of standardized examinations for teacher evaluations, a school board must develop a teacher evaluation plan that includes the following: (1) a description of the evaluation process; (2) multiple criteria in addition to examination results; (3) the rationale for using examination results for evaluating teachers; and (4) an explanation of how the school board intends to use the evaluations to improve pupil academic achievement. However, Act 60 requires that the school board bargain with the teachers' union over the development of such a teacher evaluation plan by classifying the decision to use student standardized examination results for evaluating teacher performance as a mandatory subject of bargaining.