

ASSOCIATION OF WISCONSIN SCHOOL ADMINISTRATORS

Middle Level Principals Conference

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LEGAL UPDATE

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I. EMPLOYMENT AND LABOR

- 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).

- C. **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.
- D. **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.
- E. **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.
- F. **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.

II. PUPILS AND CURRICULUM

- 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. **Search of Student 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. Student/Student Harassment.** A kindergartener told her parents that whenever she would wear a dress, a third-grade boy would bully her into lifting up her skirt on the bus. 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.

The girl's parents filed Title IX and § 1983 claims against the school committee and the superintendent, alleging that they were liable for peer sexual harassment. The U.S. District Court for the District of Massachusetts 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. The U.S. Court of Appeals for the First Circuit affirmed the decision but stated a different test to determine whether a student will prevail on a Title IX claim. To prevail, 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 appellate 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. The appellate 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. The Supreme Court heard the case solely to decide whether Equal Protection claims for gender discrimination are precluded by Title IX claims. It held that Equal Protection claims are not precluded by Title IX claims. Title IX was not meant to be the exclusive mechanism to address gender discrimination claims. *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165 (1st Cir. 2007), *rev’d*, 129 S.Ct. 788 (2009).

E. 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).

F. 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).

- G. 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).
- H. 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).
- I. 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.

- J. Services for 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).
- K. 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).
- L. 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 in an opinion written by Chief Judge Brown. 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. And under those circumstances, the teacher had a ministerial duty to stop the activity the way it was presently conceived. Had the teacher performed one of the two precautionary measures she identified, this accident may never have occurred. *Heuser v. Community Ins. Corp.*, 2009 WI App 151.

III. GOVERNANCE

Public Records. 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).