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School Boards May Hold Nonpublic Session During Public Meeting

***Cincinnati Enquirer v. Board of Education*, 192 Ohio App.3d 566 (Feb. 18, 2011).**

Recently the Ohio 1st District Appellate Court held that the Cincinnati Public Schools Board of Education did not violate the Open Meetings Act by holding a non-public session during the public meeting.

In August of 2009 two members of the Cincinnati City Council contacted the acting president of the Board of Education, Melanie Bates, to inform her that the City Council was contemplating a deferral of the City's October 2009 stadium payment of $2.5 million. The stadium payment was supposed to be made to the Board of Education in lieu of the various taxes that the Board of Education had a right to assess on the stadiums in downtown Cincinnati.

After meeting with City Council members and learning that the Council planned to announce the deferral at a press conference, Bates called an emergency public meeting of the school board. At that meeting the Board decided to enter into an executive session to discuss "legal issues" surrounding the proposed deferral of payment with the Board's legal counsel. During that session the Board members did not discuss the proposal with each other, but only asked questions of legal counsel. In addition, no decisions were reached and there was no action taken during or as a result of the executive session.

The Cincinnati Enquirer sued the board alleging a violation of the Open Meetings Act (OMA). The trial court held that this allegation was true and entered judgment in favor of the Enquirer. However, the Appellate Court disagreed and overturned that decision.

The OMA was developed to prevent public bodies from engaging in secret deliberations with no accountability to the public. Therefore, the OMA requires that any deliberations or official actions of public bodies must be made in a public meeting.

In order to violate the OMA a public body must do two things simultaneously.

First, the public body must conduct a "meeting", which is defined as any prearranged discussion of the public business of the public body by a majority of its members.

Second, the public body must "deliberate" over "public business." While there is no statutory definition of "deliberate," courts have held that a public body deliberates when there is a thorough discussion of all factors involved in the decision. This includes weighing the pros and cons and considering any ramifications of the proposed actions before coming to a decision. Deliberations are not simply information-gathering, fact-finding sessions or investigations.

The trial court held that holding an executive session during a public meeting was of itself a violation of the OMA. However, this Appellate Court found that the timing of a public body's investigative or fact-finding sessions does not determine whether an OMA violation has occurred. If no deliberations take place and no decisions are reached during the board's executive session, then there is no OMA violation.

In the current case, the Board members did not discuss the proposal with each other, nor did they reach any decisions while in the executive session. The Appellate Court held that in the absence of deliberations or discussions within the session, the session is not a meeting as is required by the OMA in order to trigger a violation.

How this Affects Your District:

Most importantly, this decision highlights the components of what constitutes a meeting and how to avoid

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School Boards May Hold Nonpublic Session During Public Meeting, Cont.

violating the OMA. The threshold question in any OMA liability case is whether a meeting actually occurred. As the Court stated, a meeting involves a discussion of public business. Discussions are defined as "an exchange of words, comments or ideas" among the members of the public body. Therefore, if the members of the public body are not exchanging ideas about a public topic, then a meeting is not taking place. Sessions that are intended to be held in order to gain information from legal counsel will generally not be classified as meetings because the conversation is occurring between the members and the counsel and not among the members themselves.

The same idea would hold true for any session held to investigate an issue within the district. If the discussion that occurs is between the members of the board and an outside entity or person, then the session would not fall under the definition of a meeting and thus would not trigger liability under the OMA.

When holding private sessions, boards should keep in mind that no issue will arise, as to OMA, if there is an absence of discussion and deliberations that ultimately lead to a decision about a public issue.

District Prevails on Summary Judgment for §1983 Claim

***Catlett v. Duncanville Independent School District*, N.D. Texas September 2, 2010 (2010 WL 3467325).**

We first mentioned this case in our January 2011 edition and noted that the teacher's claim was allowed to move past a motion to dismiss phase of the trial. In order for the teacher to get past that stage, the Court only had to find that the alleged facts of her complaint, if true, would give her a valid claim. That is to say, the teacher did not have to prove that any of the facts alleged were true.

While the teacher in this case was able to state a valid claim, the U.S. District Court for the Northern District of Texas held that she did not support her claim with any genuine facts that could lead a reasonable jury to believe that the district or its employees could be held liable under a §1983 claim.

The undisputed facts of this case are that the teacher, Catlett, was acting oddly at a teacher meeting. When the principal, Granger, was informed of this odd behavior he went to the meeting and observed the behavior. The odd behavior included Catlett (1) having difficulty following directions, focusing and feeding herself; (2) almost falling out of her chair; and (3) exhibiting slow, slurred speech. After observing this behavior Granger requested a voucher for drug testing from the Assistant Superintendent for Human Resources, Sandra Burks. After obtaining the voucher Granger, along with a school counselor, took Catlett to the drug testing facility where she refused to be tested. After Granger and the counselor left and Catlett's husband arrived, she consented to the drug test.

Catlett complained that Granger, Burks, and the school counselor violated her Fourth and Fourteenth Amendment rights when they, acting under Duncanville School District's drug testing policy, took her to the drug testing facility by "forcing her into a vehicle against her will" and forcing her to submit to a drug test. She specifically complained that the District was liable because the three school workers' actions were the result of official District policy.

The first grounds by which the District argued that summary judgment was appropriate was that the defendants in the case (principal, school counselor, and associate superintendent) were not policymakers, and that merely having a drug testing policy is insufficient to establish liability on the part of the District. The Court agreed. In general, §1983 does not allow a claim against an employer for actions of its employees. Therefore, the District could only be held liable for its own wrongdoings when the enforcement of the drug policy resulted in the violation of the Plaintiff's rights. Since there was nothing in the drug testing policy directing employees to force employees into cars and to force compliance with the drug testing, the District could not be held responsible for these actions. Therefore, the Court concluded that the individual employees, not the policymakers within the District, made discretionary decisions when acting under the policy, and thus, the District had not acted inappropriately in having the drug testing policy.

The second ground by which summary judgment was granted was that Catlett never proved she was forced to do anything. On the contrary, she testified in her deposition that she never refused to go with Granger or the school counselor and she never told them that she wanted to get out of the car. Also, after initially refusing to take the drug test, Granger and the counselor left Catlett with her husband at the drug testing center where Catlett eventually consented without any undue pressure. The Court found that there was no evidence to show that she was taken against her will or forced to submit to a drug test except for her affidavit. However, an affidavit cannot contradict prior testimony without an explanation of the contradiction. Since that did not occur, there was no evidence supporting her allegations.

The last piece the Court discussed was Catlett's argument that there was no warrant for the drug test and that the drug testing must serve a "special governmental need." The Court cited a 1998 decision from the 6th Circuit Court of Appeals that held that suspicionless drug testing of teachers is justified in part by the unique role teachers play in the lives of children. Catlett argued that since there were no students present at the meeting where she was exhibiting odd behavior there was no risk to any students. However, the Court noted that this setting may be one of the most likely places for District administrators to notice a teacher's odd

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District Prevails On Summary Judgment For §1983 Claim, Cont.

behavior. Teachers spend most of their time in the classroom alone with children. Students may not be old enough to know their teacher is acting oddly, and those students who do know may be in a position where they fear reporting the teacher. Therefore, if Districts wish to monitor this behavior, teacher meetings may be one of the best opportunities to decipher whether an employee is acting oddly.

Consequently, the District's summary judgment motion against Catlett's §1983 claim was granted. Further, the summary judgment motion as to Granger, Burks, and the school counselor against the §1983 claim was also granted because Catlett made no response to the motion and because the three employees were entitled to immunity based on their employment supervisory capacities.

How This Affects Your District:

While this case is not binding here in Ohio, it is interesting that the Court cited from the 6th Circuit Court of Appeals, which is binding authority in Ohio.

In the Ohio Case, the Court noted that a teacher's job is to influence children, both directly and by example. Therefore, there is a strong governmental interest in protecting children who are entrusted into a teacher's care on a daily basis. Since teachers tend to spend most of their working hours alone in a classroom with only students present, it is often difficult for administrators to fully assess whether a teacher may be acting in an odd manner. Further, students cannot necessarily be trusted to report odd behavior to administrators because of various factors including lack of understanding due to age and fear of repercussions. The Court in the present case used the Ohio Case to illustrate that sometimes the best time to observe oddities in teacher behavior is when students are not around. Thus, it is not necessary that teachers suspected of drug use must be in an area with children before a drug test can be justified.

Therefore, as long as a district has a policy outlining when a teacher may be drug tested and the administrators use reasonable means to assess whether a drug test is needed, courts are likely to uphold a district's policy and use of such policy.

Student's Age Can Inform Whether a Student Should Be Given *Miranda* Rights

***In the Matter of J.D.B.*, 131 S.Ct. 2394 (June 2011).**

The U.S. Supreme Court held in June that the age of a student should be taken into account when deciding whether the student is in custody for *Miranda* purposes.

A 7th grade student was removed from his class by the school resource officer (SRO). This removal was prefaced by an investigator from the local police department asking to speak with the student about the possibility of his involvement with two home break-ins. The student had been seen at the vicinity of the break-ins and was questioned at that time, but there was new evidence that the student was in possession of a digital camera matching the description of one that was stolen. After being removed from the classroom, the student was taken to a closed conference room where the investigator, SRO, and two administrators were also present. The student was not given *Miranda* warnings, nor was his grandmother (his legal guardian) notified. At first the student denied involvement, but after one of the administrators urged him "to do the right thing," the student admitted to his involvement in the break-ins. It was at that point the investigator informed the student that he was free to leave, but the student continued and provided further details about the crime and wrote a statement. The student was later charged with breaking and entering and larceny. His attorney moved to suppress his statements, arguing the student had been interrogated in a custodial setting without being given his *Miranda* warnings. The trial court denied this motion. The Appellate Court and State Supreme Court affirmed and declined to find the student's age relevant to the determination of whether he was in police custody for *Miranda* purposes. The U.S. Supreme Court overturned those decisions and found that age should be taken into account when determining whether a student is in custody.

There are two questions a court will consider when determining whether a suspect is in custody: (1) What were the circumstances surrounding the interrogation; and (2) Given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave.

When looking at the first question the court must examine all the circumstances, including those that would affect how a reasonable person would perceive his or her freedom to leave. However, there is no consideration of a particular person's actual mindset. The Court in this case found that one of the circumstances to be considered is the person's age, if that person is a child. The Court stated that age would have some effect on how a juvenile suspect "would perceive his or her freedom to leave."

Juveniles are more susceptible to influence and outside pressures than adults are. Studies have shown that the pressure of custodial interrogation is so immense that it can induce a high number of people to confess to things they did not actually do, and that risk becomes even higher when dealing with juveniles. It is possible that being removed from class (when the student was required to attend because of compulsory attendance laws) and taken to a closed room where an investigator, the SRO, and two administrators were present created a situation where a reasonable juvenile in the 7th grade would not feel free to leave or stop the interrogation. The Court stated that a juvenile's age would not be determinative, or even significant,

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Student's Age Can Inform Whether A Student Should Be Given *Miranda* Rights, Cont.

in every case of deciding whether a student was in custody for *Miranda* warning purposes. However, officers should include age in their "circumstance" analysis when making *Miranda* decisions.

The Court remanded the case back to the North Carolina courts in order to address whether the student was in custody when he was questioned, taking into account the student's age.

How This Affects Your District:

The first piece to understand about this holding is that it does not apply to actions of school officials in their investigations of alleged violations of school rules that do not implicate criminal issues. Therefore, when administrators are involved with the investigation of school rule violations, there is no need to extend this and require any notification of rights to the student being questioned. However, when an SRO is conducting the investigation, the school should be more careful. Again, if the investigation does not involve any type of criminal action, then the presence of an SRO does not change the fact that a notification of rights is not needed.

If, on the other hand, administrators are investigating something that has criminal implications then it may be best not to have an SRO present during the initial questioning. If he or she is present, the SRO should give the student some type of *Miranda* warning about the implications of talking to a police officer.

In all cases where an off-campus police officer or investigator is present, it is important for that officer to give students a *Miranda* warning before questioning begins, because courts are likely to find that students, because of their age and their compulsory education requirements are likely to believe that they cannot just leave and that they are under custody when a uniformed police officer is asking them questions.

In order to better facilitate this process, education officials should have written policies in place that outline how to safeguard students' rights when off-campus officers begin questioning students on-campus. This policy should include procedures for contacting parents and guardians and a process for documenting when and how that contact was made. In the case here, the school did not contact the student's guardian and that was a problem. Parents and guardians should be informed of their right to be present while their child is questioned and of their right to contact an attorney.

While the Court did not give specifics as to what age student would require *Miranda* rights, it did comment that the closer a student gets to 18, the more likely that student understands whether he or she is in custody. Therefore, if students are in middle school or below, they must be given their rights when questioned about criminal conduct by any police officer, including an SRO. If the student is in high school there is more ambiguity, but a good rule of thumb is to proceed with caution when questioning students on criminal matters and make contact with the parents. That is the basic school responsibility. The *Miranda* warning issue, when an SRO is not involved, becomes a police department issue, and it is best left to them to decide if the age of the student requires the warning.

Court Allows Student to Bring Service Dog to School

***C.C. by Ciriacks v. Cypress School District*, 8 ECLPR 89 (C.D. Cal. 2011).**

A California Federal District Court recently granted a preliminary injunction to a 6-year old student with autism, allowing him to bring his service dog to school. To grant a preliminary injunction the Court had to find that the student was likely to succeed on his claim based on its merits and that he was likely to suffer irreparable harm in the absence of the preliminary relief. Finding both, the Court has directed the student's school to allow the service dog to attend with the student, at least until all of the aspects of his case have been decided.

The student's autism is categorized as severe. He is nonverbal, has a low cognitive level, and has difficulty communicating and interacting with others. When he becomes anxious, the student will shriek, pace, plug his ears, laugh inappropriately, and at times wander or run away from his assigned area.

In May 2010, the student was paired with Eddy, a service dog that was trained by the Autism Service Dogs of America (the "ASDA"). Eddy had been trained for about two years, from the time he was about 8 weeks old. The trainer knew that Eddy would eventually be paired with this particular student, and thus Eddy was specifically trained for this student. Eddy is able to help prevent and interrupt impulsive and destructive behavior in this student. After Eddy was paired with the student, the student's mother requested that the school allow the student to use Eddy at school. The school refused to allow that request and the student's mother (fearing the benefits from student's connection with Eddy would be lost if Eddy could not accompany student at school) kept the student home from school during the last two weeks of the school year. At the beginning of the next school year the student's mother sent him back to school, without Eddy, but there were still concerns on her part. In accordance with those concerns, this action followed and the student asked for a preliminary injunction allowing him to bring Eddy to school while his other claims were being decided.

The student's claim was that the school had violated Title II of the ADA. In order to establish this case the student must show: (1) he is a qualified

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Court Allows Student to Bring Service Dog to School, Cont.

individual with a disability; (2) he was either excluded from participation in or denied the benefits of a public entity's services, programs or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of the disability. In this case, all parties agree that the first and third prongs of this test are satisfied. The issue comes from whether the student was excluded from participation or denied any benefits at the school.

The Court commented that any failure to make reasonable accommodations could qualify as discrimination under the ADA. The question the Court asked was whether the school failed to make reasonable accommodations for the student that would not fundamentally alter the nature of the school's educational program. To answer the question the court looked at two major points of contention: (1) whether Eddy was a service dog; and (2) whether the school's educational program would be fundamentally altered if Eddy accompanied the student to school.

The school first argued that Eddy was not a service dog, under the ADA. The definition of a service dog, according to the ADA is "any dog individually trained to do work or perform tasks for the benefit of an individual with a disability." Any work or tasks that the dog performs must be "directly related to the individual's disability" and "work" includes helping people with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. However, "work" specifically does not include "the provision of emotional support, well-being, comfort, or companionship." The school argued that Eddy was only present for the emotional support of the student. The Court found that the student had provided enough evidence to show that the school was incorrect. Since Eddy was trained specifically for the student's disability for two years, the Court found that the specialized training more likely supported the student's argument that Eddy is a service dog.

The second issue was whether the school's educational program would be fundamentally altered if Eddy was allowed to accompany the student to school. The school had to show that "making the modifications would fundamentally alter the nature of the service, program, or activity." The school tried to show that in a few different ways: (1) that a school staff member would need to learn various commands; and (2) the aide would need to hold the dog's leash when navigating campus, provide the dog with water, and tether and un-tether Eddy to the student throughout the day. The Court was not persuaded that even if these issues did exist, that they would fundamentally alter the educational program provided by the school.

Then, the school tried to offer that the presence of Eddy would impede the student's educational process and independence. The Court did not find this persuasive either, because the question was not whether Eddy would improve the student's educational progress, but whether Eddy would fundamentally alter the school's educational program.

Because the school did not sufficiently show that the educational program would be fundamentally altered by accommodating the student, the Court found that the student was likely to have success on the merits for his ADA claim.

As to irreparable harm, the Court stated that it presumes irreparable harm when any plaintiff shows a likelihood of success for a violation of a civil rights statute. Therefore, since the Court had already decided that the student was likely to succeed on his claim, the Court had to hold that irreparable harm was presumed.

Therefore, the Court found that a preliminary injunction was proper in this case and the school was required to allow Eddy to attend school with the student, at least until the claim has been fully adjudicated and decided.

How This Affects Your District:

Essentially, the analysis comes down to two main points: (1) Whether the dog was a service dog; and (2) whether the school's educational program would be fundamentally altered if the dog was allowed to attend school.

According to the ADA regulations a "service animal" is a dog that is individually trained to do work or perform tasks for people with disabilities. Service animals must be allowed to accompany people with disabilities in all areas of a government facility where the public is normally allowed to go. Therefore, since the public is generally allowed within schools and classrooms, and that is where a service dog trained to help a particular student would be most helpful, the ADA requires schools to allow service dogs to be present in school when the school's educational program would not be fundamentally altered by the dog's presence.

Unless a school can prove that the presence of the service dog would impede the program and activities of the school, the school has no right to deny the presence of the dog. It is not enough that the presence of the dog will impede the particular student's progress, because the analysis only deals with the school's educational program and not the impact of the service animal on the student's progress.

While this case is not binding on Ohio schools, it is the one of the first cases of its kind dealing with how the service animal provision in the ADA will intersect with IDEA, and therefore, gives insight into how cases such as this may be decided in the future.

Education Law Speeches/Seminars

Ennis, Roberts & Fischer regularly conducts seminars concerning education law topics of interest to school administrators and staff.
Popular topics covered include:

Cyber law
School sports law
IDEA and Special Education Issues
Employee Misconduct

Jeremy Neff
National Business Institute Seminar on October 13, 2011
Ohio Special Education Law

Jeremy Neff
OSBA/OASBO School Law for Treasurers Workshop on October 14, 2011
Human Resources Legal Update

Bill Deters
OSBA Employment Law Workshop on October 21, 2011
Hiring Hypotheticals: You're Hired...or are you?

Bill Deters
OSBA Capital Conference School Law Workshop on November 15, 2011
Strategies for Managing eNightmares

Gary Stedronsky
OSBA Capital Conference School Law Workshop on November 16, 2011
You're A New Superintendent — Now What?

Administrator's Academy Dates at Great Oaks Instructional Resource Center

December 8, 2011 — *FMLA*

March 22, 2012 — *New Teacher Evaluation Procedures*

June 14, 2012 — *Special Education Update*

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