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School Law Review

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Ennis, Roberts & Fischer's School Law Review has been developed for use by clients of the firm. However, the review is not intended to represent legal advice or opinion. If you have questions about the application of an issue raised to your situation, please contact an attorney at Ennis, Roberts, & Fischer for consultation

Is DNA Collection in Schools on the Horizon?

DNA analysis is far more accurate than fingerprinting or eyewitness identification. However, do the crime-solving advantages suggest the more DNA collection, the better? The Supreme Court answered affirmatively by approving Maryland's DNA law on Monday, June 3rd in their 5-4 ruling.

Currently, all 50 states have the authority to collect DNA samples from people after criminal conviction. However, *Maryland v. King* (Case No. 12-207) presents the issue of whether states can widen their databases of genetic material to include someone who is solely arrested and not yet convicted. In the majority opinion, Justice Kennedy urged that the additional collection is simply a basic booking procedure, similar to fingerprinting. Additionally, Kennedy claims DNA collection from arrested persons serves a "legitimate government interest" due to "the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody." In other words, it would allow the police to more accurately classify or identify who they have arrested, access the person's record, and alert judges of any red flags to take into account when deciding whether to release the person on bail.

In *Maryland v. King*, the DNA sample taken upon arrest led to King's conviction of a previously unsolved crime. Where the benefits of crime solving are evident, Kennedy is seemingly unconcerned about the level of intrusion this decision warrants. A cheek swab counts as a search under the Fourth Amendment. The Amendment is meant to protect each of us from unreasonable searches and seizures. The Court asserts that DNA would be used to properly identify those in custody, however the testing process takes months. In the case at issue, the booking, arraignment, and bail were long over by the time the results were in. There was no question as to who the Court was arraigning prior to the DNA's return from testing. Therefore, it seems that the real purpose of DNA collection would be to match the profile against the national database of unsolved crimes, not solely for identification.

Where the benefits of crime solving are evident, Kennedy is seemingly unconcerned about the level of intrusion this decision warrants. The dissenting opinion by Justice Scalia warns that upholding the police taking the DNA of criminal suspects could open the door to a new era of massive double-helix collection. The Maryland law authorizes DNA swabs of suspects arrested for serious, violent crimes only. The Court's decision does not require other states to comply with the same terms.

Scalia claimed to speak for the nation's founding fathers stating that, "perhaps the construction of such a genetic panopticon is wise. But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection." He added that, "today's judgment will, to be sure, have the beneficial effect of solving more crimes; then again, so would the taking of DNA samples from anyone who flies on an airplane (surely the Transportation Security Administration needs to know the 'identity' of the flying public) […] or attends a public school."

Could this approval of DNA collection and testing lead to widespread sampling of students? The American Civil Liberties Union filed a friend-of-the-court brief arguing that the evolution of using DNA for identification would inevitably lead to the use of DNA collection beyond law enforcement, including when children are enrolled in public schools.

Hence, the cases evolution to DNA testing in schools is a convoluted debate and on the minds of many. It would prove to be a limit on the legitimate privacy expectations of students to keep an eye on.

Teen Must Cut Hair to Play Basketball

Hayden v. Greesburg Cmty. Sch. Corp., 1:10-cv-1709-RLY-DML (S.D. Ind. 2013).

The U.S. District Court for the Southern District of Indiana ruled in favor of a school district, finding that a teen must cut his hair to play basketball.

In fall 2010, a student athlete tried out for the 8th grade basketball team. At the time, the District's Athletic Code of Conduct included a mandatory haircut policy that required both middle school and high school boys to wear their hair above their ears, eyebrows, and collar. The athlete made the team, but refused to cut his hair. He claimed that the policy violated his constitutional rights. The refusal led him to be removed from the team. His parents requested a hearing before the school board, which was denied.

Two years later, the cycle was repeated. Now in high school, the teen again tried out for the team with long hair, and once more was advised that he had to follow the policy. Instead of complying with the rule, the teen moved out of the district. The teen's parents filed a lawsuit alleging that the school board, coach, principal, and superintendent denied him procedural due process prior to his removal from the team. The family moved the court to order the district to allow the teen to play and to forbid removal on the grounds of hairstyle. The court refused to grant that order, instead ruling in favor of the school district.

First, the court stated that a student had no constitutional right to participate in extracurricular athletics. This sort of interscholastic activity is deemed a privilege, not a right.

Next, the court noted that a person's choice of hairstyle is indeed an element of liberty protected by the Fourteenth Amendment. However, the Court subsequently stated that public schools may lawfully enact and enforce dress and grooming policies. With participation in interscholastic sports comes an even higher degree of regulation. By electing to participate, the athletes subject themselves to the rules accompanying the privilege. Therefore, the Court concluded, the teen lacked a protectable liberty interest to wear long hair.

In addition, the claim that he was denied due process of law was equally without merit. Prior to the athlete's dismissal from the team, his parents were given the opportunity to meet with the coach and administrators. These meetings were deemed adequate enough to ensure procedural fairness.

In conclusion, the Court dismissed the claims, finding that a student's private interest of wearing the hairstyle of his/her choice did not outweigh the interest of the school.

How This Affects Your District:

Although not binding, the case offers athletic administrators two valuable takeaways. First, the case supports the general rule that districts may limit students' participation in extracurricular sports, pursuant to reasonable grooming policies. While students may have a constitutionally protected property right in their education or a protectable liberty interest in their hairstyle, constitutional protections do not apply equally to public school students who wish to participate in extracurricular sports. Therefore, students who wish to participate should expect intrusions because interscholastic sports are not deemed a fundamental right and liberty.

In addition, to be safe, athletic administrators should be sure to provide a student-athlete and his or her parents the opportunity to meet with the coach and principal, at a minimum, before enforcing eligibility or other administrative rules. This will help ensure that the individual receives adequate due process.

Reminder That Speech on Social Media Could Warrant Discharge

O'Brien v. State Operated Sch. Dist. Of the City of Patterson, A-2452-11t4 (N.J. Super. Ct. App. Div. 2013).

In December 2010, O'Brien was assigned to teach first grade at a school comprised entirely of minority students. All of the students in her class were either Latino or African-American. During the school year, O'Brien posted two statements on Facebook. The first stated, "I'm not a teacher I'm a warden for future criminals!" The second statement read, "They had a scared straight program in school—why couldn't [I] bring [first] graders?"

The principal was informed of the postings and confronted O'Brien. After being unrepentant and insisting that her comments were not meant offensively, O'Brien was suspended with pay, pending a complete investigation.

Meanwhile, news travelled quickly to parents and residents of the district. The school received at least a dozen angry phone calls. Parents came to the principal to express their outrage sparked from the comments. By the end of the day, there was a protest assembled outside the school. Reporters and camera crews descended upon the property, and the principal reassured those expressing distaste for the teacher's conduct that she had been removed from the classroom.

During the administrative hearing, O'Brien claimed that her statements had nothing to do with the students' race or ethnicity. She said the statement calling them "future criminals" was in reference to their behavioral problems. Next, she claimed that the "Scared Straight" program reference was intended to point out that all children who misbehaved should pay the consequences, including the ones in her classroom.

The ALJ issued an initial decision,

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Reminder That Speech on Social Media Could Warrant Discharge, Cont.

determining that the postings were "a personal expression" of job dissatisfaction and not addressing a matter of public concern. It was also determined that O'Brien's comments disrupted school matters and operation. Therefore, her employment was terminated.

O'Brien appealed the decision, asserting that the First Amendment protected her postings. The Court balanced the employee's interest "as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." O'Brien contended that her statements addressed a genuine matter of public concern: the student behavior in the classroom. However, the ALJ had previously determined that the comment was not one of public interest. Instead, the statements were driven by her dissatisfaction with her job and some of her student's conduct.

The Court also disagreed with O'Brien, and confirmed that her conduct was indeed unbecoming of a tenured teacher. The Commissioner stated that O'Brien's actions not only destroyed the "public respect for government employees and confidence in the operation of public services" but also endangered the mental well-being of the students. Hence, the Court agreed with the ALJ in that O'Brien "showed a disturbing lack of self-restraint, violated any notion of good behavior, and [acted in a manner that was] inimical to her role as a professional educator." Therefore, the tenured teacher's dismissal for posting comments about her students on Facebook was permitted.

How This Affects Your District:

This case serves as a reminder that the First Amendment can allow the use of an employee's speech as the grounds for discharge. Speech that is on a personal matter, or that is disruptive to the educational mission of a school, may not be given First Amendment protection. Therefore, a teacher's derogatory posts about students on social media sites allow a district to discipline, or even terminate, an employee whose speech interferes with the operations of the building.

Union's Merit Pay Lawsuit is Dismissed

A Florida circuit judge dismissed a Florida's teachers union's lawsuit, determining that a sweeping merit-pay law did not violate teachers' constitutional rights. Leon County Circuit Judge John Cooper shut down the lawsuit filed by the Florida Education Association (FEA) and sided with state officials.

The new law revamped how Florida teachers are to be evaluated, paid, and promoted. The lawsuit argued that the law brought about changes that "collide" with constitutionally granted bargaining rights. Judge Cooper stated that the merit-pay law does not prohibit collective bargaining. Therefore, it did not infringe on the teachers' collective bargaining rights, pursuant to the Florida Constitution.

Union president, Andy Ford observed that there was nothing in the ruling that prevented the union from subsequently going to court in the future if specific aspects of the law impair union members' collective bargaining rights. Ford also addressed the option the Union has to appeal the ruling, as the Union still believes the law delegated too much authority regarding teacher evaluations and salary to the Florida Department of Education (FDE).

Many teachers, and their union, agree with Ford and dislike the new legislation. They argue that the state's test-score based evaluation is unfair and unworkable.

A separate legal challenge was filed by the teachers union in federal court over how the merit-pay law ties teacher evaluations to student test score data. That lawsuit argues that the law resulted in many teachers' evaluations being comprised of the test scores of students or subjects that they were not responsible for. Therefore, they claim the law violates the equal-protection and due-process clauses of the U.S. Constitution.

On the contrary, the department is very pleased with the results. A spokesman for the FDE writes that, "The winners here are the teachers, parents, and students who can work together in an atmosphere where the best educators in the country can thrive." Advocates agree, claiming the merit-pay law could open the door and help identify and reward the state's best teachers, ultimately helping to improve student learning.

How This Affects Your District:

This lawsuit serves as a reminder that performance pay discussion is also a hot topic right now in Ohio. While Race to the Top applications are prominent in Florida, there is also a big push for increased efforts to tie teacher evaluation and performance to pay in Ohio. It will be valuable to keep a close eye on how this plays out in Florida to see if it has equal ramifications in Ohio.

Denial of FAPE Due to Inadequate Diabetic Care

***District of Columbia (DC) Pub. Charter Schs.*, 60 IDELR 231 (OCRXI, D.C. (DC) 2012).**

Due to several D.C. charter schools' frequent short-handedness when it came to personnel who were trained to assist students with diabetes-related care, OCR determined that the District denied FAPE to students with diabetes. A complaint to OCR claimed the District engaged in disability discrimination because students with diabetes were sometimes forced to either have their parents come to school to attend to their diabetes-related needs or go home early.

The D.C. charter schools only provided nurses for diabetes care services, but nurses were not always available or readily accessible. Other staff members responsible for supervising

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Denial of FAPE Due to Inadequate Diabetic Care, Cont.

or caring for students were not adequately trained. Hence, when the nurses were not available, diabetic students went without proper care and services.

Section 504 requires districts to provide students with disabilities the same opportunities, benefits, and services nondisabled peers. The requirement encompasses any school activity. A failure to take adequate precautions compromises the ability for students with diabetes to attend school safety. The Section 504 obligation is satisfied in regards to diabetic care when adequate policies, properly trained personnel, and sufficient 504 plans are developed for diabetic students.

The OCR noted that the situation could easily be remedied by providing training to other relevant staff members to ensure there would always be a trained person available during school hours to assist the student.

How This Affects Your District:

Similar to other disabilities, students with diabetes require their own unique type of care. A diabetes care provider must be available full-time to meet this obligation. The district denied FAPE in the current case because the trained nurses were not always available to the students in need. It is important to note, however, that a nurse is not always necessary—any properly trained personnel counts! This case demonstrates how when districts expose gaps in the availability of services, modifications and additional training are crucial to ensure a staff member is able to provide the appropriate level of care at all times.

Education Law Speeches/Seminars

Administrator's Academy Dates at Great Oaks Instructional Resource Center

You can enroll in an Administrator's Academy session using the form on our website or by emailing Pam Leist at pleist@erflegal.com.

June 13th—*Special Education Legal Update*

Many special education administrators, psychologists, teachers, and related service providers report that just a few challenging parents consume the majority of the time they have for meetings and other communication. During this seminar, Bill Deters and Jeremy Neff will discuss common sticking points and practical solutions to disputes related to:

- Section 504
- Discipline
- Independent Educational Evaluations
- Transportation
- Private Placement
- Child Find
- Restraints and Seclusion

July 11th—*Education Law Legal Updates 2012-2013*

Other Upcoming Presentations

Bill Deters
2013 Ohio School Resource Officers Annual Conference on June 25, 2013
Legal Update

Webinar Archives

Did you miss a past webinar or would you like to view a webinar again? If so, we are happy to provide that resource to you. To obtain a link to an archived presentation, send your request to Pam Leist at pleist@erflegal.com or 513-421-2540. Archived topics include:

- Education Law Legal Update - Including SB 316
- Effective IEP Teams
- Cyberlaw
- FMLA, ADA and Other Types of Leave
- Tax Incentives
- Prior Written Notice
- Advanced Topics in School Finance
- Student Residency, Custody and Homeless Students
- Ohio Budget Bill/House Bill 153
- Student Discipline
- Media and Public Relations
- Gearing Up for Negotiations

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