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# School Law Review


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## Nurse Has Qualified Immunity Regarding Examination of Student's Genital Area

***Hearring v. Sliwowski*, No. 12-5194 (6th Cir. Mar. 27, 2013)**

The 6th Circuit Court of Appeals found that a school nurse's examination did not violate a student's Fourth Amendment Right to be free from unreasonable search and seizure when the examination was for medical purposes.

A 6-year-old student complained twice in a week about itching and discomfort in her genital area and a burning sensation when she urinated. When the student first complained to the school secretary, the secretary called the student's mother and left a message. Later in the day, the student's mother returned the secretary's call and informed the school that the student had a history of bladder infections.

When the second complaint occurred, two days later, the student was sent to see the school nurse. The secretary again called and left the mother a message. The student informed the nurse that "she had pain when urinating, had trouble sitting and walked funny." The nurse asked the student to pull down her pants and underwear and did a visual check to see if there were any areas on the student's legs or inner thigh area that were red or could be causing the student discomfort. At no point during the examination did the nurse touch the student. Rather, the nurse would direct the student to show certain areas of her body so that the nurse could visually check that area.

The student's mother filed suit against the nurse and the district, arguing that the nurse had performed an illegal search of her child. The national and state nursing guidelines, with which the nurse clearly did not comply, "prohibit a genital examination of a student absent parental consent or a medical emergency." Nonetheless, the court found that the nurse was not in violation of the Fourth Amendment.

In order for the nurse to be found liable, two things had to be true. First, a constitutional right had to be violated. Second, the constitutional right that was violated had to be clearly established so that the person being held accountable would have known she was violating another person's constitutional right.

In this case, the court found that it had not been clearly established by precedent that a nurse who is inspecting a student's genital area for medical reasons is violating the student's Fourth Amendment right to be free from search. If, on the other hand, the nurse had been conducting the examination in order to find contraband, or if the nurse had reason to believe the student was being abused and inspected the student then it is clear from precedent that there would be a constitutional violation. Even though it was against the national and state nursing standards for the nurse to have conducted this search, it was not a constitutional violation.

**How This Affects Your District:**

The critical factor that distinguishes this case from more typical strip search cases is the fact that the nurse's visual inspection of the student's genital area was not an investigation related to contraband or child abuse (which would lead to police involvement), but instead was an attempt to assess the student's medical condition.

It is generally never a good idea to allow school personnel to conduct any type of strip search on a student, whether it is for medical purposes or investigative purposes. While there was no constitutional violation here, the school nurse did violate state and national nursing guidelines. It is best practice for inspections like the one at issue to be conducted when the school nurse has parental permission or if there is an emergency situation.

## "Fetus Dolls" A Substantial Disruption

***Taylor v. Roswell Independent School District*, No. 11-2242 (10th Cir., Apr. 8, 2013)**

A federal appellate court recently upheld a district's right to prohibit students from distributing "fetus dolls."

Students at a New Mexico school who were members of a religious group called Relentless frequently distributed materials and talked to other students at the school about their religious beliefs and their anti-abortion views. Prior to the planned distribution of fetus dolls, the school's administrators had never interfered with the students' distribution of materials.

The religious group planned to distribute 2,500 fetus dolls amongst the high school population of the district. The dolls were rubber and about two inches in size. They were meant to represent a 12-week old fetus. However, after about 300 dolls had been distributed at one of the high schools, the administrators stopped the distribution. The school noted that it predicted the dolls would cause a substantial disruption and, in fact, a substantial disruption did occur. Because the dolls were rubber, they were easily torn apart. Many of the students who initially received the dolls tore the heads off the dolls and bounced them around classrooms like rubber balls. Some of the students used the dolls to clog toilets and some students covered the dolls in hand sanitizer and lit them on fire. Additionally teachers complained that their classes were disrupted because students became involved in name-calling over stances on abortion. At least one scheduled test had to be postponed because of the anarchy that occurred in the classroom.

The students sued after they were barred from distributing the dolls. The court noted that while the fetus doll distribution would likely merit First Amendment protection outside of the classroom, the distribution inside the classroom had to be non-disruptive to the school environment. Clearly, that was not the case. However, if the students had chosen to wear a t-shirt or an armband in support of their views, the outcome would be wholly different.

It also did not matter that the students handing out the dolls were not the ones who were causing the disruption. The analysis rests wholly on whether the speech at issue (the distribution) was the cause of the disruption.

**How This Affects Your District:**

This case is an excellent example of when a district can stop a group of students from distributing items without violating the students' First Amendment Rights. Because these dolls were easily torn apart and could be used as playthings in the classroom and in an otherwise destructive manner, it was permissible for the school to limit the student distribution of the dolls.

Schools need not wait for a disruption to actually occur in order to limit student speech. However, if a substantial disruption has not occurred, the district must have a reasonable belief that a substantial disruption will occur if the speech continues. The Court noted that if the students had conveyed their message on a t-shirt or through some other type of symbolism, the degree of disruption would likely not have been substantial. However, because the students put items in other students' hands that could be torn apart and used in lewd, dangerous, and disruptive ways, the necessary degree of disruption was met.

Schools should still be careful before limiting student speech. However, when it is obvious that a substantial disruption is either occurring or will occur, schools may limit the particular speech causing the substantial disruption.

## Reasonable Jury Could Find School's Report of Abuse Was Retaliatory

***A.C. v. Shelby Cnty. Bd. Of Educ.*, No. 11-6506 (6th Cir. Apr. 1, 2013).**

The 6th Circuit Court of Appeals decided last month that parents of a diabetic student had a potentially valid claim against the school district when the district filed a child abuse report against the parent.

The issues between the district and the parents started early in the student's school career. The student suffered from Type 1 diabetes and required close supervision from the school nurse and her teacher. Prior to the student beginning kindergarten the student's parents requested numerous accommodations, including training for the student's teachers and a full time nurse on site at all times.

The day before the meeting with the parents to discuss the accommodation requests, the Principal made a call to the school nurse to express her frustrations with what she believed to be the parents' unreasonable requests. Unfortunately, the Principal mistakenly called the parents' phone instead and left the following message:

> This is Kay Williams from Bon Lin. [A.C.'s mom] is here causing all kinds of confusion and [A.C.'s teacher] has already broken down and cried. This woman is out to lunch… I don't know what to do with this lady anymore. She does not reason or have any common sense. So you know that since I am the one with common sense, I am going to have a little problem with her.

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## Reasonable Jury Could Find School's Report of Abuse Was Retaliatory, Cont.

The parents filed a complaint with the Office for Civil Rights ("OCR") and, as a result of OCR's intervention, the district provided the parents with almost all of the accommodations the parents requested. One request that was not granted was for A.C.'s manual testing, which occurred four times a day while at school, to be done in the classroom instead of the nurse's clinic. A year later when that request was renewed, the school nurse wrote in her log that if the parents were so worried about their student being around sick children in the clinic, maybe school wasn't the right place for the student to be.

Generally, nurses at each school completed the Individualized Health Plans ("IHP") for students. However, the parents insisted that they write the IHP for their child and the school complied. As a result of their concerns about the parents writing the IHP, two nurses at the school quit and a third threatened to quit.

When the student was in first grade, the student's teacher saw her with candy. Based upon this observation the teacher reported to the Principal that she believed the student was being medically abused by her parents because they were not feeding her the appropriate diet. On a particular day the nurse found that the student's blood sugar was low and commented to the teacher that they were lucky the student had not passed out. At that point the teacher began to hyperventilate and cry and eventually was sent home for the day.

The Principal reported this incident to the superintendent, director of student services, and the director of coordinated heath. In the email the Principal noted that the student had "roller coaster [glucose] levels," that the parents were not monitoring the student at home, and that the student was constantly coming into school with high glucose and then crashing. Then the Principal stated that she was "ready to report the family to Child Services for abuse." The three officials agreed with the Principal and recommended she report the alleged abuse.

After an investigation, Child Services concluded that there was no medical abuse occurring in the student's home. At that point the parents filed a retaliation claim against the school alleging the child abuse report was made in retaliation for attempts by the parents to have certain accommodations for their child.

The Court found there was enough evidence for the parents to claim the district had engaged in retaliation. However, the Court also noted the district had the right to rebut the claim with a legitimate, non-discriminatory basis for the child abuse report. Because both parties met that burden, the Court stated that a reasonable jury could find for either of the parties and therefore the case must go forward in front of a jury.

**How This Affects Your District:**

This case is a great example of how not to handle requests for accommodations by parents. It is true that some parents can be unreasonable in their requests for accommodations. However, it is important that the relationship between parents and the district does not become antagonistic. In particular, districts should be careful what they say in front of and to parents. In the case above, the Principal left an unfortunate message on the parent's answering machine, which likely fueled their general distaste for the district. However, that message also makes clear that the Principal was likely not being careful about what she said in front of the parents about their requests. It is perfectly acceptable to not grant every single accommodation requested. Nevertheless, it is not advisable to treat parents with open distaste. This type of action generally does not lead to favorable results for the student or the school. It is important to always consider what is best for the child.

Further, the school may have had a good faith reason for reporting the parents to child protective services. The student was bringing items to school that were not in the best interest of her dietary restrictions, and the student's blood sugar did seem to be very unpredictable. However, when the relationship between the parents and the school is strained, any report the school makes against the parent will be met with a high level of angst. Because of the prior incidents between the school and parents in this case, the report appeared to be retaliatory.

The main point districts should glean from this case is that parents, particularly those who are troublesome, should be treated as neutrally as possible. There should be no reason for the parents to believe that the district is acting in any manner other than professionally. Additionally, documentation is key to ensuring that the district can prove its professional demeanor.

## *Miranda* Warning Required When Student Questioned By Both Administrator and SRO

***N.C. v. Kentucky*, No. 2011-SC-000271 (Ky. Apr. 25, 2013).**

A student who was questioned about selling prescription drugs on school grounds was entitled to a *Miranda* warning, according to the Kentucky Supreme Court.

A teacher found a pill bottle for hydrocodone on the floor of the boys bathroom and the name on the pill bottle matched that of a student at the school. The teacher turned the pill bottle over to the school's Assistant Principal ("AP") and an investigation ensued. After finding out that the student had given some of the pills to another student, the AP decided to question the student.

The AP and the School Resource Officer ("SRO") went to the student's classroom and removed him for questioning. They took the student to the

*(Continued on page 4)*

## *Miranda* Warning Required When Student Questioned By Both Administrator and SRO, Cont.

office where they closed the door and questioned the student about the pills. During that questioning the student admitted that he had given two pills to another student. The AP informed the student that he would be subject to school discipline and then left the room, leaving only the student and the SRO in the office. At that point the SRO informed the student that he would be charging the student with a crime.

Whether a student is entitled to a *Miranda* warning is dependent on the totality of the circumstances. Generally, there is a presumption that a *Miranda* warning is needed when a student would no longer believe that he or she could leave the room or remain silent. Because the SRO was present, was wearing a uniform, and was carrying a gun it is likely that the 17-year-old student did not believe he was able to leave. Therefore, the student was owed a *Miranda* warning.

**How This Affects Your District:**

If your district is conducting an investigation into drug activity on campus and plans to use this information for school discipline, there is no need for a *Miranda* warning. However, if a SRO is planning to also use the information to press charges against the student, then the SRO should take an opportunity to inform the student of his or her rights.

In most cases, if a student is being questioned in a closed-door room with an administrator and a SRO, that student will not believe he or she has the choice to leave or stop answering questions. It is particularly a SRO's responsibility to recognize that this student would believe he or she is in custody, if the SRO is planning to use any information to charge the student later with a crime.

There could also be instances where an SRO doesn't realize that the information that will be gleaned from questioning the student will create a need for criminal charges. A situation could arise where an administrator always questions students about school violations in the presence of a SRO. If that is the case, an SRO could be present when a student admits to a criminal infraction, but the SRO would probably not be able to use that information if a *Miranda* warning has not been issued.

In general, it is good practice for administrators to question students outside of the presence of the school's SRO, unless the SRO is planning to give the student his or her *Miranda* warning.

## "Technically Eligible" Section 504 Students

It is important for districts to keep in mind that students who are eligible under Section 504 do not always require special services or 504 plans.

Section 504's eligibility standard states that a student is eligible if he or she is determined, as a result of an evaluation, to have a "physical or mental impairment" that "substantially limits one or more major life activity." Notice that no part of the definition requires a student need special services in order to be eligible. Consequently, some students will be technically eligible but will not need a 504 plan or services.

The Office for Civil Rights ("OCR") has noted that in one particular situation a district's procedures incorrectly stated that a student was not eligible if the student does not need 504 services in order for the student's educational needs to be met. Whether a student's educational needs are met is a question related to placement and services decisions, but does not affect whether a student is technically eligible under Section 504.

In a 2012 Dear Colleague Letter, OCR gave examples of students who would be eligible but do not need special education or related services. These examples included: (1) a student whose impairment is in remission; (2) a student whose needs are addressed through mitigating measures that he or she controls; and (3) a student with severe asthma that substantially limits the major life activity of breathing and the function of the respiratory system, but who, based on an evaluation, does not need any special education or related service as a result of the disability. This is not an exhaustive list.

So, why is it important that a school recognize that a student is eligible under Section 504 when that student does not necessarily need special education or related services? A student who is technically eligible would still remain protected by the general nondiscrimination provisions of Section 504 and Title II, even if extra services are not needed. Further, the district is responsible for following up with the student on a regular basis to ensure that the district provides services if the need develops.

Students who are technically eligible should be provided all of the Section 504 procedural protections, such as the right to a manifestation determination, to file OCR complaints, a due process hearing, and an equal opportunity to participate in extracurricular and nonacademic services. Districts must ensure that these students with disabilities are not discriminated against because of their disabilities, even if a 504 plan is not needed.

## 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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## ERF Practice Teams

### Construction/Real Estate

***Construction Contracts, Easements, Land Purchases and Sales, Liens, Mediations, and Litigation***

**Team Members:**
**Bronston McCord**
**Ryan LaFlamme**
**Gary Stedronsky**

### Workers' Compensation

***Administrative Hearings, Court Appeals, Collaboration with TPAs, General Advice***

**Team Members:**
**Ryan LaFlamme**
**Pam Leist**
**Erin Wessendorf-Wortman**

### Special Education

***Due Process Claims, IEPs, Change of Placement, FAPE, IDEA, Section 504, and any other topic related to Special Education***

**Team Members:**
**Bill Deters**
**Pam Leist**
**Jeremy Neff**
**Erin Wessendorf-Wortman**
**Michael Fischer**

### School Finance

***Taxes, School Levies, Bonds, Board of Revision***

**Team Members:**
**Bill Deters**
**Bronston McCord**
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