



Exploring Recent Legal Trends

NYSCOSS Fall Conference
Rochester New York
October 4, 2009

Douglas Gerhardt, Esq.
Kate L. Hill, Esq.



HARRIS BEACH PLLC
ATTORNEYS AT LAW



Presentation Topics

1st & 4th Amendment Cases

Trends & Cases Involving Students with Disabilities

Student Discipline

Hiring, Training & Screening

Employee Surveillance

Employee Discipline & Dismissal

Evaluation, Tenure & Seniority Rights

Employee Benefits

Federal Law Changes





First Amendment: Religious Exemption to Immunization

Appeal of S.B., Decision No. 15,875 (February 19, 2009):

- The District questioned a parent's request for a religious exemption. It determined the parent's response of general statements (i.e. a letter from her rabbi indicating beliefs were "sincerely held religious beliefs" against immunization) were insufficient and did not meet the legal standard. The Commissioner upheld the district's decision.
- The Commissioner explained that in determining whether to grant a religious exemption from immunization, school officials must decide whether a religious belief is sincerely held and make a good faith effort to assess credibility and sincerity of parents seeking exemptions. Districts are NOT bound by a prior grant of exemption by another district. Instead, they have an independent obligation to make such a determination.





First Amendment: Social Networking Websites

***J.S. v. Blue Mountain School District*, 2008 U.S. Dist. LEXIS 72685 (M.D. Pa. September 11, 2008):**

- Student created a personal profile which appeared on the website MySpace.com which had the picture of the high school principal and indicating that the principal was a pedophile and sex addict.
- Student was suspended for 10 days and brought a lawsuit claiming a violation of her 1st Amendment rights.
- The court held there was no 1st Amendment violation and that vulgar and lewd speech off campus is subject to discipline when it has an effect on campus.





First Amendment: Social Networking Websites

Spanierman v. Hughes, 576 F. Supp.2d 292 (D. Conn. 2008): A district court rejected a probationary teacher's claim that a school district and administrator violated his 1st and 14th Amendment rights by not renewing his employment contract following the discovery of his profile and activity on www.MySpace.com.

- The teacher posted inappropriate comments and was conducting “very peer-to-peer like” conversations with students. For example, the teacher discussed with one student whether the student was “getting any” (presumably sex), and made a facetious comment to another student about giving him detention for calling him “sir.”
- The court held that when using MySpace, the teacher was not acting pursuant to his responsibilities as a teacher and, therefore, may have had First Amendment protection. BUT, it concluded almost none of the contents of the teacher's MySpace page touched matters of public concern and that the majority of the profile page consisted of personal conversations between the teacher and other MySpace users or creative writing.





1st Amendment: Statements to the Press

McAvey v. Orange-Ulster BOCES, 2009 U.S. Dist. LEXIS 77152 (S.D.N.Y. Aug. 28, 2009):

- A federal district court held that a school social worker's statements to the press regarding possible sexual abuse of a student by a teacher *were* protected speech because the statements were made as a private citizen on a matter of public concern.
- The court refused to dismiss the social worker's lawsuit against BOCES.





Fourth Amendment: Student Searches

Doran v. Contoocook Valley School District, 616 F. Supp. 2d 184 (D. N.H. Mar. 25, 2009):

- A district court ruled the use of drug sniffing dogs by police to conduct a drug sweep of a high school, which encompassed personal items, did not constitute a search implicating students' Fourth Amendment rights.
- Various school and school board officials were concerned that there was a serious drug problem at ConVal High and requested a search using police dogs. Students were instructed to leave their bags and belongings and were escorted to the football field, where they were kept for 90 minutes. The police dogs sniffed the students' belongings in the school. The sniff did not violate the 4th Amendment because the sniff did not expose noncontraband items that would otherwise remain hidden from view.





Fourth Amendment: Student Searches

Safford Unified School District v. Redding, 129 S. Ct. 2633 (June 25, 2009).

- The United States Supreme Court held a strip search of a 13-year old female student suspected of providing prescription painkillers (Prescription strength Advil) to other students at school was *unconstitutional*.
- During questioning the student denied knowledge of the pills. After a search of her bag and outer garments (yielding nothing), the student was taken to the nurse's office, made to strip down to her undergarments, and asked to pull them from her body and shake them. No pills were found.
- According to the Court, while “the indignity of the search [did] not... outlaw it,... it [did] implicate the... scope” prong of the reasonable suspicion standard.” In this case the content of the suspicion did not match the scope of the intrusion.





Defense and Indemnity

Matyas v. Board of Education, Chenango Forks CSD, 63 A.D. 3d 127 (3d Dept. 2009):

- A teacher/coach had an altercation with a parent while coaching a baseball game. After the game, the teacher/coach gave a statement to the police that was the basis of a criminal charge against the parent.
- The parent later filed a civil suit for malicious prosecution against the teacher/coach. The Board of Education denied defense and indemnification pursuant to Education Law §3811.
- The teacher/coach appealed to the NYS Supreme Court, which ruled the civil lawsuit was as a result of the teacher's actions as a coach, and thus the district was required to defend and indemnify him.
- District appealed and the appellate court overturned the Supreme Court and remanded the matter.



Appeal of Laub et. al., Decision No. 15,923 (May 22, 2009):

- Commissioner found a board should have provided defense to board members with respect to a lawsuit brought against them.
- The Commissioner held that the request for indemnity was valid and the decision to deny was arbitrary and capricious.



Students with Disabilities: Due Process

Fuentes v. Board of Education, 12 N.Y.3d 309 (April 30, 2009):

- A non-custodial parent sought to file a due process hearing request to challenge the recommendations of the CSE.
- The New York State Court of Appeals held that the authority to make educational decisions regarding children of divorced parents resides solely with the custodial parent unless there are specific provisions in the separation agreement, custody order or divorce decree.
- NOTE: Non-custodial parents with no decision-making authority can still participate in their child's education, including attending CSE meetings, requesting educational records, etc.





Students with Disabilities: Tuition Reimbursement

Z.D. v. Niskayuna C.S.D., 2009 U.S. Dist. LEXIS 52077
(N.D.N.Y. June 19, 2009):

- Student diagnosed with ADHD, Reactive Attachment Disorder and related problems. He attended Kindergarten through 5th grade in the District and was placed in a regular education classroom with special education support.
- Pursuant to his IEP, the student attended 6th grade at the District's middle school and achieved grades of "B"s and "C"s. In January of his 6th grade year his parent placed the student at an out-of-state unapproved residential facility. The parent then sought tuition reimbursement from the District.
- The Court held the District was not required to maximize the student's potential. Because the District offered FAPE, the parent could not recover private school costs.





Special Education: Transportation

Appeal of C.C. and E.C., Decision No. 15,938 (June 29, 2009): The Commissioner upheld a district's refusal to provide transportation from a student's home to the public school he attends in another district as a tuition-paying, non-resident pupil. (The parents claimed the other district provided special educational services that better met the student's needs.) A district is not obligated to provide transportation to students enrolled in the public schools of another district if it offers an instructional program for such students.





Special Education: What is a Superintendent to Do?

1. Know the difference between an “accommodation” a student is legally entitled to receive and an “appeasement” to a parent.
2. Properly train district staff regarding completing accurate reports.
3. Be aware of the “Billboard Rule.”
4. Be knowledgeable of eligibility requirements under Section 504 and IDEA.
5. Ensure CSE meetings are convened with the required members.





Student Suspension Annulled

Appeal of F.W., Decision No. 15,897 (March 25, 2009).

- The Commissioner *annulled* and expunged a five-day suspension of a high school senior for possession of marijuana because the student cooperated and followed the directives of the school authorities during and after a search of the vehicle he drove to school and parked on school property. Therefore, there was not a “reasoned determination” that immediate suspension was necessary because the student’s continued presence at school was disruptive or posed a threat of disruption.
- The Commissioner also held it was permissible for school attorneys to act as the hearing officer.





Advantages of Surveillance

Issues include:

- Criminal
- Discipline
- Part 83
- Internal controls





Installation of Video Surveillance Cameras

- Because public employers are accountable for public funds and are, therefore, obliged to supervise their employees and maintain security of their property, it has been held that they need not negotiate with the union regarding the installation of a video surveillance system for security purposes.
- Note ***City of Syracuse, 14 PERB ¶4645 (1981)*** (hearing officer held that city was not obligated to bargain with union concerning its decision to place surveillance cameras in police garage).
- Note also ***Bloom Township High School District, 119 LA 321 (September 1, 2003)*** (school district did not violate collective bargaining agreement by installing a surveillance camera in response to complaints regarding certain custodians inadequately performing their job tasks).





Surveillance: Global Position (“GPS”) Software

Matter of Halpin v. Klein, 62 A.D. 3d 403 (1st Dept. 2009):

- A determination of the Chancellor of the New York City Department of Education was unanimously confirmed.
- There was substantial evidence in the record (Global Positioning Software records, the employee’s time cards, and eyewitness testimony) that the employee left early 63 times over a four-month period and submitted falsified time cards for his work on those dates.
- Given the circumstances, termination was not an excessive penalty.





Teachers Convicted of Sex Offenses Governed by “SORA”

- Effective July 21, 2008, **Chapter 296 of the Laws of 2008** added new section (7-a) to New York State Education Law Section 305, to require the Commissioner of Education to automatically revoke and annul the certificate of a teacher convicted of a sex offense for which registration is required under the New York State Sex Offender Registration Act ("SORA").
- "Conviction" is defined under Section 305(7-a)(b)(1) as "any conviction whether by plea of guilty or *nolo contendere* or from a verdict after trial or otherwise."
- “Teacher” expressly includes, but is not limited to, classroom teachers, teaching assistants, pupil personnel services professionals, school administrators or supervisors, or superintendents of schools.





Teachers Convicted of Sex Offenses Governed by “SORA”

Termination by District without a Hearing

- §2 of Chapter 296 of the Laws of 2008 amended New York State Education Law Section 3020-a(2)(b) to provide that “the employee shall be terminated without a hearing,” as provided for in this section, upon conviction of a sex offense, for which registration is required under SORA.
- Section 296 also amended New York Criminal Procedure Law §380.95 to require district attorneys and other prosecuting authorities to notify the Commissioner when teachers are convicted of sex offenses covered by SORA.





Staff Residency Requirements

***Matter of O'Connor v. Board of Education of City School District of City of Niagara Falls*, 48 A.D. 3d 1254 (4th Dept. 2008), *app. dismissed*, 10 N.Y.3d 928 (2008):**

- Court upheld the dismissal of two tenured teachers without a hearing, The teachers failed to comply with the District's residency requirement.
- The Court held a district may dismiss a tenured teacher who fails to comply with a residency policy set forth in an employment agreement **without a 3020-a** hearing.





Staff Residency Requirements (con't.)

Appeal of Connor, Decision No. 15,809 (August 6, 2008):

- A superintendent contract provided “The Superintendent must permanently reside at his primary residence in Suffolk County...” and that in the event this did not happen the entire contract would be null and void.
- The superintendent entered into a 1-year lease for an apartment, but his family remained upstate and he traveled there most weekends.
- The Commissioner held the terms of the Agreement were unclear and ambiguous. Therefore, it was necessary to look to extrinsic evidence.
- The Commissioner found the district made clear during interviews that it did not want to employ a “commuter superintendent” and upheld the Board’s determination to nullify the agreement.





Education Tenure Areas

Appeal of Devente and Jesenof, Decision No. 15,822 (August 14, 2008): Two professional development specialists challenged the Broome-Delaware-Tioga BOCES's decision to abolish/reduce their services, claiming that they had more seniority in the elementary tenure area than two elementary education teachers.

- The Commissioner found the BOCES determination that the two teachers had greater seniority in the elementary education tenure area was not arbitrary or capricious.
- The Commissioner explained that because the petitioners were hired as professional development specialists (which is not among the positions certified by the Commissioner to the Civil Service Commission as being educational) and never devoted at least 40% of their time to classroom instruction, they were not professional educators as defined in Part 30





Regulatory Response to *Devente*

The Board of Regents addressed issues which arose in *Devente*. Regents concerns included:

- Parity
- Equity
- No new tenure areas
- Provide Guidance

New Regulations:

- Define the work of teachers to include instructional support services;
- Confirm teachers appointed to instructional support positions will accrue tenure and seniority in certification areas; and,
- Apply if the individual is only providing support services or is providing support services and services in a tenure area recognized by Part 30





Regulatory Response to *Devente* (con't)

- The regulation defines 'instructional support services' broadly to include a variety of assignments.
- Establish qualifications for being appointed to ISS
- Those appointed to special assignment status prior to 5/1/09 will get retroactive credit (unless knowingly waived it)
- Proper appointments must be made by July 1, 2009.





Administrative Tenure - *Caution*

- ***Appeal of Murray***, Decision No. 15,934 (June 26, 2009): Although boards of education may establish district-wide administrative tenure area or multiple, defined tenure areas, the Commissioner cautioned that frequently abolishing positions and rehiring individuals to multiple and restrictive tenure titles could be seen as a way to transfer individuals outside their tenure areas without permission.





COBRA and New York State Continuation Coverage

What is COBRA?

- The Consolidated Omnibus Budget Reconstruction Act of 1985.
- Allows employees and their dependents who are covered under group health insurance plans maintained by their employers that have at least **20 employees** (this is MOST school district, but not all) to elect to continue their coverage at their own expense, plus a 2% administration fee.
- Coverage for at least 18 months from the “qualifying event”.





COBRA and the American Recovery and Reinvestment Act of 2009 (“ARRA”)

- The purpose of the COBRA subsidy under the ARRA is to help more individuals afford continuation health care benefits.
- Government subsidy for continuation coverage
 - 65% of the cost of COBRA coverage premiums for a maximum of 9 months.
 - Available only to Assistance Eligible Individuals (“AEI”s).
 - Involuntary termination from September 1, 2008 through December 31, 2009.
 - May be extended, but unclear at this point.





New York State Continuation Coverage

Generally, New York State Continuation coverage applies only to employers with less than 20 employees. **However**, on July 29, 2009, Governor David Patterson signed into law two bills that impact large and small employers.

- Extended Continuation Coverage: The new law requires employers that offer group health policies to offer continuation coverage in some cases for **36 months**.
- Increased Eligibility for Dependent Children: The other new law permits dependent children to continue group medical benefits under a parent's individual or group medical plan until the child's 30th birthday.





COBRA and New York State Continuation Coverage

How does this impact your District?

- Settlement Negotiations for Disciplinary Matters
- Severance Packages
- Training for HR Professionals within the District
- Collective Bargaining Implications





ARRA: 5 Fund Use Categories Reflect Main Priorities of ARRA

- 1) Adopting rigorous college and career ready standards and high quality assessments;
- 2) Establishing data systems and using data for improvement;
- 3) Increasing teacher effectiveness and equitable distribution of effective teachers;





ARRA: 5 Fund Use Categories Reflect Main Priorities of ARRA

- 4) Turning around the lowest performing schools;
- 5) Improving results for all students, including early learning, extended learning time, use of technology, preparation for college, and school modernization.





Medicare Compliance

Districts receiving reimbursement or submitting claims of \$500,000 or more annually, must adopt a Medicare Compliance program.

- July 1, 2009: New regulations (18 NYCRR 512) became effective;
- September 1, 2009: Have Medicare compliance program in place;
- December 1, 2009: District **certify** they have compliance programs in place:





Questions?

Douglas E. Gerhardt, Esq.
Dgerhardt@harrisbeach.com
(518) 701-2738

Kate Hill, Esq.
Khill@harrisbeach.com
(585) 419-8613

