LEGAL UPDATE

Presented by

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I. Summary of Recent Legislation and Regulations

***Note**: Not all provisions of new laws are included.*

A. House Bill 153.

The recently enacted budget bill, H.B. 153, revises R.C. 149.351 by establishing a $10,000 cap in a civil action to recover a forfeiture, limiting attorney fees to the amount recovered ($10,000 maximum), and prescribing a five-year statute of limitations to commence a civil action. When a forfeiture has been recovered, a second person may not recover a forfeiture for a violation involving the same record.

The bill specifies that a person is not aggrieved by the unlawful destruction of public records "if clear and convincing evidence shows that the request for a record was contrived as a pretext to create potential liability under this section." Amendments to 149.351 go into effect on September 29, 2011.

B. House Bill 116 – "Jessica Logan Act" Regarding Policies Prohibiting Harassment, /intimidation, or Bullying

(Effective May 4, 2012 – *Bullying provisions take effect six months after the act's effective date.*)

H.B. 116 requires school districts to revise their policies prohibiting harassment, intimidation, or bullying to include electronic acts, and policies must expressly provide for the possibility of suspension of a student responsible for bullying by an electronic act. Policies must also now specify that bullying is prohibited on school buses, allow incidents to be reported anonymously, prohibit students from deliberately making false reports, and include strategies for protecting "other persons" (in addition to the victim) from new or additional harassment or retaliation after a report is made.

An explanation of the seriousness of bullying by electronic means must be made available to students and parents, and a written statement describing the bullying policy and consequences for violating it must be sent (with report cards or electronically) to each student's parent each school year. Age-appropriate instruction on the policy is also required if state or federal funds are appropriated for this purpose.

In-service training in the prevention of child abuse must now incorporate training on the board's bullying policy. These provisions take effect six months after the bill's effective date. An unrelated provision in the bill grants residency status to certain home-schooled students for purposes of in-state tuition.

C. **Online Child Safety**
Order FCC 11-125 (Aug. 11, 2011)

On August 11, 2011, the FCC released Order FCC 11-125, adding the requirements outlined in the Protecting Children in the 21st Century Act to the existing Children's Internet Protection Act (CIPA). Beginning with funding year 2012, schools receiving e-rate funding must certify that the school's Internet safety policy provides for the education of minors about appropriate online behavior, including interacting with other individuals on social networking websites and in chat rooms, and cyber-bullying awareness and response.

II. Employment Issues

A. **Statements Made as a Public Employee Are Not Protected Speech**
Fox v. Traverse City Area Public Schools Bd. of Educ., No. 09-1688, 2010 U.S. App. LEXIS 9976 (6th Cir. May 17, 2010)

A special education teacher claimed her contract was non-renewed in retaliation for voicing her concerns that her teaching caseload exceeded limits allowed by law. The court found no violation of the teacher's First Amendment free speech rights. Her statements were made as a public employee, not as a citizen, were directed solely to her supervisor rather than to the general public, and were made pursuant to her official duties.

B. **Filing of Grievance Is Not Protected Speech**
Weintraub v. Board of Educ., No. 07-2376, 593 F.3d 196 (2nd Cir. Jan 27, 2010)

When a teacher filed a union grievance protesting the principal's failure to discipline a student, his speech was pursuant to his official job duties and therefore was not protected by the First Amendment. Interpreting the U.S. Supreme Court's holding in *Garcetti v. Ceballos* that "[w]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline," the Second Circuit found the "grievance was 'pursuant to' his official duties because it was 'part-and-parcel of his concerns' about his ability to 'properly execute his duties' … as a public school teacher – namely, to maintain classroom discipline."

C. **Text Message Search Did Not Violate Employee's Fourth Amendment Rights**
City of Ontario v. Quon, No. 08-1322, 2010 U.S. LEXIS 4972 (U.S. June 17, 2010)

A police officer complained that the city violated his Fourth Amendment right to be free from unreasonable searches and seizures when the police chief searched text messages the officer sent on a pager supplied by the city. The officer was disciplined when it was discovered that many of his messages were not work-related, and some contained sexually explicit content.

The U.S. Supreme Court ruled that the search was reasonable "because it was motivated by a legitimate work-related purpose, and because it was not excessive in scope." The city had undertaken the audit of text messages to determine whether their current contractual character limit was too low after exceeding the limit several months in a row. The city limited the search to two months, and messages the officer sent while off duty were redacted. The Court did not resolve the parties' disagreement over Quon's privacy expectation**.**

D. **Employee Facebook Posts**
NLRB Report, Aug. 17, 2011

The National Labor Relations Board's Acting General Counsel issued a report summarizing the NLRB's recent social media decisions. The report details the outcome of investigations into 14 cases involving the use of social media and employers' social and general media policies. In four cases involving employees' use of Facebook, it was found that the employees were engaged in "protected concerted activity" because they were discussing terms and conditions of employment with fellow employees. In other cases involving Facebook or Twitter posts, the Division found that the activity was not protected. These generally involved online personal attacks that were posted generally or sent to non-employees, and did not evidence group action. Source: Bricker & Eckler Fall 2011 Water Cooler Newsletter.

***Note**: On January 25, 2012, NLRB's Acting General Counsel issued a second report on 14 recent social media cases.*

III. Student Issues.

A. Student Discipline.

1. Discipline for off-campus internet speech violated student's free speech rights

a. *J.S. v. Blue Mountain Sch. Dist*., No. 08-4138, 2011 U.S. App. LEXIS 11947 (3d Cir. Pa., June 13, 2011)

The U.S. Court of Appeals for the Third Circuit, *sitting en banc*, ruled that a school district violated a student's First Amendment free speech rights when it disciplined her for creating, at home on her home computer, a parody MySpace profile making fun of the school's principal. The profile did not name the principal, but included his photograph, and insinuated that the principal was a pedophile and sex addict. The court concluded the student "was suspended from school for speech that indisputably caused no substantial disruption in school and that could not reasonably have led school officials to forecast substantial disruption in school."

The court also rejected the school's argument that discipline was justified because the parody was lewd, vulgar, and offensive. The Fraser exception does not apply to off-campus speech, and "to apply the Fraser standard . . . would be to adopt a rule that allows school officials to punish any speech by a student that takes place anywhere, at any time, as long as it is about the school or a school official, is brought to the attention of a school official, and is deemed 'offensive' by the prevailing authority."

***Note**: In February 2010, a Third Circuit three-judge panel ruled the district had not violated the student's free speech rights. The panel's decision was withdrawn in April 2010 when the court granted a motion for a rehearing en banc.*

b. ***Layshock v. Hermitage***, No. 07-4465, (3d Cir. Pa., June 13, 2011) - In a second *en banc* ruling issued by the Third Circuit on the same day, the court again concluded that a student's free speech rights were violated when he was disciplined for after-school, off-campus speech (creating an offensive *MySpace* profile of the high school principal). The district conceded that the speech did not cause a substantial disruption at school, and the student's use of the district's web site (to obtain the principal's photograph) did not constitute entering the school.

Note: On January 17, 2012, the U.S. Supreme Court declined to hear the joint appeal of the Blue Mountain and Hermitage school districts (No. 11-502).

2. **Suspension for Online Bullying Upheld**
Kowalski v. Berkeley County Schools, No. 10-1098, 2011 U.S. App. LEXIS 15419 (4th Cir. Va. July 27, 2011)

A high school student was suspended from school for creating a MySpace page which was largely dedicated to ridiculing a classmate. The student asserted that the district was not justified in disciplining her because she created the page at home after school. The appeals court upheld the discipline, explaining that the student's use of the Internet to "orchestrate a targeted attack on a classmate" was "materially and substantially disruptive" as it interfered with the school's work and collided with the rights of other students to be secure. The student targeted by the attack was forced to miss school to avoid further abuse, and had the school not intervened there was a real potential for ongoing and more serious harassment. "Where such speech has a sufficient nexus with the school, the Constitution is not written to hinder school administrators' good faith efforts to address the problem."

Note: *On January 17, 2012, the U.S. Supreme Court denied a petition for certiorari (No. 11-461).*

3. **Student Barred from Student Government Following Incendiary Blog Post**
Doninger v. Niehoff, 2011 U.S. App. LEXIS 8441 (Ct. App. 2nd Cir. Con. April 25, 2011)

A student was barred from running for senior class secretary in response to a publicly-accessible blog post the student wrote from home in which she called district officials "douchebags" for canceling a band contest and urged others to contact the superintendent "to piss her off more." Claiming her free speech rights were violated, the student filed suit.

The court held that district officials were entitled to qualified immunity. It was "reasonably foreseeable" that the student's post would reach school property and cause disruption. Given the student's current role as the junior class secretary charged with working with administration officials and faculty, it was also reasonable to conclude the student's behavior was potentially disruptive of student government. While the court did "not conclude in any way that school administrators are immune from First Amendment scrutiny when they react to student speech by limiting students' participation in extracurricular activities," in this case the speech was closely tied to school events and the student's role in student government.

Note: The U.S. Supreme Court denied a petition for writ of certiorari (Oct. 31, 2011).

4. **No First Amendment Protection for "True Threats"**
D.J.M. v. Hannibal Public School District #60, No. 10-1579, 2011 U.S. App. LEXIS 15799 (Ct. App. 8th Cir. Mo., August 1, 2011)

A student was suspended from school for the remainder of the school year based on the content of instant messages he sent from his home computer to a classmate wherein he said he had access to a gun and was going to shoot other students and himself. The student claimed his messages were not true threats and that his suspension violated his First Amendment free speech rights.

The court found that based on the student's admitted depression, expressed access to weapons, the naming of five specific individuals that would be "first to die," along with his hate-filled comments and statement that he wanted the school "to be known for something," it was reasonable for school officials to construe his messages as a true threat. "The First Amendment did not require the District to wait and see whether [the student's] talk about taking a gun to school and shooting certain students would be carried out."

5. **Extracurricular Suspension for Off-Campus Conduct Violated Students' Free Speech Rights**
T.V. v. Smith-Green Cmty. Sch. Corp., No. 09-290, 2011 U.S. Dist. LEXIS (N.D. Ind. Aug. 10, 2011)

Two students were suspended from extracurricular activity participation for posting vulgar photos online that depicted the girls posing with phallic lollipops. While the photos were taken and posted off-campus during summer break, the principal based the suspensions on the Extracurricular Code of Conduct, which applies both in and outside of school during the entire year.

The Indiana court ruled the students' First Amendment rights were violated. While the conduct was raunchy and crude, it was not unprotected obscenity or child pornography. Further, there was no reasonable forecast of substantial disruption. Even though there is no constitutional right to participate in extracurricular activities, the "right at issue is freedom of expression, not that of participation" and "a student cannot be punished with a ban from extracurricular activities for non-disruptive speech."

B. **Cell Phone Expectation of Privacy**
State v. Smith, 2009-Ohio-6426, 124 Ohio St. 3d 163 (Dec. 15, 2009)

In this case, concerning a warrantless police search of a cell phone, the Ohio Supreme Court ruled that a person has a high expectation of privacy in a cell phone's contents that goes beyond the privacy interest in an address book or pager, and an arresting officer may not search the phone's contents without a warrant. Although this decision stems from a criminal matter, and school searches are not subject to the same standards, it provides insight as to the standard the Ohio Supreme Court applies to cell phone searches.

***Note**: The U.S. Supreme Court denied a petition for certiorari (October 4, 2010).*

C. Miranda Rights Extended to Children Questioned in School

J.D.B. v. North Carolina, No. 09-11121, 2011 U.S. LEXIS 4557 (U.S. June 16, 2011)

A uniformed police officer on detail to a school removed a 13-year-old student from his classroom and took him to a conference room where the officer and school officials questioned the student about some recent neighborhood thefts. The student was not given the Miranda warnings, was not told he could call his grandmother, and was not told that he was free to leave the room. The student confessed, and his public defender moved to suppress his statements. The U.S. Supreme Court, explaining that "children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave," held that the age of child questioned by police is relevant to the Miranda custody analysis. The case was remanded, and the state courts are required to address whether the student was in custody when he was questioned, taking into account all relevant circumstances including the student's age.

D. Laptop Privacy Lawsuit Settled by Lower Merion School District near Philadelphia (Oct. 12, 2010)

Lawsuits filed on behalf of two students after it was discovered that school district officials had remotely accessed webcams on laptops provided to the students by the district have been settled, according to news reports. Under the terms of the settlement, $175,000 was placed in trust for one student; $10,000 for a second student, and attorney fees of $425,000 will be paid by the district. The district's insurance carrier agreed to cover $1.2 million in fees and costs.

The school district used the remote webcam access to locate lost, missing, or stolen computers, and admitted in a statement that a large number of webcam photographs and screen shots were recovered. One of the students learned of the remote tracking program when an assistant principal cited a laptop photograph while talking with the student about improper behavior the student had allegedly engaged in at home. The district has continued the laptop program, but removed the webcam security program, revised its policies and procedures, and enacted safeguards to protect students' privacy.

E. Special Education

Guidance on the Rights of Students With Disabilities When Educational Institutions Use Technology
U.S. Department of Education Office for Civil Rights Dear Colleague Letter (May 26, 2011)

The U.S. Department of Education's Office for Civil Rights issued a Dear Colleague Letter and a "Frequently Asked Questions" document on the legal obligation to provide students with disabilities an equal opportunity to enjoy the benefits of technology. The FAQ document is a follow-up to a June 29, 2010 Dear Colleague Letter regarding the use of electronic book readers and other emerging technologies used in the educational setting. Technological devices must be accessible to students with disabilities unless the benefits of the technology are provided equally through other means. The Dear Colleague Letter and the FAQ document are available at:

http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201105-ese.html.