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Inside This Issue:

School Not Required to Heat Student's Homemade Lunch

Moody v. NYC Department of Education, 513 Fed.Appx. 95 (2013).

The Second Circuit Court of Appeals ruled in favor of a school district that refused to provide a parent's preferred accommodation to a student with diabetes. The parent of a 7th grade student with diabetes argued that the school district violated Section 504 and the Americans with Disabilities Act by refusing to heat up the student's homemade lunches in the school's microwave. Instead, the student had the option of bringing cold lunches from home, hot lunches from home in a thermos, or eating the school cafeteria's hot or cold lunches options that were diabetic-friendly. Additionally, the school provided the parent with access to lunch menus and resources online to help calculate the caloric intake of the school lunches and to help establish a meal plan for the student.

Section 504 requires school districts to provide necessary and reasonable accommodations that do not cause undue burden. For an accommodation to be necessary, it must be needed to ensure that a student has meaningful access to educational opportunities. In this case, the issue was whether the accommodation of heating up the student's lunch was necessary to provide the student with meaningful access to public school lunches. The parent argued that heating up the student's lunch was a necessary accommodation because the student would skip lunch or only eat part of his lunch if it wasn't heated. Despite the fact that the student refused to eat his homemade lunch unless it was heated, heating the student's lunch was not a necessary accommodation for the student's disability.

Several facts weighed on the side of the school district. First, diabetics do not require hot lunches. Second, even though the student did not always eat all his lunch, which impacted his caloric intake and ability to maintain a balanced meal, his blood sugar highs and lows were monitored by the school nurse and never resulted in emergency intervention. Third, despite recommendations from the student's physician and nutritionist that he bring homemade lunches and that his lunches be heated, the student had access to school lunches that were diabetic-friendly and his mother had access to the nutritional information for the school lunches. Because the Court ruled that the accommodation was not necessary, it did not need to address whether the accommodation was reasonable or whether it caused an undue burden to the school district. Ultimately, the Court concluded that the school district was not required to provide the parent's preferred accommodation because the student had meaningful access to public school lunches.

How this Affects Your District:

Just because a parent or physician requests an accommodation, the school district is not bound to provide the accommodation unless it is necessary for the student to access educational opportunities. Remember, Section 504 is an anti-discrimination law which requires school districts to provide students with disabilities meaningful access to academic and nonacademic programs. It does not require that school districts always provide the preferred accommodation (s).

Membership Determination Deadline for STERS & SERS

Earlier this year, STERS and SERS provided joint guidance on membership determination for positions of mutual interest. Employers are required to abide by the membership determination guidance as of July 1, 2014. Additionally, employers must make any changes to membership for employees who are not contributing to the correct retirement system beginning July 1, 2014. Employers are also responsible for notifying employees of any changes. STERS and SERS provided the following membership determination guidance.

Positions of Mutual Interest:

- Coaches and Athletic Directors
  - Currently has a valid teaching license- STRS
  - Currently does not have a valid teaching license- SERS

- Nurses
  - Position requires an ODE school nurse license- STRS
  - Position does not require an ODE school nurse license- SERS

- Speech-Language Pathologists and Audiologists
  - School did not receive an exception from ODE under R.C. 3319.224- STRS
  - School received an exception from ODE under R.C. 3319.224- SERS

STRS Ohio Membership:

- Occupational therapists and assistants
- Physical therapists and assistants
- Interpreters for the hearing impaired
- Orientation and mobility specialists
- Social workers
- School psychology interns
- Head teacher in a special education preschool program defined under O.A.C. 3301-37-01
- Director of special education or regular education preschool programs
- Full-time and part-time teachers
- Adult education instructors
- Substitute teachers
- Tutors
- Superintendents
- Psychologists
- Guidance counselors
- Auxiliary service personnel in positions that require licensure under R.C. 3319.22-3319.31

SERS Membership:

- ESL or ELL interpreters
- EMIS coordinators
- Teachers' aides or paraprofessionals
- Bus drivers
- Food service personnel
- Custodial or maintenance personnel
- Technology coordinators
- Treasurers
- Business managers
- Secretarial or clerical personnel
- Preschool teachers and aides in a special education preschool program, except the head teacher defined under O.A.C. 3301-37-01
- Preschool teachers and aides in a regular education preschool program
- Latchkey employees
- Early childhood instructors
- Ticket takers
- Security officers
- Auxiliary service personnel in positions that do not require licensure under R.C. 3319.22-3319.31

If you do not have a copy of this joint guidance, please contact an ERF attorney.

Pending Legislation Becomes Law

Mid-Biennium Education Bill Signed into Law

House Bill 487, the mid-biennium education bill, reviewed in last month's ERF School Law Review newsletter, was signed into law on June 16, 2014. Except as indicated otherwise in the statute, HB 487 becomes effective September 15, 2014. Some of the upcoming changes in the law include the following:

College and Work-Ready Assessment System-

- For students entering the 9th grade on or after July 1, 2014, the OGT requirement will be replaced by the College and Work-Ready Assessments System, which is comprised of two assessments:
  - (1) Nationally standardized assessment measuring college and career readiness and
  - (2) End-of-Course Exams.

High School Graduation Requirements-

- For students entering the 9th grade on or after July 1, 2014, the OGT is no longer a requirement for graduation.
- Instead, students must meet one of the following options:
  - (1) Score at "remediation-free" levels in English, math, and reading on the nationally standardized assessment;
  - (2) Obtain a minimum cumulative performance score on end-of-course exams; or
  - (3) Obtain a passing score on a nationally recognized job skills assessment and obtain either an industry-recognized credential or a state agency- or board-

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Pending Legislation Becomes Law, Cont.

issued license for practice in a specific vocation.

Statewide Curriculum Requirements-

- Extends exemption from the Ohio core curriculum requirements for graduation (now referred to solely as "requirements for graduation") until July 1, 2016
- For students entering 9th grade for the first time on or after July 1, 2014 (Class of 2018), in addition to the current requirements, the following changes must be satisfied for the exemption to apply:
  - The student has a Student Success Plan (previously called "individual career plan") and
  - The student meets the other graduation requirements, including the following curricular changes:
    - 4 units of math (instead of 3 under current law),
      - One must be probability and statistics, computer programming, applied mathematics, quantitative reasoning, or any other course approved by ODE before October 1, 2014;
    - 5 elective units (instead of 6 under current law); and
    - 3 units of science which are inquiry-based laboratory experience that engage students in asking valid scientific questions and gathering and analyzing information.

Third-Grade Reading Guarantee-

- Allows school districts to submit an alternative staffing plan for the 2014-2015 or 2015-2016 school years if the school district is unable to provide the number of teachers who meet the criteria needed to teach 3rd grade students below grade level.
- Establishes the English-language arts assessment to be administered to 3rd graders during the 2014-2015 school year:
  - Fall- Same assessment administered during the 2013-2014 school year;
  - Spring-
    - For students who failed to obtain the minimum score on the assessment and would be subject to retention—same assessment administered during the 2013-2014 school year; and
    - For students who have obtained the needed minimum score and would not be subject to retention—the PARCC assessment.

Online Administration of Assessments-

- For the 2014-2015 school year, school districts are not required to administer assessments through an online format.
- School districts have the option to administer the assessments in any combination of online and paper format.

Safe Harbor for the 2014-2015 School Year-

- School districts may enter into an MOU with the teachers' union stating that the value-added progress dimension score from the 2014-2015 school year will not be used to make decisions about teacher dismissal, retention, tenure, or compensation.
- Prohibits various penalties and sanctions due to a school district's report card rating.
- Prohibits from assigning an overall letter grade to schools and school districts.

Emergency Management Plan-

- Changes the name of School Safety Plan to Emergency Management Plan.
- Requires the administrator of a school district to develop and adopt a comprehensive Emergency Management Plan including a floor plan, site plan, and emergency contact information, as well as protocols for threats and emergency events.
  - "Administrator" means superintendent, principal, chief administrative officer, or other person having supervisory authority over the school district.
- Requires the administrator to review and certify the accuracy of the plan to ODE by July 1st of each year.
- In addition to current requirements, the plan must be updated whenever the emergency contact information changes.
- Requires the administrator to schedule an annual emergency management test.
  - "Emergency management test" means a regularly scheduled drill, exercise, or activity designed to assess and evaluate the Emergency Management Plan.
- The State Board must adopt standardized rules and standardized forms for Emergency Management Plans.
- Because it is unlikely that the State Board will have adopted rules and standardized forms prior to the effective date of September 15, 2014, the expectations for the 2014-2015 school year are unclear at this time. ERF will continue to monitor the requirements of this provision.

Career-Technical Education-

- Expands requirement to provide career-technical education to students in grades 7-12.
- If a Board of Education decides not to provide career-technical education for students enrolled in grades 7-8 in a particular school year, the Board must adopt a resolution and submit it to ODE by September 30th of that school year.

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Pending Legislation Becomes Law, Cont.

Teacher Evaluation Bill Signed into Law

Last month's ERF School Law Review newsletter reviewed the House and Senate's struggle over the teacher evaluation bill, Senate Bill 229. After additional debate and, ultimately, compromise, the Ohio General Assembly finally agreed to a number of changes for teacher evaluations thru House Bill 362, which becomes effective September 11, 2014.

The bill contains the following provisions:

- A Board may choose to evaluate a teacher who received a rating of "Accomplished" every three years as long as the teacher's SGM score for the most recent school year is average or above.
- A Board may choose to evaluate a teacher who received a rating of "Skilled" every two years as long as the teacher's SGM score for the most recent school year is average or above.
  - The Board must conduct at least one observation and one conference in the off years.
- A Board may choose not to evaluate:
  - (1) A teacher who has been on leave for at least 50% of the year or
  - (2) A teacher who has submitted a notice of retirement and the notice has been approved by the Board by December 1st.
- Beginning in 2014-2015, schools may elect to use an alternative framework for teacher evaluations which includes the following:
  - Teacher performance rating=42.5% of evaluation;
  - Student growth measure=42.5% of evaluation; and
  - Remaining 15% of evaluation derived from one of the following: student surveys, teacher self-evaluations, peer review evaluations, or student portfolios.
- For the 2015-2016 school year and beyond, schools must use the following framework:
  - Teacher performance rating=42.5%-50% of evaluation;
  - Student growth measure=42.5%-50% of evaluation; and
  - Remainder of the evaluation must be comprised of one of the following: student surveys, teacher self-evaluations, peer review evaluations, or student portfolios.

* Under the new statute, the Ohio Department of Education must compile a list of approved instruments for school districts to use with the alternative framework. School districts are required to select evaluation instruments from amongst that list.

Diabetes Care Bill Signed into Law

House Bill 264, which provides for the care of students with diabetes in public schools, was signed into law on June 12, 2014 to become effective on September 11, 2014.

HB 264 requires school districts to do the following:

- Provide "appropriate and needed diabetes care in accordance with an order signed by the student's treating physician";
- Provide parents of children with diabetes notice that their children may be eligible for a Section 504 plan within 14 days of receipt of an order signed by a treating physician;
- Allow students with diabetes to attend their home school; and
- Allow students to provide self-care (with parent and physician authorization), including providing a private area for care and the ability to carry supplies on the student's person.

HB 264 permits school districts to do the following:

- Provide staff training for the purpose of authorizing staff to provide diabetes care;
- Provide training to school employees and bus drivers with primary care responsibilities for students with diabetes on the signs of hypoglycemia and hyperglycemia and responses to take in emergency situations; and
- Store diabetes medications in an easily accessible location.

HB 264 also prohibits school districts from requiring parents to come to school or a school-event to provide diabetes care.

Religious Credit Bill Signed into Law

House Bill 171 permits public school students to attend and receive credit for released time courses in religious instruction. HB 171, recently signed by the Governor, becomes effective September 11, 2014. It permits a Board to adopt a policy authorizing students to be excused from school to attend a released-time course in religious education, which is conducted by a private entity off school property so long as the following occur:

- A parent or guardian gives written consent for the release;
- The private entity keeps attendance records, makes records available to the school, and makes provisions for and assumes liability for the students;
- Transportation is provided by the private entity, the student's parent, or the student;
- No public funds or school personnel are involved in providing the religious instruction; and
- The student assumes responsi-

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Pending Legislation Becomes Law, Cont.

bility of any missed work from the public school.

A Board may adopt a policy that authorizes students to receive up to two units of credit for the completion of a religious released time instruction course. The Board must evaluate the course based on purely secular criteria to determine if the course is credit-worthy. Although the legislature has provided some guidance on factors to consider in determining whether a course is credit worthy, issues may still arise regarding the Board's involvement in religious instruction, including, but not limited to, First Amendment issues regarding the state's involvement in the establishment or prohibition of the free exercise of religion. Additionally, it is unclear how released time instruction will affect minimum school year requirements, particularly when course credit is not given for release time.

Other Legislative Updates

The General Assembly has also recently passed bills regarding career guides, STEM schools, and the Bid-Biennium Budget Review which contains some educational provisions. HB 487 also included other changes to current law that were too in-depth to summarize above, such as changes to student career advising and planning, dual enrollment plans, and diagnostic assessments. **To keep clients abreast of these new legal requirements, ERF will present a detailed update of HB 487 and other recent legislative changes at ERF's Administrator's Academy Legal Updates Webinar on July 10th. You can sign up for ERF's Legal Updates Webinar at http://www.erflegal.com/client-resources/erf-administrators-academy.**

Public Employees Afforded First Amendment Protections when Testifying Under Oath

Lane v. Franks, 2014 WL 2765285 No. 13-483 (June 19, 2014).

On June 19, 2014, the U.S. Supreme Court ruled on a case regarding the free speech rights of public employees. In the case, a director of a public program uncovered corruption within the program while conducting an audit of the program's finances. The audit reveled that a state representative was on the program's payroll despite the fact that she rarely ever worked for the program. When the director reported the audit findings to the president of the program and the program's attorney, they warned him that he may experience negative consequences if he fired the state representative. The director chose to fire the state representative, which led to an FBI investigation and, ultimately, a federal trial which resulted in a conviction of the state representative for mail fraud and theft of over $177,000.

During the trial, the director was subpoenaed to testify about the events that led to his firing of the state representative. Approximately five months after the trial, the director was fired from his job. The director claimed he was fired in retaliation for his testimony in the trial, while the president claimed the director was fired because of an "ambiguity" in his services. The director subsequently filed a lawsuit against the president claiming that the president violated his First Amendment free speech rights by firing him in retaliation for his testimony.

The U.S. Supreme Court first determined whether the director's speech should be classified as that of a citizen outside the scope of employment on a matter of public concern or whether the director's testimony was given within the scope of employment. If the employee spoke as a citizen on a matter of public concern, the employee would receive a higher level of First Amendment protection, but if the employee spoke pursuant to his official duties, the speech was not as a citizen and was not protected under the First Amendment. The Court clarified that the question was whether the speech was ordinarily within the scope of the employee's duties, not whether the speech merely related to the employee's duties or concerned information learned while performing the employee's duties. Because the speech was sworn testimony before a tribunal and not within the scope of the director's employment, it was speech provided as a citizen. Additionally, the speech involved was on a matter of public concern because it involved corruption within a public program and the misuse of state funds. Therefore, the director's testimony was speech as a citizen on a matter of public concern. The Court concluded that "the First Amendment protects a public employee who provides truthful sworn testimony, compelled by a subpoena, outside the scope of his ordinary job responsibilities."

Next, the Court used the *Pickering* test to determine whether the government's needs outweighed the employee's free speech rights. The *Pickering* test balances whether the government's interest, such as the efficiency and effectiveness of the government's public service, outweighs the speech of a public employee on a matter of public concern, such that the government has "an adequate justification for treating the employee differently from any other member of the public." In this case, the Court could not find any government interest to tip the scale for the government. The director did not provide false or erroneous testimony, nor did the director disclose any confidential or privileged information.

Because the director's testimony

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Public Employees Afforded First Amendment Protections when Testifying Under Oath, Cont.

was speech as a citizen on a matter of public concern and the government's interest did not outweigh the director's free speech rights, the director's speech was protected under the First Amendment and his claim for retaliation should not have been dismissed by the lower courts.

How this Affects Your District:

This case is a reminder that public employees retain First Amendment protections for speech that is made by a citizen on an area of public concern. Specifically, the Court acknowledged the importance of a public employee being able to testify in court without the employee fearing retaliation. Many times the only person that knows about corruption in the work place is an employee who learned of the corruption in the course of his or her duties. However, the Court clarified that testifying at trial is typically not within the duties of a public employee. Therefore, any negative employment decisions due to an employee's testimony under oath may be considered unlawful retaliation.

Administrator Did Not Violate Students' Rights by Banning American Flag

Dariano v. Morgan Hill Unified School Dist., 745 F.3d 354 (2014).

The Ninth Circuit Court of Appeals recently ruled in favor of an assistant principal that required students to remove clothing with images of the American flag when he reasonably believed that there was a threat of violence to the students. The case involved students from a high school with a history of racial tension between Caucasian and Mexican students, as well as violence related to gang activity. The history of racial tension included an altercation on Cinco de Mayo 2009 after Caucasian students hung a makeshift American flag on one of the trees on campus. On the same day, a Mexican student became angry with a Caucasian student who wore an American flag shirt.

The facts at issue in the case occurred a year later on Cinco de Mayo in 2010. A group of Caucasian students wore American flag shirts to school. After the assistant principal received concerns from other students that violence might occur due to the students wearing American flag shirts, the assistant principal met with the students to explain his concern for their safety. He allowed a couple of the students to return to class because he did not think the images on their shirts would cause them to be targeted. He then told the remaining students that they could either turn their shirts inside out or go home for the day with an excused absence. The students who chose to go home were not disciplined. Some of the students received threatening text messages, phone calls, and heard rumors from other students after the incident and chose not to attend school the following day.

Three of the students filed suit against the assistant principal and school district claiming that their their rights to freedom of expression and equal protection had been violated. The Court analyzed the claims using the *Tinker* standard. Under *Tinker*, students may express controversial opinions as long as the expression does not materially and substantially disrupt the operations of the school or interfere with the rights of others. School officials do not have to wait until a disruption occurs to intervene. Instead, there need only be a reasonable forecast of substantial disruption.

In this case, the school was able to show that it was reasonable for the assistant principal to believe that a disruption would occur due to the students' dress. First, it is clear that there was threat of violence. There was a history of racial tension and gang violence at the school, including altercations over the American flag on Cinco de Mayo the previous year. In addition to students coming to the assistant principal with concerns of violence, other students had confronted each of the three students about their clothing. Additionally, the school district's actions supported the motivation of student safety. The school district's motivation was shown through the assistant principal's conversation with the students about their safety, through the conversations with the students' parents, and through a memorandum and press release issued by the school district. The assistant principal did not put a blanket restriction on clothing with American flag images, but only those that were likely to make the students targets of violence, and when he sent students home who refused to turn their shirts inside out, he did not provide any punishment. All of these actions show that the school district was concerned about student safety.

Although the students argued that the school district violated their equal protection rights because they were treated differently than students wearing Mexican flags, the students were unable to provide evidence that students wearing the Mexican flag were also the target of violence, and the school was able to provide a viewpoint neutral reason for suppressing the student's expression—safety. Under *Tinker*, schools may prohibit viewpoint specific images if the prohibition is necessary to prevent a reasonable forecast of a substantial disruption. Therefore, the Court rejected the students' freedom of expression and equal protection claims.

How this Affects Your District:

Although it is important for school district's to deal with student dress in a viewpoint neutral manner,

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Administrator Did Not Violate Students' Rights by Banning American Flag, Cont.

there are times that the interest of the school outweigh students' rights to freedom of expression and equal protection. To make it over this constitutional hurdle, the school district must show that its actions to prohibit a viewpoint specific image were necessary to prevent a reasonable forecast of substantial disruption. For advice on a specific situation, please consult your legal counsel.

Law Enforcement Must Have a Warrant to Search a Cell Phone

Riley v. California, 573 U.S. _____ (2014); *U.S. v. Wurie*, 573 U.S. _____ (2014).

The U.S. Supreme Court issued an opinion on two cases on June 25, 2014, which prohibits law enforcement from searching the contents of cell phones without warrants. In these cases, police officers did not have probable cause to search the individuals' cell phones, but instead relied on the exception law enforcement has of a search incident to a lawful arrest. This exception allows police officers to conduct a search of a person and area within his or her immediate control during an arrest for the safety and protection of law enforcement personnel and for the preservation of evidence.

However, when considering whether cell phones could be searched without a warrant utilizing the exception of a search incident to a lawful arrest, the Court focused on the prevalence of cell phones in modern society and the vast quantities of personal information stored on cell phones. The Court even indicated that cell phones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."

The Court found that the vast amount of personal information stored on cell phones, and the inherent privacy of that personal information, outweighed any of the government's concerns for police officer safety or protection of data. It reasoned that digital data on a cell phone could not itself be used as a weapon to harm an arresting police officer or to effectuate the escape of the arrestee. Further, the Court indicated that any concern of data destruction, either through remote wiping or data encryption, could be alleviated through a police department's own means of data recovery once a warrant was obtained. In the end, the Court indicated that while "[p]rivacy comes at a cost," cell phones are still capable of being searched, once warrants are appropriately acquired.

How this Affects Your District:

While these cases only apply to law enforcement officers, it will have an impact in school districts looking to involve their school resource officers in searches of students' cell phones. School resource officers should not be searching students' phones without warrants given this ruling from the U.S. Supreme Court. However, these cases do not impact how school administrators conduct investigations and searches related to school discipline. School districts are still held to a reasonableness standard when conducting searches of students: the search must be justified at inception and reasonable in scope.

If a school administrator believes that a student has violated school policy through utilizing his or her cell phone while on school campus, the school administrator may search the student's cell phone for evidence of the violations. However, school administrators must use caution when searching a student's phone. For example, a student simply possessing a cell phone on school property in violation of Board policy will not permit an administrator to search the student's cell phone. If a student has a cell phone out in his or her lap during a test, this may permit an administrator to search the student's phone for evidence of cheating in appropriate and reasonable areas of the phone. If evidence of a criminal violation is believed to be found on a student's cell phone during an administrator's search, that evidence should be turned over to the school resource officer after the investigation is complete.

Education Law Speeches/Seminars

SAVE THE DATE! 2013-2014 Administrator's Academy Seminar Series

Seminars will take place at the Great Oaks Instructional Resource Center or via live webinar from 9:00 a.m. to 11:30 a.m. unless otherwise noted. Additional registration information will be provided in the near future!

Education Law Legal Updates 2013-2014 – July 10th, 2014 (Webinar ONLY)

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Want to stay up-to-date about important topics in school law? Check out ERF's Education Law Blog at www.erflegal.com/education-law-blog.

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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