School Law for Administrators

Headlines on School Law: Some Legal Issues Related to COVID-19

By Rob Taylor, PhD

Like other state teachers' unions, the Colorado Education Association (CEA) has been bombarded with questions about impacts of the coronavirus. The CEA legal department has listed out the Top Five Frequently Asked Questions and the union's answers, as summarized here. Though each union needs to consider the facts and circumstances relevant to its members, these questions and answers may be instructive as a starting point.

1. *Are there any additional paid sick days available for those dealing with the ramifications of COVID-19?*

In July of 2020, the state passed the Healthy Families and Workplace Act (HFWA) which requires all employers to provide paid sick leave up to 10 additional days because of COVID -19 under the act's provision called Emergency Paid Sick Leave (EPSL). Although there are some caveats for employees working under a collective bargaining agreement (CBA), generally the additional paid sick leave is required to be provided by school districts if the employee is unable to work due to COVID -19 because the employee is subject to a legitimate quarantine order, or has been advised by a health care provider to self-quarantine; or, an eligible employee may be experiencing coronavirus symptoms or may be caring for an individual subject to quarantine rules; or, a son or daughter has been sent home because a school or place of care has been shut down.

2.Can SPED services, including IEP meetings and instruction, be provided electronically under the law?

Once the local education agency (LEA) continues to provide educational opportunities, in-person or electronically, to the general student population during a school closure, the school must ensure that students with disabilities "also have equal access to the same opportunities." "LEAs must ensure that to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP developed under Individuals with Disabilities Education Act (IDEA), or a plan developed under Section 504 of the Rehabilitation Act."

3. Is there money available for Educational Support Personnel (ESPs) who are not working and being paid through this crisis?

The federal Fair Labor Standards Act allows school districts to make "pay advance/loans" to ESPs. Such ESP members of CEA temporarily short of money would need to consider requesting loans or pay advances from their district.

4. How does Executive Order 2020-2021 affect education evaluations?

Executive Order 021 permits educator evaluations to continue despite COVID complications, even though the pertinent Colorado statute is temporarily suspended. That statute requires a specific number of observations and evaluations of particular personnel classes on an annual basis. What the executive order does is allow the school to continue evaluations but "without having to comply with many restrictions that afford valuable protections to educators." CEA attorneys conclude that "Many educators will likely find it preferable to receive no evaluation score for 2019-2020 than to receive a rating based on insufficient data and unreliable conclusions."

5. How does Executive Order 2020-035 affect educator instruction for the remainder of the 2019-2020 year?

This dramatic executive order suspended in-person instruction and extracurricular activities through May 14, 2020. During this suspension period, the order nixed a variety of district requirements, including for example student hearing and sight test requirements and childcare licensing fees. Also, the order allowed school districts to obtain waivers of statutory requirements from the State Board of Education and authorized the State Board to grant such waivers on its own initiative without any applications or requests from the districts. CEA attorneys were particularly vexed that the executive order permitted the State Board to grant waivers to districts of important Colorado statutes "without the receipt of an application or any information about crucial questions, such as why the particular statute(s) need to be waived."

COLLEGE APPLICATONS TAKE PANDEMIC HIT

According to the Associated Press, both high school seniors and colleges are grappling with major disruptions of COVID-19 on the college application process already complicated, difficult, and frustrating for all involved. Typically, high school seniors faced with January and February college application deadlines send out complete applications replete with "SAT and ACT entrance exam scores, community service records, and resumes flush with extracurricular activities." Not this year, not so when so much of school and related activities have been cancelled and students have spent so much time at home, online.

Sports seasons have been cancelled, leaving student athletes no means of producing the videos of their athletic prowess usually attached to their college applications.

For the first time, the Common Application allowing students an easier time applying to multiple institutions has added a 250 word "optional space" for a student to articulate the pandemic impacts on them. Even so, colleges and universities believe the situation has put their backs to the wall as well, "Colleges and universities don't have the same tools they did to evaluate students before," says Angel Perez, chief executive of the National Association for College Admission Counseling (NACAC).

In their short pandemic-related essays, students have focused on a variety of personal difficulties, such as trying to study in often noisy households in which adults are going to

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First Amendment

Parents sue school board, principal, coach after the cheerleading coach taped their daughters' mouths shut

Citation: *Haley v. DeSoto Parish School Board, 2021 WL 261273 (W.D. La. 2021)*

A federal district court in Louisiana has granted in part and denied in part a school board, school principal, and coach's request to dismiss a First Amendment and Fourteenth Amendment lawsuit filed against it by students who accused their cheerleading coach of using bullying tactics and profanity. In one incident, the coach allegedly forced the girls to put tape over their mouths during practice and later removed them from their officer roles on the team when they reported it to the principal. While the court dismissed the complaint against the school board and defendants in their individual capacities, it concluded that there was sufficient evidence that could support that the individuals retaliated against the girls in violation of their First Amendment rights.

In July 2019, the Mansfield High School cheerleading squad attended a summer cheerleading camp hosted by the Universal Cheerleading Association in Lafayette, Louisiana. On July 26, 2019, Stephanie Brewer was coaching the students in a particular routine. During the practice, several members of the squad spoke out about Brewer's "bullying and profanity." Brewer threatened to tape their mouths shut if the students continued to distract from the practice. When the students persisted, Brewer taped the mouths of team members with white athletic tape. Shakisha Handy's child, one of the ones who reported the incident, was not subjected to the taping. One cheerleader removed the tape to ask Brewer if she could call her parents, but Brewer said no and told her to retape her mouth.

After summer camp, the cheerleaders who had complained were treated differently because they had reported the taping incident to their parents. At a football game in the fall, Brewer yelled at the team to "[shut] the f* * *up!" Later that fall, Handy visted practice unannounced and said she witnessed a "hostile environment." Handy's and Kalette Haley's children began getting demerits and lost their officer positions on the team. In the end, the children left the team altogether.

Haley met with Principal Toras Hill, Brewer, and another faculty member to discuss the taping incident. Haley also met with Hill in September 2019 to express concerns about her child's safety while with Brewer. Haley also had a telephone conversation with a supervisor for the DeSoto Parish School Board office, who apologized on behalf of the school board. Kemo Wyatt, the parent of another one of the children involved, also met with Hill and another supervisor regarding the taping incident.

In April 2020, Haley, Handy, and Wyatt (plaintiffs) filed a lawsuit on behalf of their children against the school board, Brewer, and Hill (defendants), with numerous claims including First Amendment free speech claims and Fourteenth Amendment due process claims. The complaint also alleged that the defendants retaliated against the children for reporting the taping incident. In addition, the complaint alleged violations of Title IX for subjecting female cheerleaders to disparate treatment from their male counterparts and the state law torts of assault and battery.

The defendants asked the court to dismiss the complaint.

The court granted the defendants' request to dismiss in part and denied it in part.

SECTION 1983 CLAIMS AGAINST BOARD

Regarding the plaintiffs' Section 1983 claims against the school board, the court noted that a school board could not be held responsible under a theory of vicarious liability for the actions of one of its employees unless there was a policy or custom created by the board that resulted in a constitutional violation (See *Monell v. Dept. of Social Serv. Of City of New York).* The claims of free speech and due process violations in this case did not indicate any policy created by either the school board or the individual defendants (Hill and Brewer) that "essentially fosters and condones constitutional violations of the kind alleged." The plaintiffs did not identify any school policy that unconstitutionally violated the children's rights, therefore, the court agreed to dismiss the claims against the school board under Section 1983. Similarly, where the complaint alleged the same claims against Brewer and Hill in their official capacities, the court dismissed those claims, as they duplicated the claim against the school board.

HILL AND BREWER'S INDIVIDUAL CAPACITIES

Regarding the claims against Hill and Brewer in their individual capacities, the court noted first that Handy's child was not a victim of mouth tapping. Therefore, Handy was not enti-

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work online, siblings are vying for Zoom time, and technology is too frequently absent or inefficient.

Many colleges are feeling the effects of large drops in applications and sharply declining enrollment, with the attendant revenue loss. Other colleges have the opposite problem of dealing with increasing applications due to students having deferred attendance in the current year but being now anxious to start their college career.

Colleges are demonstrating a good deal of flexibility in responding to the admissions process disruptions caused by COVID, many higher ed. institutions making tests optional and exploring new ways to evaluate students.

—School Law Bulletin,
Vol. 48, No. 4, February 25, 2021, pp. 1-3.

Around the Nation ~ Utah

Parents seek court order requiring schools to reopen to in-person instruction dismissed by Utah judge

A lawsuit against the Salt Lake City School District brought by a group of parents calling for the district to reopen to in-person instruction has been dismissed by District Judge Adam Mow. In his decision, the judge stated that the decision made by SLCSD to move to an online learning format due to COVID-19 did not cause irreparable harm to the students of the district, saying that in-person learning is not a constitutional right.

In the parent's lawsuit, they claim that the decision to move to a strictly online learning format has caused unprecedented failure rates among students in the school. Judge Mow agrees that online learning has not worked well for students in the district, but also noted that the failure rates seen in schools during the pandemic were not unique to SLCSD. Additionally, the judge determined that while online education may not have been the preferred education method for students and parents in this case, that SLCSD provided adequate and appropriate learning opportunities, and the students' access to education was not restricted. Judge Mow stated that under Utah law, it is only the responsibility of the school to determine the curriculum that is best suited for a student, and that nothing under Utah law explicitly states that Utah school districts are not legally obligated to make that curriculum for strictly in-person learning.

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tled to relief on the violation of free speech or due process, so the court granted the defendants' requests to dismiss Handy's claims of free speech and due process on behalf of her child. In addition, Hill was not present for the taping incident and did not take part in stopping their speech or restraining them. Therefore, court also granted the defendants' request to dismiss the Section 1983 claims of free speech and due process against Hill.

The defendants argued they were protected by qualified immunity from liability. To overcome qualified immunity, the plaintiffs had to show the violation of a constitutional right that was "clearly established" the time of the incident and that a school official would have reasonably known. The court believed that Brewer was aware of the children's rights to free speech. "As a reasonable school official, Brewer knew taping the children's mouths, literally silencing their comments, infringed upon their right to speak freely," the court stated. Therefore, the court denied the defendants' request to dismiss the free speech violation claim against Brewer.

However, the court believed that Brewer was entitled to qualified immunity on the due process claim. The plaintiffs argued that the right to due process was clearly established, citing *Doe v. Taylor Independent School District*. However, the court found this particular case differed from *Doe*, which had to do with a student's right to be free from sexual abuse and violation of bodily integrity by her teacher. The court noted that the students in this case were able to remove the tape, and that they wore the tape for no more than half hour. Therefore, the court granted the defendants' motion to dismiss the due process claim against Brewer under qualified immunity.

RETALIATION

To succeed on their claim of retaliation, the plaintiffs had to prove that "(1) they were engaged in constitutionally protected activity, (2) the defendants' actions caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants' adverse actions were substantially motivated against the plaintiffs' exercise of constitutionally protected conduct" *(Brinsdon v. McAllen Ind. Sch. Dist.)* The plaintiffs claimed the children were retaliated against because they were treated with hostility after reporting the taping incident, and two of them were removed from their officer positions on the team, ultimately quitting the team because of the treatment they were getting. The court found that the plaintiffs presented enough evidence of retaliation to survive dismissal at this point and, therefore, denied the defendants' request to dismiss these claims.

TITLE IX

Regarding the Title IX claims, the court found that the plaintiffs did not support this claim with any evidence of discrimination based on gender. Rather they supplied "the blanket accusation that Mansfield High never taped the mouths of male students shut." The court did not accept such conclusory statements. The court granted dismissal on this claim to defendants.

ASSAULT AND BATTERY

The plaintiffs argued that Hill and Brewer were responsible for assault and battery under Louisiana state law. The defendants argued that under state law they were entitled to statutory immunity from civil liability. However, the court noted this immunity stops short for actions or statements that are made "maliciously, willfully, and deliberately intended to cause bodily harm to a student or to harass or intimidate a student." There was no evidence that Hill participated in taping the children's mouths shut, so the claims against him under state law were dismissed. However, the court found the plaintiffs had shown that Brewer "haz[ed]. . . beyond any act of reasonable discipline" the children and retaliated against them for reporting the incident to their parents. Therefore, the defendants' request to dismiss state law claims against Brewer was denied.

In conclusion, the court granted the defendants' claims to dismiss the complaint in part. The court denied dismissal as far as the Section 1983 retaliation claims against Hill and Brewer in their individual capacities, the claims for free speech violations against Brewer in her individual capacity, and the state law claims against Brewer.

—School Law Bulletin,
Vol. 48, No. 6, March 25, 2021, pp. 5-6.

Negligence: Family alleges district, principal liable for sexual abuse by family member after student dismissed early

Citation: L.B. by and through Buschman v. Jefferson City School District, 833 Fed. Appx. 40 (8th Cir. 2021)

The Eighth U.S. Circuit has jurisdiction over Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

The Eighth U.S. Circuit Court of Appeals has affirmed a lower court's decision dismissing a lawsuit brought against a school principal and the school district after the student was dismissed early to an unauthorized family member who sexually abused her. The student's father sued the principal and school district alleging negligence and a violation of the Missouri Human Rights Act. The lower court dismissed, finding that the principal was permitted to use discretion in administering the early-dismissal policy and that the human rights claim was untimely. The appeals court affirmed.

L.B. was a high school student in the Jefferson City School District. Under district policy, principals are responsible for creating procedures to ensure that students are dismissed early only "for proper reasons" to "authorized persons." Robert James was the principal at L.B.'s school and had created procedures in which school employees who received calls requesting early dismissal for students were to ask for verifying information including the caller's name and address in order to establish that the caller was an authorized parent or guardian. Follow up questions were to be used if there was some doubt about the caller's identity.

Although these procedures existed, they were not always followed and on four occasions, L.B.'s 31-year old cousin called into the school to request her early dismissal and L.B. was excused only to then be sexually abused by her cousin. Her father believed that this failure to follow the procedures for early dismissal made the principal and school district liable for the sexual abuse and sued alleging claims of negligence and a violation of the Missouri Human Rights Act. The school district sought to have the claims dismissed after removing the case to federal court, and the lower court agreed to dismiss on summary judgment. L.B.'s father appealed.

The appeals court reviewed the decision *de novo*, noting that summary judgment is appropriate when the evidence, viewed in the light most favorable to the non-moving party, shows no genuine issue of material fact that the moving party is entitled to judgement as a matter of law.

Addressing the claim of negligence against the school principal James, the appeals court noted that the lower court had concluded that James was entitled to official immunity which protects public employees from liability for alleged negligence that they "commit during the course of their official duties for the performance of discretionary acts." *(Southers v. City of Farmington, 263 S.W.3d 603 (Mo. 2008), as modified on denial of reh'g, (Sept. 20, 2008)).*

Like the lower court, the appeals court found that James had to use discretion in creating and administering the early dismissal policy at the school. In particular, the court viewed this as a discretionary act given that each school principal was to set the policy at their school, and it was acknowledged that the procedures "may vary depending on the age of the student." The use of the word "may" in the district's requirement for principals to develop their own policies showed that it was anticipated that principals would need to exercise judgement and reason in determining the appropriate early dismissal procedure.

With respect to the claim under the Missouri Human rights Act, the appeals court concluded that there was a procedural problem in that before filing such a claim in court, L.B.'s father first would have needed to file a complaint in writing with the Missouri Commission on Human Rights within 180 days of the complained of act. L.B.'s father did not meet that timeline, filing his complaint after the 180 days had passed from the last alleged discriminatory act. Therefore, he failed to exhaust administrative remedies. This was so despite the fact that the Commission later sent a right to sue letter to the family, according to the appeals court, given that statutory amendments have been made clear that even if a right-to-sue letter is received, failure to file a timely complaint can still be raised as a complete defense in any subsequent litigation.

The court closed by noting that even if it considered the claim on its merits, it still would have affirmed the lower court's decision. The appeals court noted: "To succeed, L.B. had to prove, among other things, that the school district 'knew or should have known of the [abuse] and failed to take prompt and effective remedial action.' *(Doe ex rel. Subia v. Kansas City, Missouri School Dist., 372 S.W.3d 43, 283 Ed. Law Rep. 568 (Mo. Ct. App. W.D. 2012))*. There was no evidence here that school officials knew about the abuse, much less that they knew about it and failed to take action."

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Mow also pointed out that any parents who were not happy with the district's decision to opt for virtual education were given the option of transferring their children to other districts in the area that were offering in-person or hybrid learning.

—School Law Bulletin,
Vol. 48, No. 5, March 10, 2021, p. 8.