

# ***MSU COMMUNITY OUTREACH***

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## **MICHIGAN SAFE SCHOOLS INITIATIVE WORKGROUP May 14, 2008**

### **LEGAL UPDATE (Covering the time period from November 7, 2007 to May 9, 2008)**

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MICHIGAN SAFE SCHOOLS INITIATIVE

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**ATTACHMENT:**

FERPA revision would allow disclosure of special education status

Bullying injury in stairwell costs district \$1.15M

District liable for not supervising violent student in bathroom

Teen’s violent outbursts justify move to behavior-centered facility

Knife from random locker search qualifies as evidence

## SAFE SCHOOLS CASE LAW UPDATE

The following cases are summarized because of their potential applicability and relevance to Michigan Safe Schools' law.

*I. Video surveillance cameras and unreasonable searches*

*i. Brannum v. Overton County School Board*, No. 06-5931 (6th Cir. Feb. 20, 2008)

In *Brannum v. Overton County School Board*, No. 06-5931 (6th Cir. Feb. 20, 2008), the Sixth Circuit Court of Appeals ruled that the installation and operation of video surveillance cameras in a boys' and girls' locker room where middle school students undressed was an unreasonable search in violation of the students' Fourth Amendment privacy rights.

In *Brannum*, thirty-four Tennessee middle school students sued various school officials under 42 U.S.C. § 1983 and others, alleging that the defendant school authorities violated the students' constitutional right to privacy by installing and operating video surveillance equipment in the boys' and girls' locker room. In an effort to improve security, the Overton County School Board (the "Board"), located in Overton County, Tennessee, approved the installation of video surveillance equipment throughout Livingston Middle School ("LMS"). The Board ordered the Director of Schools, William Needham, to oversee the project. Needham delegated his authority for the installation of the monitoring equipment to the LMS principal, Melinda Beaty, who in turn delegated her authority to the Assistant Principal, Robert Jolley. None of the aforementioned promulgated any guidelines, written or otherwise, determining the number, location, or operation of the surveillance cameras.

After several meetings between the Assistant Principal and the contractor, it was decided to install the cameras throughout the school in areas facing the exterior doors, in hallways leading to exterior doors, and in the boys' and girls' locker rooms.

The images captured by the cameras were transmitted to a computer terminal in Jolley's office where they were displayed and were stored on the computer's hard drive. In September 2002, Jolley testified that he discovered that the locker room cameras were videotaping areas in which students routinely dressed for athletic activities. He immediately notified Principal Beaty of the situation, but the cameras were not removed nor were their locations changed for the remainder of the fall semester. Following an incident, on January 9, 2003, in which visiting team members from another school noticed the camera in the girls' locker room complained to Principal Beaty, the cameras were removed the following day.

The thirty-four students thereafter brought suit against the Board and the individual administrators for violations under 42 U.S.C. § 1983 for violations of their privacy rights against unreasonable searches as protected by the Fourth Amendment. The Fourth Amendment to the United States Constitution provides that the government shall not violate "the right of the people

to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” Analysis of the Fourth Amendment, as applied in the school setting, is governed by the United States Supreme Court case, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) in which the Court offered a framework for evaluating the issue. Courts will look to whether (1) the state action “was ***justified at its inception***” and (2) whether the search “as actually conducted was ***reasonably related in scope to the circumstances which justified the search in the first place.***”

A student search is justified in its inception when there are ***reasonable grounds for suspecting that the search will garner evidence that a student has violated or is violating the law or the rules of the school***, or is in imminent danger of injury on school premises. The Sixth Circuit determined that, in this case, the policy of setting up video surveillance equipment throughout the school was instituted for the sake of increasing security, which was an appropriate purpose. Thus, the first prong of the analysis was satisfied by the defendants. However, the defendants were unable to meet the second prong of the test.

A search is permissible in its scope when the ***measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the students and the nature of the infraction.*** It is a matter of balancing the scope and the manner in which the search is conducted in light of the students’ reasonable expectations of privacy, the nature of the intrusion, and the severity of the school officials’ need in enacting such policies, including particularly, any history of injurious behavior that could reasonably suggest the need for the challenged intrusion.

Although the Sixth Circuit acknowledged that students have a lesser expectation of privacy than is afforded the general population, it found that, even in locker rooms, students retain a significant privacy interest in their “unclothed bodies.” The Court also pointed out that, in contrast to a case in which the Supreme Court upheld a district’s practice of monitoring student athletes while they submitted to drug tests, neither the students nor their parents in this case were aware of the video surveillance in the locker rooms. Indeed, the Sixth Circuit stated that the “school officials wholly failed to institute any policies designed to protect the privacy of the students and did not even advise the students or their parents that students were being videotaped.”

In determining whether a search is excessive in its scope, the nature and immediacy of the governmental concern that prompted the search is considered. That is, in this case, the surveillance methodology employed, in particular the installation and operation of the cameras in the locker rooms, in order to be reasonable in its scope, must be congruent to the need for such a search in order to serve the policy goals of school safety and security. However, the Court found that there was nothing in the record to indicate that the school had entertained any concerns about student safety or security in the locker rooms that would reasonably justify the installation of the cameras to record the activities there. The school never claimed that any misconduct occurred in these areas in the past or that the plan to install the surveillance equipment in the school locker rooms was adopted because of any reasonable suspicion of wrongful activity or

injurious behavior in the future. Thus, the Court concluded that the locker room videotaping was a search that was unreasonable in its scope and consequently violated the students' Fourth Amendment privacy rights.

**II. State-created danger claim brought against school district for student assault on special education student dismissed for lack of grounds**

- i. *Molina ex rel. Molina v. Board of Educ. of the Sch. Dist. for the City of Detroit*, 49 IDELR 66 (E.D. Mich 2007)

In *Molina ex rel. Molina v. Board of Educ. of the Sch. Dist. for the City of Detroit*, 49 IDELR 66 (E.D. Mich 2007), the U.S. District Court for the Eastern District of Michigan dismissed a § 1983 state-created danger claim brought against school district officials by the parent of a special education student who had been assaulted by one of his classmates because the plaintiff failed to establish that the school officials took affirmative acts that caused her son's injuries.

The plaintiff, Joanna Molina, brought an action against the Detroit Public Schools District and certain administrators on behalf of her son, Jeremias, a minor special education student at Higgins Elementary School, after her son was severely injured when a classmate shoved him into an open locker at school. The plaintiff alleged that the school district had actual and longstanding knowledge that J.B., another special education student in Jeremias's class, was a violent and dangerous person who was a threat to Jeremias and other special education students at school.

Throughout the 2003 and 2004 academic years, the plaintiff repeatedly complained to the school principal and teacher that her son was being physically assaulted and psychologically harassed by J.B. on an almost daily basis, including the threat that J.B. had intended to "kill" her son. As J.B.'s assaults against Jeremias continued and increased with severity, school officials told the plaintiff that they would suspend J.B. from school for one week and that, upon his return, J.B. would be placed in a classroom separate and apart from Jeremias's classroom. Despite this promise, school officials decided to return J.B. to Jeremias's class following his one-week suspension. Shortly thereafter, on March 10, 2004, J.B. struck and pushed Jeremias into an open locker at school after the two boys left the same classroom. The assault left Jeremias with a perforated right eardrum, and he suffered loss of hearing, a closed head injury, and other damages. Following the assault, the plaintiff transferred her son to another elementary school within the school district, and in August 2005, the plaintiff and Jeremias moved to North Carolina.

In her complaint, the plaintiff alleged, *inter alia*, that the defendants had: 1) violated her son's Fourteenth Amendment substantive due process rights under the "state-created danger" doctrine, and 2) failed to protect Jeremias from J.B.'s assault and harassment thereby depriving her son of access to public school resources and opportunities in violation of IDEA and the Rehabilitation Act.

In asserting a § 1983 claim against the defendants, the plaintiff argued that the school officials created a danger for Jeremias when they placed J.B. into Jeremias's class upon his return from suspension and despite promises to the contrary. The defendants argued that the plaintiff's § 1983 claim should be dismissed because it was in essence a disguised claim under the Individual with Disabilities Education Act ("IDEA"), and requested that the Court dismiss the case because the plaintiff had not exhausted the administrative remedies available under the IDEA within the two-year statute of limitations.

The Court found that neither the two-year statute of limitations for IDEA claims nor the IDEA's exhaustion requirement shielded the school district from the separate state-created endangerment claim. The Court reasoned that the plaintiff's § 1983 claim had no nexus to IDEA, did not seek to enforce rights created by the IDEA, or request any remedies available under the IDEA. Indeed, the Court found that because Jeremias was no longer enrolled in the school district, he could not exhaust the administrative remedies available to him under IDEA. Accordingly, although the Court dismissed the plaintiff's IDEA claim for failing to state a claim for relief, the Court also concluded that the viability of plaintiff's § 1983 claim was not dependent upon whether the plaintiff had exhausted the available remedies under IDEA.

However, the Court dismissed the plaintiff's § 1983 state-created danger claim on the basis that school officials could not reasonably be found to have taken affirmative steps that caused Jeremias's injuries. The Court cited the Sixth Circuit's decision in *McQueen v. Beecher Cmty. Schs.*, 433 F.3d 460, 464 (6th Cir. 2006), where the Court found that "liability under the *state-created-danger theory is predicated upon affirmative acts by the state which either create or increase the risk than an individual will be exposed to private acts of violence.*" The Court found that when J.B. was returned to Jeremias's classroom after his suspension, school officials merely *subjected him to a preexisting danger, and not one that was created by the defendants.* The Court concluded that the plaintiff could not allege that Jeremias was safer before the school official's alleged affirmative acts than he was after. Consequently, the Court granted the defendant's motion to dismiss plaintiff's Fourteenth Amendment substantive due process rights claim under the "state-created danger" doctrine.

### ***III. No liability for MDE officials implementing safe schools legislation***

#### ***i. Frohriep v. Flanagan, WL 1884097 (Mich.App. April 29, 2008)***

In *Frohriep*, the Michigan Court of Appeals dismissed a complaint brought by and on behalf of certified teachers who had allegedly been falsely identified as having criminal convictions by certain Michigan Department of Education ("MDE") officials acting to implement certain safe school provisions, on the basis of governmental immunity and the fact that plaintiffs' failed to state a claim on which relief could be granted under various intentional tort theories.

*Frohriep* arose from efforts of the MDE to revise its school safety legislation by implementing Public Act No. 130 of 2005, which amended section 1535a of the Revised School Code (the “Code”), and Public Act No. 131 of 2005, which added section 1230d to the Code. This new “school safety” legislation requires the Michigan Department of Information Technology (“MDIT”) to work with the MDE and the Michigan State Police (“MSP”) to develop and implement an automated program that does a comparison of the MDE’s list of registered educational personnel and individuals holding a teaching certificate or state board approval with the conviction information received by the MSP. The school safety law further provides that, unless otherwise prohibited by law, the comparisons shall include convictions contained in nonpublic records. If a comparison discloses that a person on the MDE’s list of certified teachers or registered educational personnel has been convicted of a crime, the law requires the MDE to notify the superintendent or chief administrator and the board or governing body of the school district, intermediate school district, public school academy, or nonpublic school in which the person is employed of the conviction. As the Court noted, the purpose of the amendments was to improve the safety of school children by removing persons with certain criminal convictions from school employment.

Plaintiff Eric Frohriep, a certified teacher, brought suit against defendant Mike Flanagan, the Superintendent of Public Instruction and the MDE’s principal executive officer, defendant Jeremy Hughes, the MDE’s chief academic officer and deputy superintendent, and defendant Frank Ciloski, the MDE’s supervisor of client services, alleging that defendants falsely identified him and others similarly situated as having criminal convictions. In their complaint, plaintiffs asserted theories of libel *per se*, interference with business expectancy, intentional infliction of emotional distress, and false-light invasion of privacy.

In January 2006, the MDE, through a letter by defendant Flanagan, distributed to various school districts throughout the state, lists of employees in their respective school systems with criminal convictions. The letter requested the various school administrators to advise defendant Ciloski of the status of the listed employees. The letter also included instructions for correcting mistaken or inaccurate conviction records. According to the letter, any employee with a conviction for a “listed offense” had to be dismissed, whereas any employee with an unlisted felony conviction might be retained if the school board and superintendent so agreed in writing. Additionally, any employee with an unlisted misdemeanor conviction might be retained without special action.

In support of his intentional tort claims against the defendants, plaintiffs attached to their complaint an affidavit by defendant Hughes attesting that the MDE “undertook an initial attempt...before the legislation went into effect, to perform the database comparison” and “acknowledged the expectation that the comparison would result in some ‘false hits.’”

The defendants moved the trial court for summary disposition and the trial court granted the motion on the ground that the action was precluded because of other related litigation. On appeal, the Court of Appeals held that the trial court had properly granted summary disposition, although for improper reasons. The Court held that summary disposition was proper not because of other related litigation, but because plaintiffs’ tort claims were barred by governmental

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immunity granted by law. The Court found that defendant Flanagan, because he was the MDE's highest executive official, was absolutely immune from tort liability pursuant to MCL 691.1407(5). MCL 691.1407(5) provides that:

A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.

With respect to defendants Hughes and Ciloski, the Court opined that the MDE is a governmental agency that was engaged in the exercise or discharge of a governmental function. The Court also noted that plaintiffs had alleged no facts from which it could be inferred that either Hughes or Ciloski acted outside the scope of his authority or in a grossly negligent manner. Accordingly, the Court held that Hughes and Ciloski were immune from plaintiffs' tort claims under Michigan statute, MCL 691.1407(2).

On appeal, the Supreme Court reversed the Court of Appeal's judgment that Michigan statutory law provided immunity to defendants Hughes and Ciloski, finding that subsection 2 of § 1407 did not apply to defendants Hughes and Ciloski because they were individual government employees who were not provided immunity under MCL 691.1407(5) (i.e. they were not the MDE's highest appointed executive officials), and because the plaintiffs alleged *intentional torts* for which liability was imposed before July 7, 1986.

On remand, the Court of Appeals acknowledged that, because plaintiffs alleged intentional torts, it erred in *Frohreip I* in its citation to MCL 691.1407(2) as the legal basis for providing immunity to defendants Hughes and Ciloski. Instead, the Court noted that the Supreme Court's decision in *Ross v. Consumers Power Co.*, 420 Mich. 567 (1984), was the proper basis of analysis for these two defendants. In referencing the *Ross* decision, the Court noted that "the common law in Michigan extended immunity from both intentional and negligent tort to government officers, employees, and agents while engaged in discretionary acts within the scope of their authority." The Court noted that "[l]ower level officials, employees, and agents are immune from tort liability only when they are: 1) acting during the course of their employment and acting, or reasonably believe that they are acting, within the scope of their authority; 2) acting in good faith; and 3) performing discretionary, as opposed to ministerial acts." The Court further noted that under this test, "no individual immunity exists for *ultra vires* activities."

Applying the above criteria for qualified immunity to the allegations against defendants Hughes and Ciloski, the Court concluded that plaintiffs' asserted no malicious or intentionally unlawful behavior by either defendant. The Court reasoned that while Hughes and Ciloski played some role as MDE employees regarding the comparison lists, plaintiffs' complaint contained no allegations from which it could be inferred that Hughes and Ciloski were engaged in *ultra vires* activities. Accordingly, the Court held that although MCL 691.1407(2) did not provide immunity to lower level governmental officers and employees in the face of a complaint alleging intentional torts pursuant to MCL 691.1407(3), the defendants Hughes and Ciloski were entitled

by *common law to qualified immunity*, and therefore affirmed the trial court's granting of summary disposition to the defendants.

In re-examining the merits of plaintiffs' intentional tort claims against Hughes and Ciloski, the Court found that plaintiffs' complaint failed to state a claim on which relief could be granted. With respect to the tort of libel per se, the Court noted that to prove defamation, the plaintiff must show: "1) a false and defamatory statement concerning the plaintiff; 2) an unprivileged communication to a third party; 3) fault amounting to at least negligence on the part of the publisher; and 4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication." The Court further noted that all government employees have a qualified privilege when acting within the scope of their employment, and that a plaintiff asserting defamation must overcome a qualified privilege by showing that the alleged libelous publication was made with actual malice (i.e. with knowledge of its falsity or reckless disregard of the truth). The Court found that plaintiffs' allegation that defendants expected some "false hit" to arise from the data comparisons required by the school safety legislation was insufficient to establish actual malice, noting that "reckless disregard for the truth is not established merely by showing that the statements were made with preconceived objectives or insufficient investigation." The Court further reasoned that the comparison lists were prepared by MDIT and MSP, and not defendants Hughes and Ciloski.

With respect to plaintiffs' claim of interference with business expectancy, the Court noted that for plaintiffs to succeed on this claim, they were required to allege that the interferer did something illegal, unethical or fraudulent. The Court noted that plaintiffs did not allege that defendants Hughes and Ciloski did anything illegal, unethical or fraudulent. Rather, the Court found that in assisting the MDE to comply with the school safety legislation, defendants Hughes and Ciloski acted lawfully and justifiably.

With respect to the plaintiffs' intentional infliction of emotional distress claim, the Court noted that plaintiffs were required to show that the defendants conduct was "extreme and outrageous." The Court found that plaintiffs did not allege any conduct by defendants Hughes and Ciloski that was so extreme it could be deemed "outrageous." Lastly, the Court rejected plaintiffs' false-light invasion of privacy claim, noting that such a claim requires a communication to be broadcast to the public in general or publicized to a large number of people. The Court found that even if defendants Hughes and Ciloski published the comparison lists, the publication was not "to the public in general or publicized to a large number of people" but rather only to the affected school districts. Under these facts, the Court concluded, plaintiffs' complaint failed to state a claim of false light invasion of privacy against the defendants on which relief could be granted.

Therefore, in addition to grounds of qualified immunity, the Court of Appeals on remand found that the trial court's granting of summary disposition to the defendants was proper on the basis that plaintiffs' complaint failed to state a claim on which relief could be granted under the intentional tort theories asserted against defendant Hughes and Ciloski.

**MICHIGAN SAFE SCHOOLS INITIATIVE WORKGROUP  
ENACTED LEGISLATION**

***i. Public Act No. 163 - Criminal Sexual Conduct Actor Expansion***

On December 27, 2007, the Legislature assigned Public Act No. 163, (approved and signed by Governor Granholm on December 20, 2007), which amends the Michigan Penal Code to expand the applicability of the criminal sexual conduct (CSC) provisions to other actors who may come into contact with children at schools, such as school volunteers and contractors.

Public Act No. 714 of 2002 amended the Michigan Penal Code to prohibit as criminal sexual conduct (CSC) sexual penetration or sexual contact between a teacher or administrator of a public or nonpublic school with another person enrolled in that school, even if the person is over the age of consent (i.e. 16 years of age or older). The intent of the legislation was to prohibit consensual sex and sexual contact between teachers or school administrators and students.

Public Act No. 163 amends the Michigan Penal Code, to expand these provisions to apply to school volunteers, other school employees, and contractual service providers, and include teachers and workers employed by a school district; intermediate school district; or federal, state, or local government. Thus, under Public Act No. 163, a person is guilty of criminal sexual conduct if he or she is a teacher, substitute teacher, administrator, *employee, or contractual service provider* of the public or nonpublic school, *school district, or intermediate school district* in which the other person (student) is enrolled, *or is a volunteer who is not a student in any school in grades K through 12, or is a state, municipal, or federal employee* (i.e., a school liaison officer employed by a law enforcement agency) *assigned to provide any service to that public or nonpublic school, school district, or intermediate school district.* (Italics denote new language.)

Also, sexual conduct or sexual penetration with a special education student who was at least 16 years old but less than 26 years of age and who was receiving special education services is CSC in the first or second degree, if the actor was a teacher, substitute teacher, administrator, *employee, or contractual service provider* of the public or nonpublic school, *school district, or intermediate school district* in which the other person (student) is enrolled, *or is a volunteer who is not a student in any school in grades K through 12, or is a state, municipal, or federal employee* (i.e., a school liaison officer employed by a law enforcement agency) *assigned to provide any service to that public or nonpublic school, school district, or intermediate school district.* (Italics denote new language.)

***ii. Public Act No. 138 - Mandatory Expulsion Provisions and Special Education Students***

On November 27, 2007, the Legislature assigned Public Act No. 138 (approved and signed by Governor Granholm on November 12, 2007), which amends sections 1311 and 1311a of the Revised School Code (i.e. the sections concerning student expulsion or suspension).

Under section 1311 of the Revised School Code, a student who is guilty of gross misdemeanor or persistent disobedience may be suspended or expelled from school if such action is deemed by the school board or its designee to serve the best interests of the school. Prior to Public Act No. 138, this provision provided that if there is reason to believe that the student is “handicapped,” and the school district had not conducted an evaluation to determine if the student is handicapped, the student must be evaluated immediately. Public Act No. 138 replaces the term “*handicapped*” with “*eligible for special education programs and services.*”

**MICHIGAN SAFE SCHOOLS INITIATIVE WORKGROUP  
PROPOSED LEGISLATION**

*i. House Bill No. 5827 - No School Bus Stops Within 500 Feet of Sex Offender’s Residence*

On February 27, 2008, Michigan House of Representative Lawrence Wenke (R) introduced and referred to the Committee on Judiciary, House Bill No. 5827, which proposes amendments to section 55 of Michigan’s “Pupil Transportation Act,” MCL 257.1855.

Section 55(4) currently prohibits school bus drivers from stopping a school bus to receive or discharge students 1) within 200 feet of a public or private roadway intersection unless the stop is approved by the school officials, 2) upon a limited access highway or freeway, or upon any other highway or roadway that has been divided into 2 roadways by an intervening space or physical barrier, or 3) upon a roadway constructed or marked to permit 3 or more separate lanes of vehicular traffic in either direction if the students are required to cross the roadway. MCL 257.1855(4).

House Bill No. 5827 would add a provision prohibiting bus drivers from receiving or discharging students “[w]ithin 500 feet of a residence of a sex offender listed on the sex offender registry established under the sex offenders registration act, 1994 PA 295, MCL 28.271 to 28.736.”

**SELECTED SAFE SCHOOLS ARTICLES**

- For additional information regarding school safety, please refer to the attached materials from the “*Practical Strategies for Maintaining Safe Schools.*”
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## ATTORNEY PROFILES

**W**illiam J. Blaha graduated with high honors from Michigan State University and received his Juris Doctorate degree from Wayne State University Law School. For the past twenty-two years, Mr. Blaha's expertise has been concentrated in representing educational institutions in the specialized area of labor relations and education law. Mr. Blaha's litigation practice includes representing public schools in state and federal courts and such administrative forums as the American Arbitration Association, Michigan Employment Relations Commission, Michigan Department of Civil Rights, and the Michigan Department of Education. Mr. Blaha frequently speaks at conferences for administrators and employees on current legal issues confronting schools. William J. Blaha co-authored the sixth edition of *The Michigan Teacher and Tenure* with Gary J. Collins. He is a member of the Labor Law Section of the State Bar of Michigan. Additionally, Mr. Blaha holds memberships with the National Council of School Board Attorneys and the Michigan Council of School Board Attorneys. Mr. Blaha also serves as the School Board attorney representative on the State of Michigan's Safe Schools Initiative Work Group which serves in an advisory capacity to the Michigan Department of Education's Office of Safe Schools. Mr. Blaha intends to continue monitoring safe school legislation and its impact on public schools. Mr. Blaha has been with the firm since 1983.

**K**evin F. O'Neill received his undergraduate degree from Simon Fraser University in British Columbia, Canada. He holds a Master of Laws from Lancaster University in the United Kingdom, and a Juris Doctor from Ave Maria School of Law in Michigan. While in law school, Mr. O'Neill served as a judicial intern for the Honorable Paul V. Gadola of the U.S. District Court for the Eastern District of Michigan, and also interned with the Toyota Technical Center in Ann Arbor. He served as Vice President of the Ave Maria School of Law Moot Court Board, and was a 2005 State of Michigan Moot Court Competition Champion. Prior to attending law school, Mr. O'Neill served as a legal research consultant with the Office of Indian Residential Schools Resolution in Canada. In addition to Michigan state courts, Mr. O'Neill is admitted to practice before the U.S. District Court for the Eastern District of Michigan. He is a member of the State Bar of Michigan and the Federal Bar Association. Mr. O'Neill has been with our firm since January 2006.

## FERPA revision would allow disclosure of special education status

Proposed revisions to federal school privacy law could make it easier for administrators to share education records to prevent a safety or health threat. Schools are more likely to avert safety threats by sharing student records, an education attorney says. The Education Department is accepting comments on the proposed rule until May 8.

### Key points

- Clarification of FERPA safety exception proposed.
- Released information could include student's special ed status.
- Parents who object can still file complaints. ■

ED's proposed revision to the Family Educational Rights and Privacy Act may prompt school administrators to use the safety exception more often to release student information,

said Jose Martín, an attorney in Austin, Texas, who represents school districts in special education cases.

In the proposed rule, published in March, ED says it will not second-guess administrators if they use that exception to disclose information about a student without the student's or his parents' consent.

"What I take that to mean is, all you have to do is invoke it," to release information, Martín said. According to Martín, you won't have to defend your decision because you'll automatically prevail in the event of a complaint.

However, Martín said, parents who object to the release of their children's information could still complain to the Family Policy Compliance Office on the grounds that the school didn't have a "rational basis" for thinking a health and safety risk existed.

Also, he said, parents could file a due process complaint on the same grounds, at least in states where hearing officers are willing to entertain such complaints. In some states, hearing officers do not consider FERPA disputes to be part of their purview, Martín said.

### Sharing records clarified

Many provisions of the proposed rule were prompted by the Virginia Tech attack last year. Only after Seung-Hui Cho killed 32 people and himself did officials learn that he had been a special education student in high school.

New language clarifies when school officials may share student records with authorities at a school where a student intends to enroll or has enrolled. Under FERPA's health and safety exception, officials at Westfield High School in Fairfax County, Va., where Cho attended, might have disclosed his special ed status in response to an inquiry from Virginia Tech officials, without the consent of Cho or his parents.

Regulations say this exception must be "strictly construed." Such language has unnecessarily impeded disclosure, according to a panel that investigated the Virginia Tech shootings.

### Changes explain safety rationale

In its place, ED proposes that school officials:

- May take into account the totality of circumstances that could threaten the safety or health of the student or others.
- Determine whether a significant threat exists.
- Disclose without consent information from education records to any person who needs to know those facts to protect the health and safety of the student or other individuals.

In a preamble, ED said the new language would continue to make privacy a priority by requiring a determination of an "articulable and significant" threat, and by requiring that anyone requesting such information needs it for health and safety reasons.

In explicit recognition of the Virginia Tech panel's recommendations, ED said if there's a rational basis for accessing information, the department "will not substitute its judgment for that of the educational agency" in evaluating such situations.

This language, the department said, will afford "greater flexibility and deference" to administrators on the ground.

However, nothing in the rule would require schools to use the health and safety exception. This means school officials could still withhold information — such as a student's special education status — even if they don't need consent to disclose it.

Requiring school officials to disclose such information when there is a health or safety risk would probably require a change in the law itself, Martín said.

The whole tenor of FERPA is that it's about restrictions and limits on disclosure, he said. "There's nothing in the statute about affirmative duty to provide information," he said.

View FERPA legislation at [www.ed.gov/legislation/FedRegister/proprule/2008-1/032408a.pdf](http://www.ed.gov/legislation/FedRegister/proprule/2008-1/032408a.pdf). ■

## At a glance

### BULLYING

The New York Supreme Court said a teacher's failure to escort and monitor her sixth-grade class in a stairwell caused permanent injuries for a student who was bullied. So, a \$1.15 million dollar jury award was justified. **See page 11**

### SUPERVISION

The New York Supreme Court, Appellate Division found that a school district must face trial for failing to supervise a student with a history of violence. **See page 11**

### VIOLENCE

An administrative law judge said school authorities were justified in placing a violent 17-year-old student with autism in a psycho-educational school for safety reasons. **See page 12**

### WEAPONS

The California Court of Appeals said a knife found in a random search of school lockers could be admitted as evidence in court. **See page 12**

classroom to the lunch room, as prescribed by school policy. A jury awarded the parents \$1.15 million in damages.

The district appealed and argued that the unprovoked, spontaneous attack wasn't foreseeable, and no amount of supervision could have prevented it. But the court pointed out an assistant principal testified that teachers usually tried to keep crowds out of the stairwells because of the risk of someone getting pushed down the steps. The court found the district was liable for the student's injuries. The teacher violated her duty to escort her students to lunch and that violation directly caused the student's injuries. ■

### SUPERVISION

## District liable for not supervising violent student in bathroom

**Case name:** *Johnson v. Ken-Ton Union Free Sch. Dist.*, 226 CA 07-00968 (N.Y. App. Div. 2008).

**Ruling:** The New York Supreme Court, Appellate Division found that a school district must face trial for failing to supervise a student with a history of dangerous conduct.

**What it means:** School officials have a duty to supervise students. A school district may be held liable for foreseeable injuries that are directly caused by inadequate supervision. A student must be able to show that a district employee should have anticipated and prevented the injury based on a classmate's known history of violence. Here, the court said an injured special education student could pursue his claim. Both the injured student and his attacker testified that the teacher knew about the attacker's dangerous behavior.

**Summary:** Four special education students went to the boys' bathroom together without adult supervision. One student with violent tendencies picked up another boy, threw him on the floor, and fractured his tooth, the injured student's parents said. They argued that inadequate staff supervision caused the injury.

To establish a negligent supervision claim a person must show that school staff:

- Knew about a danger, such as an attacker's violent history.
- Failed to supervise students and prevent the danger.
- Caused an injury that directly resulted from inadequately supervising students.

The attacker testified that he'd picked up and spun the injured student around in class in front of the teacher and an aide. The injured student said

### BULLYING

## Bullying injury in stairwell costs district \$1.15M

**Case name:** *Jeter v. New York City*, 18743/02 (N.Y. Sup. Ct. 2007).

**Ruling:** The New York Supreme Court said a sixth-grade teacher's failure to monitor students in a stairwell on their way to lunch violated school policy and caused permanent injuries for a student who was bullied.

**What it means:** School officials have a duty to supervise students and can be held liable for injuries they should have foreseen, but failed to prevent through adequate supervision. A parent may hold the district liable if he can prove that a district employee's failure to properly supervise students caused an injury. Here, a sixth-grader's parents convinced a jury that their son's teacher violated a school policy requiring teachers to escort students to lunch. *Editor's note: Per court order, this decision has not been released for publication in official or permanent law reports.*

**Summary:** As middle school students went to lunch, older students pushed a sixth-grader down a flight of stairs. The victim suffered traumatic brain injuries.

The parents alleged the teacher failed to escort and supervise her class while they moved from her

he'd reported to his teacher in the past that the attacker picked him up off the ground. Also, both boys said the four students ran, jumped and made loud noises in the bathroom for about four minutes before the injury occurred.

So, the student's parents demonstrated that school staff knew about the attacker's dangerous conduct and that inadequate supervision was a proximate cause of the student's injury. Since they established a court claim, they could proceed to trial. ■

## VIOLENCE

### Teen's violent outbursts justify move to behavior-centered facility

**Case name:** *Gwinnett County Sch. Dist.*, 5 GASLD 89 (SEA GA 2007).

**Ruling:** An administrative law judge said school authorities were justified in placing a violent 17-year-old student with autism in a psycho-educational school for safety reasons.

**What it means:** Deciding on a placement for a dangerous student can be challenging, especially when the parent is skeptical about teachers' behavioral reports. So, district officials should make reasonable attempts to manage the student's behavior before changing his placement. Here, the student's violent tantrums prevented staff at a private clinic from fully implementing his IEP. Only by being placed with trained staff who could control his behavior could he learn academic material.

**Summary:** An autistic student who was over six feet tall and weighed more than 300 pounds had a history of aggressive outbursts in his general education high school class. His aggression was infrequent but intense. He bit himself, touched himself and others inappropriately, charged and head-butted others, or picked them up and threw them to the floor. He was placed in a self-contained classroom where he attacked and injured two district staff members severely enough that they needed hospital care.

IEP team members wanted to place the student in a behavioral school, but his parents objected. Instead, they placed the student in a clinical facility. However, his violent behavior interfered with his ability to learn. So, district officials decided to place him with specially trained staff who could control his behavior. The ALJ agreed a psycho-educational school was the least restrictive placement in which the student would have "opportunities for community skills training and functional academics." ■

## WEAPONS

### Knife from random locker search qualifies as evidence

**Case name:** *In Re: Wilson P.*, B196854 (Cal. Ct. App. 2008).

**Ruling:** The California Court of Appeals said a knife found in a random search of school lockers could be admitted as court evidence.

**What it means:** Students can expect only minimal privacy for school lockers. Random locker searches are constitutional as long as school officials have a good reason to search, such as keeping weapons off campus. Here, a random search turned up a knife. The search was a reasonable safety measure because school officials informed students about school policy that said school lockers would be randomly searched. So, the search complied with the Fourth Amendment. *Editor's Note: Per court order, this decision has not been released for publication in official or permanent law reports.*

**Summary:** A high school dean and safety officer randomly searched the boys' gym lockers. In one locker, he found a knife with a locking blade. It was in the pocket of a pair of pants. He asked a boy who shared that locker to dress, then asked him if he had anything he shouldn't have. The boy denied having contraband, but the officer searched him and recovered the knife from his pocket.

School authorities informed students about routine, random locker searches by a sign posted over gym lockers, at orientation and in paperwork that students needed to have their parents sign.

At his delinquency proceeding, the student asked the court to suppress the knife as evidence because he claimed it was the product of an unconstitutional search.

Generally, school districts must have solid evidence to suspect a student before searching him. However, school districts may conduct random searches without having individualized suspicion if:

- A valid need exists, such as public safety.
- Intrusion of privacy is limited.
- A more rigorous standard of suspicion is unworkable.

The court found that school officials needed to ensure student safety and the expectation of privacy was limited due to clear notice about random locker searches. Requiring individualized suspicion would be impractical. The court said that by the time a student provoked suspicion by brandishing a weapon, "it may be too late for the school to prevent" danger. So, the knife recovered in the random search was admissible in court. ■