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LEGAL UPDATE 2005

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Each year the General Assembly, the United States Congress and the courts (both state and federal) give educators new things to worry about. This year is no exception. On the legislative front, there are only a few significant developments (other than the changes to IDEA and the continuing struggles with No Child Left Behind, which are beyond our scope here). However, a number of interesting court decisions build on prior decisions to provide additional guidance to educators.

I. STATUTORY CHANGES

At the state level, a highlight of the 2005 legislative session was Governor Rell's veto of the school nutrition bill last June. This proposed law would have been an unprecedented intrusion into local decision-making, *e.g.*, by mandating specific time periods for physical activity and by prohibiting the sale of certain foods and beverages in school cafeterias. Otherwise, the General Assembly passed a number of new laws affecting school districts. Except as otherwise noted, these changes are effective October 1, 2005. The following summary provides an overview of these new laws, but the specific provisions should be reviewed in specific situations. These public acts are available online in full text at ftp://159.247.160.79/acts/Pa.

Students

Food Allergies

Public Act 05-104 requires the State Department of Education ("SDE"), in conjunction with the Department of Public Health, to develop guidelines for managing students with life-threatening food allergies. These guidelines are to be made available to school boards by January 1, 2006. School boards must, in turn, use these guidelines to implement plans for those students with

life-threatening allergies enrolled in their schools. These plans must address training of school personnel, emergency response procedures, a process for developing individualized health care plans and protocols to prevent exposure to food allergens. Effective upon passage.

Emergency Use of Cartridge Injectors

Connecticut's Good Samaritan Law (Conn. Gen. Stat. § 52-557b) currently provides immunity from civil liability to certain trained individuals who render emergency assistance, including those who use cardiopulmonary resuscitators or an automatic external defibrillator. Public Act 05-144 extends this immunity for ordinary negligence to similarly trained individuals using a cartridge injector (*i.e.* epi-pen). This immunity does not apply to acts or omissions that constitute gross, willful, or wanton negligence. In conjunction with Public Act 05-272, this legislation also requires licensed day care centers, day camps and before or after school programs that are administered in school buildings or on school grounds to ensure that they have personnel trained to administer medication with a cartridge injector to children with a medically-diagnosed allergic condition that may require prompt treatment to protect against serious harm or death. Public Act 05-272 makes clear, however, that the requirement pertaining to trained personnel only applies to programs actually administered, rather than simply offered, by a school board or municipality. Effective October 1, 2005.

Reporting of Asthma

Public Act 05-272 expands the reporting requirements for the prevalence of asthma among students. Current law requires each local or regional school board to report to the local health department and department of public health the number of students per school and per district with an asthma diagnosis as recorded on required health assessment forms. Public Act 05-272 eliminates the requirement that the asthma diagnosis must be recorded on a health assessment form in order to be reported. Thus, effective October 1, 2005, on an annual basis school districts must report the number of students with an asthma diagnosis at the prescribed intervals, regardless of whether the diagnosis is officially recorded on an assessment form.

Loaning of Assistive Technology Devices

Public Act 05-257 revises Conn. Gen. Stat. § 10-228 to require boards of education to loan assistive devices to public school students free of charge and allows boards to prescribe rules and regulations governing the care and use of such devices. The term "assistive devices" is defined in Conn. Gen. Stat. § 10-76y as "any item, piece of equipment or product system, whether acquired

commercially off-the-shelf, modified or customized, that is used to increase, maintain or improve the functional capabilities of individuals with disabilities." Section 10-228 already requires that books, supplies, materials and equipment deemed necessary for instruction must be loaned to students without charge. Effective July 1, 2005.

DCF Investigations

During the 2005 legislative session, the General Assembly made a number of changes to existing laws governing the conduct and procedures for investigating reports of child abuse and neglect. Under Public Act 05-35, DCF will now have no longer than forty-five (45) days "after the receipt of the report" to complete an investigation of a report of alleged child abuse and neglect (provided the report contains sufficient information). These investigations previously had to be completed within thirty (30) calendar days. This new timeline is consistent with the provision in the court-approved exit plan to allow DCF to come out from under a 1991 consent decree issued in *Juan F.* One of the target goals of this exit plan, among others, was that DCF would complete 85% of its investigations of reports received from the DCF hotline within 45 days.

In addition, Public Act 05-207 establishes new notice, hearing and appeals procedures for people that DCF finds reasonable cause to believe are responsible for the abuse or neglect of a child. Current law requires DCF to make disclosures to certain state agencies and to place the individual's name of its registry as soon as the abuse or neglect allegations are substantiated. This Act changes that requirement by prohibiting DCF from placing the name of a suspected abuser on its registry until it is determined that such person poses a risk to children. Public Act 05-207 also prevents DCF from disclosing anything about the accused or the case until all available procedures to overturn its findings are either completed or waived.

The General Assembly has also approved revisions to Conn. Gen. Stat. Sec. 17-101i, which will delay the notice provided by DCF to school superintendents of findings that a child has been abused by a school employee holding a certificate, permit or authorization issued by the State Board of Education. Public Act 05-246 now mandates that DCF wait until it actually recommends that such employee be placed on its neglect registry, pursuant to the procedures stated in 17a-101k. Public Act 05-257 further adds that once such recommendation is made to place the employee on the registry, DCF shall have no more than five working days to notify the employing superintendent of the finding. This notice shall be made regardless of whether or not the child involved was a student in the employing school or school district. Effective January 1, 2006.

Families with Service Needs

Public Act 05-250 prohibits a judge from ordering that children whose family has been adjudicated as a Family with Service Needs ("FWSN") be held in juvenile detention or be adjudicated as delinquent solely for violating a prior court's FWSN order. Currently, children charged with violating a FWSN order may be placed in juvenile detention facilities, and probation officers are the persons who determine whether delinquency petitions should be filed. This Act further requires a judge to find that there is no less restrictive alternative placement appropriate for the child and the needs of the community before ordering an out-of-home placement or DCF commitment. Effective October 1, 2007.

School Transportation

Last year, the General Assembly passed Public Act 04-217 which revised the classification of the endorsements and restrictions necessary to operate school buses, student transportation vehicles and student activity vehicles. These changes became effective January 1, 2005. Public Act 05-127 establishes a transition period for the Department of Motor Vehicles ("DMV") to implement these new requirements. According to this new legislation, any operator's or commercial driver's license issued prior to January 1, 2005, that is otherwise valid, shall continue to be valid based on the classification, endorsements, or restrictions in effect before January 1, 2005. From January 1, 2005 through December 31, 2005, the DMV may also issue or renew licenses with the classification, endorsement, or restriction designations that were in effect before January 1, 2005. However, each licensed issued or renewed after January 1, 2006 will be subject to the new classification system designations. Effective upon passage.

On a related note, two new laws affect student transportation vehicles. Public Act 05-58 requires that any student four years of age or older must use a seat belt or an approved restraint system. Also, Public Act 05-218 will also now require that student transportation vehicles be issued a distinctive registration marker plate. Registrations for such vehicles must be renewed annually and must undergo safety inspections prior to initial registration and before registration renewal. A student transportation vehicle is defined as any motor vehicle, other than a registered school bus used by a carrier, for transporting students, including children requiring special education. Effective July 1, 2005.

Employees

Civil Unions

Public Act 05-10 establishes the right of same sex couples to enter into civil unions. Such civil unions confer upon the couple "the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage, which is defined as the union of one man and one woman."

Bilingual Educators

Public Act 05-290 temporarily changes the certification requirements for bilingual teachers. Under current law, those persons applying for initial certification as bilingual teachers must qualify in both bilingual education and in either elementary education (for those seeking to teach at the elementary level) or in the subject area they will teach (for those seeking secondary-level bilingual certification). This new legislation suspends this dual certification requirement for a period of three years, running from July 1, 2005 to July 1, 2008. During this hiatus, those wishing to be certified as bilingual educators must demonstrate competency in English and must meet the new certification requirements set forth in this legislation, which now permits applicants to pass the appropriate state's teacher competency test or to complete additional credit hours in lieu of having to qualify for dual certification. This new legislation also expressly prohibits school districts from continuing to provide bilingual education to students who fail to meet the state's English mastery standards after thirty (30) months in a bilingual education program. Effective July 1, 2005.

Cellular Phones

Effective October 1, 2005, drivers in Connecticut will be prohibited (with limited exceptions) from using a hand-held mobile telephone while driving. Drivers operating under learners' permits will not be allowed to use any type of mobile telephone regardless of whether or not it is "hands-free." Public Act 05-159 likewise prohibits school bus drivers from using a mobile telephone or "any other electronic device, including those with hands-free accessories" while operating a moving school bus with passengers, except in

cases where the driver is making an emergency call to school officials or in similar other emergency situations defined in this Act.

Retiree Health Insurance

Public Act 05-98 requires that a retired teacher who is enrolled in a health plan offered by the State Teachers' Retirement Board must participate in Medicare Part A hospital insurance.

School Facilities

Pesticides at Schools

Public Act 05-252 restricts the application of lawn care pesticides on the grounds of any public or private *elementary* school starting January 1, 2006. Starting July 1, 2008, the application of lawn care pesticides will be completely prohibited. Between January 1, 2006 and July 1, 2008, lawn care pesticides may be applied on playing fields and playgrounds of these schools, but only in accordance with an integrated pest management plan, defined to be one that involves the "judicious use of pesticide, when warranted, to maintain a pest population at or below an acceptable level, while decreasing the use of pesticides." While it is not clear what would constitute an "acceptable" level of pests, this Act does permit emergency applications of pesticides if needed to eliminate threats to human health, as determined by the local public health commissioner, the DEP commissioner or, in the case of elementary schools, by the school superintendent. Effective January 1, 2006.

Sprinkler Systems

Current law requires that each floor of any building project classified as an "educational occupancy," and which is eligible for a school construction grant must have an automatic fire extinguishing system approved by the state fire marshal if it is put out to bid on or after July 1, 2004. Public Act 05-31 revises Conn. Gen. Stat. § 29-315 to allow the state fire marshal and state building inspector to jointly grant variations or exemptions from, or approve equivalent or alternate compliance with, the mandated automatic fire extinguishing system if strict compliance would "entail practical difficulty or unnecessary hardship" or is otherwise deemed "unwarranted." Decisions by the state fire marshal and state building inspector may be appealed within fourteen (14) days. Effective upon passage.

Significant Federal Legislation

Constitution Day

On May 24, 2005, the U.S. Department of Education ("USDOE") announced its plan regarding the implementation of a new federal law that requires public schools to teach about the U.S. Constitution one day a year. This requirement, proposed by Senator Robert Byrd from West Virginia, was incorporated into Public Law 108-447, a federal appropriations bill passed in December 2004. Under this new law, all education institutions receiving federal funds must hold "an educational program" on September 17 of each year, in recognition of the official date of adoption of the U.S. Constitution in 1787. According to recent guidance for the U.S. Department of Education, in the event that September 17th falls on a weekend or holiday, schools may commemorate Constitution day during either the preceding or following week. While the USDOE has made clear that it does not endorse any particular program to honor Constitution Day, it has made informational resources available for schools.

Medication for Students

During the course of the last year, Congress passed two new federal laws addressing medication for students. In October 2004, Congress passed legislation to encourage schools to allow students with asthma and other life-threatening allergies to self-administer medication in school. This bill, known as the Asthmatic Schoolchildren's Treatment and Health Management Act of 2004 amends current federal law by giving explicit preference, when making certain grants, to states that require schools to allow students to self-administer medications necessary to treat a student's asthma or anaphylaxis. In addition, the Child Medication Safety Act of 2005 prohibits states and school districts from requiring parents to medicate their children as a condition of attending school or for other purposes. Connecticut has been out in front on both of these issues. Current state law already permits students to carry epi-pens and to self-administer medications under specified conditions, and Conn. Gen. Law § 10-212b, passed in 2001, already prohibits school personnel from recommending that students be prescribed psychotropic medication.

II. JUDICIAL DECISIONS

Church and State

***Van Orden v. Perry*, __ U.S. __ (2005).**

> **A fractured United States Supreme Court ruled that a Ten Commandments display on the grounds of the Texas State Capitol does not violate the Establishment Clause because it has historical significance and conveys a moral message about proper standards of conduct (even though it also conveys a religious message). The plurality opinion, written by the Chief Justice, also noted that the Ten Commandments have historical significance (including displays of Moses and part of the Ten Commandments in the Court's own building). Here, the display had been up since 1961, and the Court found that its historical significance outweighed any concern over its religious message. Significantly, the opinion cites with favor *Stone v. Graham* (1980), the Supreme Court opinion that invalidated a Kentucky law requiring that the Ten Commandments be displayed in school classrooms. Three other justices joined in the opinion, and another agreed with the result and filed a separate opinion. Justice Souter wrote the dissent.**

***McCreary County v. American Civil Liberties Union of Kentucky*, __ U.S. __ (2005).**

> **In 1999 administrators of two courthouses in Kentucky posted large copies of the Ten Commandments. After there were challenges to these displays, additional documents were added, including the Magna Carta, the Declaration of Independence and the lyrics to the Star-Spangled Banner. Writing for the Court, Justice Souter applied the three-part *Lemon* test. Citing *Stone v. Graham* (1980), the Court held that these displays were essentially religious in nature and that they did not have a secular purpose. Moreover, the Court took into account the fact that the original display was limited to the Ten Commandments and that additional documents were added only after litigation had commenced. Justice O'Connor concurred in the result, and four justices dissented.**

***Myers v. Loudoun County Public Schools*, No. 03-1364 (4th Cir. August 10, 2005).**

The Fourth Circuit just affirmed a lower court decision rejecting a challenge to a Virginia statute that requires that school boards provide for the recitation of the Pledge of Allegiance by students each day in class. The court applied the *Lemon* test and found that the requirement had a primarily secular purpose – to promote patriotism. Also, the court noted that religion is acknowledged in public affairs in various ways, and it rejected the claim that including the words "under God" in the Pledge changed the result.

***Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools*, Civil No. PJM 03-164 (D. Md. 2005).**

After being enjoined from giving a religious organization the right to send home information with students in the same manner as other organizations, the Montgomery Public Schools limited to five the number of agencies granted permission to send material home with students. The organization appealed, but the court rejected the appeal, holding that such limitations were content-neutral. Significantly, however, the school district conceded equal treatment to the religious organization as to participation in back-to-school nights, open houses and posting on school bulletin boards. *See also* *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford County School District*, 386 F.3d 515 (3rd Cir. 2004) (access to all forums required for religious organization).

***Wigg v. Sioux Falls School District 49-5*, 382 F.3d 807 (8th Cir. 2004).**

A teacher participated in after-school religious club activities that involved students in her own elementary school. School officials prohibited her from doing so because they were concerned that her participation would convey the impression of school support for the religious activity in violation of the Establishment Clause. The district court granted injunction relief, stating that the teacher had the right to participate in such activities in all schools but the elementary school where she teaches. The Eighth Circuit modified that ruling, however, saying that the teacher could even attend such activities at her own school.

Students

***Dean v. Utica Community Schools*, 2004 WL 2651236 (E.D. Mich. November 17, 2004).**

A student wrote an article for the school newspaper, which described a lawsuit by local residents against her school district alleging that bus fumes from the district's bus garage were a nuisance and were harmful to health. The principal spiked (killed) the article, and the student brought legal action against the school district. The actions of the district were considered under the *Hazelwood* standard (after the 1988 United States Supreme Court case of the same name), which provides that school officials may restrict student speech in the school newspaper as long as they have a legitimate educational concern. Despite this tolerant standard, however, the student prevailed. The court ruled that the decision by the superintendent to prohibit the article was based on viewpoint discrimination without any reasonable educational justification for the action.

***Blau v. Fort Thomas Public School District*, 401 F.3d 381 (6th Cir. 2005).**

This case involved a challenge to a dress code that prohibited middle school students from wearing blue jeans among other things. The parent claimed that the dress code violated student's right of free speech and her right to select clothing, as well as the parent's right to determine the clothing child would wear. The court found no First Amendment violation because the student's wish to choose particular clothing was not a particularized message. In addition, the court held that enforcement of the dress code did not violate the student's substantive due process rights: "Whether it be the right to marry, the right to have children, the right to direct the educational upbringing of one's child, the right to marital privacy, the right to use contraception, the right to bodily integrity or the right to abortion . . . none of these fundamental rights has much, if anything, in common with the right to wear blue jeans." The parent's claims fared no better: "While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or, as here, a dress code, these issues of public education are generally 'committed to the control of state and local authorities.'"

***Wilkins v. Penns Grove-Carneys Point Regional School District*, 123 Fed. Appx. 493 (3rd Cir. 2005).**

A parent challenged a dress code provision that permitted parents with sincere religious objections to seek exemption from the dress code, but did not provide the same right to atheists (which she is). The Third Circuit held that the distinction was valid because the parent made no showing that wearing a school uniform was in any way incompatible with being an atheist.

The provision validly accommodated the interests of parents whose religious beliefs did conflict with the uniform requirement in some way.

***Keppley v. School District of Twin Valley*, No. 882 C.D. 2004, 2004 WL 3127630 (Pa. Cmmnwlth. 2005).**

A parent sought to bring a class action against the school district because cameras installed in school buses were able to record student conversations. The parent claimed that such recordings violated the statutory and constitutional rights of students. The court rejected the request for class certification, in part because different students would have different expectations of privacy based on how close they were sitting to the bus driver. However, the case raises an interesting issue concerning audio recording by bus cameras.

***Doe v. Little Rock School District*, 380 F.3d 349 (8th Cir. 2004)**

The Little Rock, Arkansas Public Schools claimed the right to conduct random searches of students and their possessions, and based on that position conducted random searches. After marijuana was found in her purse during such a random search, a student claimed that such searches violate the Fourth Amendment. In their defense, school officials pointed to a provision in the student handbook that they had recently added, which stated: "[b]ook bags, backpacks, purses and similar containers are permitted on school property as a convenience for students," and that "[i]f brought onto school property, such containers and their contents are at all times subject to random and periodic inspections by school officials." The Eighth Circuit, however, found that random searches of students attending school are unreasonable and thus violate the Fourth Amendment. Moreover, the court held that school officials could not make such searches reasonable (and thus constitutional) simply by announcing them in advance.

***Harper v. Poway Unified School District,* 2004 WL 2651281 (S.D.Cal. November 4, 2004).**

Student wore T-shirt to school with statement, "Homosexuality is Shameful." When he was told he could not wear it, he brought suit, claiming violation of his First Amendment rights of free speech and free exercise. The court held that the facts were sufficient to permit the student to bring these claims to trial. The court held that the school district did not show disruption to permit the prohibition under *Tinker*, but it reserved judgment on whether it was "plainly offensive" speech. Also, the court ruled that the student's free exercise claim should be considered under the rational basis test. However,

the court declined to issue an injunction against the prohibition of the T-shirt, because the court did not view it as highly probable that he would succeed on the merits of his claims. The Ninth Circuit heard oral argument in this case last June.

***Guiles v. Marineau*, 2004 WL 2955942 (D. Vt. 2004).**

Student wore T-shirt criticizing George Bush, including text references to "Chicken-Hawk-in-Chief," "crook," "AWOL draft dodger," "lying drunk driver" and an abuser of marijuana and cocaine. The shirt also had various drawings, including some small drawings depicting drugs and alcohol. School officials required that the student cover the pictures of drugs and alcohol with masking tape. The court rejected the student's claim that his First Amendment rights were violated by having to cover the images of drugs and alcohol. It also held, however, that the initial directive to cover the word "cocaine" was not permissible, and therefore his disciplinary record was ordered expunged.

***Comfort v. Lynn School Committee*, No. 03-2415 (1st Cir. June 16, 2005)**

Reconvening *en banc*, the First Circuit held that consideration of race by a school district in Massachusetts in permitting student transfers is legal. As part of a voluntary desegregation plan, the district permitted students to transfer only if such transfer would not exacerbate racial imbalance at the receiving school. The court affirmed the plan, finding that racial balance is a compelling state interest and that the use of race in considering transfer requests was sufficiently narrow in scope. *Compare* *Cavalier v. Caddo Parish School Board*, 403 F.3d 246 (5th Cir. 2005) (use of race in magnet school admission not permitted).

Student Discipline

***Jennings v. Wentzville R-IV School District*, 397 F.3d 1118 (8th Cir. 2005).**

Two students were suspended for drinking alcohol before a school event. Their parents sued, claiming that the students' due process rights were violated because the decision was not made by an impartial decision-maker, and because they were not given the right to impeach the information against them or the right to counsel. The Eighth Circuit affirmed dismissal of these claims. The fact that an administrator is investigating alleged wrongdoing does not make that administrator biased. The court relied on the 1975 United States Supreme Court decision, *Goss v. Lopez*, to hold that a pre-

suspension hearing can be limited to notice of the charges and an opportunity to respond. There is no right to present evidence at a trial-type proceeding or a right to counsel.

***Rossi v. West Haven Board of Education*, 359 F. Supp.2d 178 (D. Conn. 2005).**

A student was expelled for one calendar year for sale of drugs on campus. He claimed that this action violated his right to equal protection of the law because, he claimed, his punishment was more severe than that given other similarly-situated students. The court rejected his claim, however, holding that school officials had a reasonable basis for distinguishing between his case and others. Since he did in fact sell large quantities of drugs in school, his one-year expulsion was upheld.

***Wofford v. Evans*, 390 F.3d 318 (4th Cir. 2004).**

School officials briefly detained and questioned a student in the principal's office over allegations that she had brought a gun to school. School officials also subsequently permitted detectives to question the student. Despite the student's repeated requests, her mother was not contacted before or during the questioning. The parent brought suit, claiming violation of the student's due process rights and the right to be free of unreasonable search and seizure in violation of the Fourth Amendment. The court ruled that the school district's actions were permissible, stating: "School officials must have the leeway to maintain order on school premises and secure a safe environment in which learning can flourish. Over-constitutionalizing disciplinary procedures can undermine educators' ability to best attain these goals. Imposing a rigid duty of parental notification or a per se rule against detentions of a specified duration would eviscerate the ability of administrators to meet the remedial exigencies of the moment. The Constitution does not require such a result."

Employees

***Jackson v. Birmingham Board of Education*, __ U.S. __ (2005).**

Basketball coach complained about what he perceived as inequitable treatment of female athletes. He then received poor evaluations, and his coaching assignment was subsequently terminated. He sought to sue the school district under Title IX, but the lower courts held that the coach was not protected by Title IX and dismissed his complaint. The United States Supreme Court reversed. With Justice O'Connor writing for the majority, the Court held that discrimination against someone for raising issues of Title IX compliance was intentional "discrimination" "on the basis of sex" that is

prohibited by Title IX. Since the actions the coach complained of were "on the basis of sex," retaliation against him for his complaints would be intentional discrimination that conferred upon him a private right of action under Title IX. The coach did not win his case, however, but rather won the right to sue, and the ultimate question of whether the actions taken against the coach were in fact based on discrimination will be determined only after trial.

***Smith v. City of Jackson, Mississippi*, __ U.S. __ (2005).**

A group of older police officers filed a challenge under the Age Discrimination in Employment Act (ADEA) against City action providing higher salary increases to lower paid (and less experienced) police officers. The United States Supreme Court decided that the ADEA permits "disparate impact" claims, *i.e.* a claim that a rule or action neutral on its face may be discriminatory because it adversely affects a protected group adversely and is not justified by business necessity. Here the claim was that since the higher salary increases went to less-experienced employees, they perforce went to younger employees, resulting in discrimination against the older employees. However, the Court went on to hold that action based on reasonable factors other than age is not illegal age discrimination, and that the action here was based on a legitimate factor, the perceived need to raise salaries for less-experienced police officers. In short, the plaintiffs won the battle and lost the war.

***Baird v. Board of Education for Warren Community Unit School District 205*, 389 F.3d 685 (7th Cir. 2004).**

After giving a superintendent a three year contract, a board of education decided to terminate his employment after only one year. However, the board of education did not give the superintendent a formal hearing. Rather, the board afforded the superintendent only limited due process procedures, *i.e.* notice and an opportunity to be heard, with the understanding that the superintendent could bring an action for breach of contract. The Seventh Circuit held, however, that the board of education violated the superintendent's constitutional rights. Since the superintendent had a clear expectation of employment for the full three years, due process required that he receive a full hearing before the board could decide to terminate that employment.

***Konits v. Valley Stream Central High School District*, 394 F.3d 121 (2nd Cir. 2005).**

After suing her employing school district in 1996, a teacher filed this action in 2001. She alleged that, because of her actions in the earlier litigation, the

district had engaged in a course of retaliation against her in violation of her First Amendment rights. To establish such a violation a plaintiff must show that her speech was on a matter of public concern and that she suffered an adverse employment action because of her speech. Here, the Second Circuit ruled that she could maintain her action against the school district. Her first lawsuit involved her claim that school officials discriminated against her for assisting a school custodian make a claim of gender discrimination against the school district. Since that lawsuit had involved a matter of public concern, she was entitled to pursue her claim that school officials subsequently retaliated against her in violation of her rights.

***Winters v. Pasadena Independent School District*, 2005 WL 165489 (5th Cir. 2005).**

During her first year of employment, Ms. Winters was hospitalized for depression. When the school district decided not to renew her contract, she sued, claiming that this action was illegal discrimination against her on the basis of disability in violation of the Americans with Disabilities Act. However, the trial court granted summary judgment in favor of the school district, and the Fifth Circuit affirmed. The court held that the teacher did not provide any evidence that the performance concerns proffered by district personnel were pretextual. In addition, the court held that the teacher did not establish that her medical condition was a disability under the ADA, since the testimony was that she could be treated with medication and that she could work.

***Flaskamp v. Dearborn Public Schools*, 385 F.3d 935 (6th Cir. 2004).**

A school district suspended a teacher with pay and denied her tenure based on her sexual relationship with a former student, her failure to be truthful about it, and the probability that there was an inappropriate emotional relationship before the student graduated from high school. The teacher sued, claiming violation of her constitutional rights to due process. The court found that the school district did not violate her rights to liberty or to privacy by prohibiting romantic relationships between teachers and their students, even for some period following graduation, given the interest in preventing such relationships when the parties are teacher and student.

***Brookfield Board of Education*, Decision No. 4031 (St. Bd. Lab. Rel., March 16, 2005)**

The principal asked a teacher to come into his office. His manner suggested frustration, and another teacher who heard the principal's comment asked

the first teacher at the time "What did you do now?" In his office, the principal told the teacher that he was concerned or annoyed with the teacher because he had allegedly attacked a guidance counselor during a union meeting in which scheduling issues were discussed. The principal had a good relationship with the teacher, and there was no evidence that the principal had sought out information about the union meeting. However, the State Board of Labor Relations held that the principal's questioning of the teacher violated the Teacher Negotiation Act. Unionized employees have the right to engage in protected activity without interference, and by singling out a teacher and addressing him sternly about events at a union meeting violated that right, even though there was no discipline of or retaliation against the teacher.

Freedom of Information Act

***Fromer v. Freedom of Information Commission*, 2005 Conn. App. LEXIS 279 (2005).**

A student in the master gardener program at the University of Connecticut requested electronic copies of Power Point presentations, and when his request was denied he filed a FOI complaint. The Commission dismissed his appeal, as did the superior court upon further appeal. The Appellate Court addressed two points of interest to educators. First, it rejected appellant's argument that the instructors were "public agencies" whose records would be public records. Rather, it held that the instructors were contractors, and since they were not required to create the Power Point presentations, these "records" were considered personal records to facilitate their work, not "public records." Similarly, since the University did not collect and maintain these records, they were not considered "public records" subject to disclosure under the FOIA. *See also* *Edelman v. Superintendent, Windham Public Schools*, FIC Docket # 1999-408 (March 22, 2000) (lesson plans maintained by teachers not public records).

***Pinette v. Town Manager, Town of Wethersfield*, FIC Docket # 2003-341 (Freedom of Information Commission, September 8, 2004).**

The Commission ruled that the former Mayor of Wethersfield created and maintained public documents on her home computer when she did Town business at home. Accordingly, she was ordered to search her home computer and produce any public records that fell within the scope of the request.

PLEASE NOTE: **Any of the cases that are underlined are available in full text online, and the case name is a hyperlink to the decision. If you would like to receive a copy of this update electronically so that you can use the hyperlinks, please send me an e-mail at tmooney@goodwin.com.**

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