

LEADERSHIP Insider

PRACTICAL PERSPECTIVES ON SCHOOL LAW & POLICY

A Membership Benefit of NSBA National Affiliates

YOU ASKED! Answers to your school law questions

The 66th NSBA Annual Conference in Chicago last April featured the third annual special session at the National Affiliate Center devoted to answering questions from school board members and administrators from National Affiliate school districts. The National Affiliate program also sponsored a session that was open to all conference attendees.

Once again this year's "You Asked" sessions featured Thomas E. Wheeler of the Indianapolis firm of Locke Reynolds LLP. As we promised at the sessions, this special issue of *Leadership Insider* recaps some of the points discussed. You can find more questions and answers online; see the box below. Bear in mind that laws vary from state to state and from federal circuit to federal circuit.

We hope you'll be able to join us for the fourth You Asked! session at the 2007 Annual Conference in San Francisco. For details about the session and how to submit your own legal questions, see the box on page 2. ■

-Thomas Hutton, Editor

FOR MORE INFORMATION . . .

The electronic copy of this publication, along with all past issues of *Leadership Insider*, can be found at the National Affiliate section of the NSBA website, www.nsba.org/na. Just click on the *Leadership Insider* link.

You'll also find additional online resources about each of the topics addressed in this and other editions of *Leadership Insider*.

Your state school boards association can provide more information, especially on the role of state law on these questions.

Your school district's own legal counsel is the best source of detailed analysis and formal legal advice. For more information on working with a school lawyer, visit the school law section of the NSBA website, at www.nsba.org/schoollaw. That site now includes a convenient, searchable database called "Find a School Attorney."

To get a free weekly e-mail update, written for non-attorneys, on important school law topics, as well as links to helpful online resources, subscribe to NSBA's *Legal Clips* service. To sign up for this service or check out a sample issue, visit www.nsba.org/legalclips.

Can a school board require all of its employees, not just bus drivers, to take drug tests?

As an initial matter, the question is right to distinguish bus drivers from other school employees. The Federal Omnibus Transportation Employee Testing Act of 1991 requires employers that own or lease vehicles for which a commercial driver's license is required to test drivers for drugs before employment, randomly, after an accident, and when there is reasonable suspicion of drug abuse.

Another factor that might lead to confusion is that drug testing has become much more widespread among private sector employers, so people may have the impression that it shouldn't be a big deal in schools. But remember that the Bill of Rights puts limits on government action, so while private entities generally don't have to worry about pesky things like constitutional rights, school boards do.

In this case, school boards need to worry about the Fourth Amendment, which prohibits unreasonable searches and seizures. Drug tests are a "search" for Fourth Amendment purposes. For drug testing of most public employees, courts engage in a balancing test between the public concern about drug abuse in the workplace and the invasion of privacy.

On the public concern side of the scale, courts typically consider whether there has been any demonstrated problem with drug use in the workplace and, if not, what kinds of potential harms could occur if the employees in question abused drugs on the job.

Courts typically have upheld drug testing for employees in "safety sensitive" positions, such as drivers, operators of heavy

equipment, or those who carry firearms.

On the privacy side of the scale, courts consider such things as how much the test invades the employee's privacy and what reasonable expectation of privacy the employee should have in his or her position. For example, the circumstances in which a urine sample is provided could be more or less intrusive, and how heavily the employee's occupation or industry is regulated could relate to how much expectation of privacy is reasonable.

These factors could play out differently depending on when the testing is administered. Courts generally will be most lenient about testing after an actual incident, such as an accident. Courts tend to be more cautious about testing when there is only reasonable suspicion of drug use. They are still more cautious about requiring suspicionless pre-employment or pre-transfer tests, and most cautious about allowing ongoing random tests.

Other factors a court could consider are the quality and reliability of the testing program and what kinds of consequences a positive test triggers. The stronger the safeguards against false positives, the better. A program that results in dismissal or criminal referral will face a higher legal threshold than one that leads to less drastic interventions and keeps the results confidential.

One good way to illustrate how these factors work is to consider a 1998 decision by the 6th Circuit U.S. Court of Appeals, *Knox County Education Association v. Knox County Board of Education*. This ruling is instructive for two reasons: It represents the broadest ruling we have so far in

allowing teachers to be tested. But even *Knox* does not give school boards *carte blanche*—far from it.

On the public concern side, the 6th Circuit upheld suspicionless drug testing of anyone who applied for, transferred to, or was promoted to a "safety sensitive" position, which the school board defined as including all teachers. Even though there was no evidence that teacher drug use was a problem, the court found that the unique role teachers and administrators play in providing for the safety and care of children justified the designation.

On the privacy side, the court found that the program was not overly intrusive. There was no random testing and no ongoing testing after the initial test. There were strong safeguards to ensure accurate results and strong privacy protections, and urine samples generally were given in private. The court also found that school employees have a diminished expectation of privacy because they work in such a heavily regulated field.

The law on drug testing varies significantly by jurisdiction. Several other courts have declined to go as far as the 6th Circuit, which covers Michigan, Ohio, Kentucky, and Tennessee.

In addition to the above factors, a school board considering testing employees will want to discuss with its attorney: (1) whether testing would be a mandatory subject for collective bargaining and what the implications would be; (2) whether your state constitution might impose stricter limitations than those of the U.S. Constitution; and (3) whether your state has any statutes on the subject. ■

What are some recent decisions on the separation of church and state?

NSBA's Annual Conference can and does offer whole sessions devoted to this broad topic, and we discussed several questions at the You Asked! session. For this issue of *Insider*, we'll highlight one near and dear to the hearts of many school boards: invocations at school board meetings.

This is a difficult issue legally, because school board invocations fall somewhere at the intersection of two strands of Supreme Court precedent. In the 1992 case *Lee v. Weisman*, the court ruled that prayer organized by school officials on school premises is unconstitutional. But in 1983 the court had recognized in *Marsh v. Chambers* that legislative invocations are acceptable.

The question for courts, then, is whether a school board meeting is more like a school function or more like a legislative session. Until recently the highest case decided specifically about school boards was the 6th Circuit's 1999 decision in *Coles v. Cleveland Board of Education*.

After acknowledging how hard a call it was, the 6th Circuit ruled that school boards are an integral part of public school systems and, as such, are subject to the stricter constitutional protections and prohibitions that apply in schools.

The 9th Circuit also issued a short, unpublished 2002 ruling in *Bacus v. Palo Verde Unified School District Board of Education*. Unpublished opinions are not binding precedent, but lawyers and judges still read them. The 9th Circuit (which includes California, Oregon, Washington, Arizona, Nevada, Idaho, Montana, Alaska, and Hawai'i) found it didn't have to decide between *Lee* and *Marsh*, because always offering prayers "in the name of Jesus" violated either rule.

In the time between NSBA's Annual Conference and now, a three-judge panel of the 5th Circuit (which covers Texas, Louisiana, and Mississippi) split three ways over which test applies to school boards. The effect of the ruling in *Doe v. Tangipahoa*

Parish School Board was that invocations were not banned completely but that the prayers at issue in the case were deemed too sectarian. The case will now be reviewed by the entire 5th Circuit.

The 5th Circuit's fractured ruling and the split among some other lower courts show these are difficult cases. Where courts have not yet ruled on the matter, a school board has to exercise its best judgment about what it thinks is most fair to everyone in the community. That is one of the key functions of local school boards.

As a practical matter, the board seems to be on the thinnest ice if it is less inclusive than it could be about what kinds of prayers are offered, and by whom. The more sectarian the prayers, and the more limited the diversity of views welcomed, the more potential trouble. A 2004 decision, *Wynne v. Great Falls*, by the 4th Circuit (Maryland, Virginia, West Virginia, North Carolina, and South Carolina) involving a town council also upheld "invocation of divine guidance" but struck down prayers that "affiliate the government with one specific faith or belief in preference to others." ■

WHAT ARE YOUR SCHOOL LAW QUESTIONS?

The 2007 "You Asked!" session will be held at NSBA's 67th Annual Conference in San Francisco, 11 a.m.-noon, on Monday, April 16, at the National Affiliate Center.

You set the agenda for this discussion! Just take a moment to send us the school law questions you've been wondering about. We have set up an easy online You Asked! question field for you on the National Affiliate website. Log on to www.nsba.org/na and click on the You Asked! link. We will build the discussion around your questions.

Even if you are unable to attend the session in person, we want to hear from you about what topics are on your mind.

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About NSBA

The National School Boards Association is the nationwide advocacy organization for public school governance. NSBA's mission is to foster excellence and equity in public elementary and secondary education in the United States through local school board leadership. Founded in 1940, NSBA is a not-for-profit federation of state associations of school boards and the school boards of the District of Columbia, Hawai'i, and the U.S. Virgin Islands.

About the National Affiliate Program

The National Affiliate Program extends NSBA's services directly to local school districts. School districts are eligible to join provided they are members in good standing of their state school boards associations.

About the Council of School Attorneys

The Council of School Attorneys provides information and practical assistance to attorneys who represent public school districts. It offers legal education, specialized publications, and a forum for exchange of information, and it supports the legal advocacy efforts of the National School Boards Association.

What are the legal issues involving students with diabetes?

'Our district has been trying to figure out how to handle requests from parents about children with diabetes, and our state legislature may pass a law on this'

Your district and state are not alone. With the increased incidence of childhood diabetes has come increased pressure on school districts to make sure children with diabetes have full access to school programs.

Advocacy groups have been pushing for state and federal laws on the subject, successfully in some states. And in 2005 a class action lawsuit was filed against the state of California and some districts there on behalf of children with diabetes.

Depending on the situation, existing laws already might apply. Where diabetes or its management—sometimes in combination with other conditions—results in actual learning difficulties that require special interventions, it may constitute a disability for purposes of the Individuals with Disabilities Education Act.

Most commonly, diabetes might be considered a disability under Section 504 of the Rehabilitation Act, which prohibits federally funded schools from denying students with disabilities the same benefits of programs and services provided to other students.

Diabetes is not automatically considered a disability under Section 504, however. This must be determined case by case. But most people agree that any child with Type

1 diabetes, which requires insulin injections, has a disability. Besides, the U.S. Department of Education's Office for Civil Rights (OCR) essentially has taken the view that if the management of the condition requires the student to seek the school's permission for anything, the diabetes is a disability.

If the student's diabetes is a disability, the school must develop a Section 504 plan to accommodate the condition, based on the student's individual needs. This is where the issues of food requirements, glucose testing, and insulin injections arise that sometimes lead to disputes and calls for new laws.

Disability advocates take a fairly hard line supporting the rights of children to self-administer treatment or requirements that school personnel take responsibility for care. School personnel, in turn, raise concerns about safety, lack of qualified staff, classroom distraction, and, of course, cost.

Depending on the facts of a particular case, courts, the OCR, and state lawmakers have differed on what should be considered reasonable accommodations. There can be distraction and safety issues involving needles in a classroom, especially with young children, but requiring a student to leave the classroom if necessary raises

other practical issues.

A particularly thorny issue has been who can administer care, especially injections. Many schools lack nurses, and other personnel often may be reluctant to be called on for this task, even where training is available. The school's responsibility extends to extracurricular activities, as well. Organizations representing school nurses have been vocal about who should be allowed to administer care, and organizations representing other employees sometimes have insisted that state law prohibit the district from requiring employees to give injections.

Another worry is liability, especially where people other than nurses have been asked to administer injections. Some state legislatures have responded by shielding districts and employees from any resulting liability except in the most egregious cases.

At a minimum, a school board is well advised to ensure that district personnel know the applicable state laws, consider each request for accommodation of diabetes on a case-by-case basis, and are well-informed about this increasingly common condition so the district's position is based on defensible concerns and not on fear of the unfamiliar. ■

Why aren't school boards and states contesting NCLB on legal grounds instead of the funding argument?

'The Spending Clause of Article I and the 10th Amendment are clearly being violated here, and no constitutional provision exists for federal support of public education'

This is a multifaceted question with a multifaceted answer. First, as a practical matter there is far more unanimity among school boards and the rest of the world about the inadequacy of the No Child Left Behind Act's funding than there is about all of its provisions, let alone whether the country would be better off without the act altogether.

For all of the act's considerable infirmities—and for all the Beltway hubris and inherent limitations of trying to decree local educational reality through federal law—there's much for school boards to applaud in NCLB: significantly higher academic aspirations, overdue accountability and higher expectations for students who have not been so well served before, meaningful parental involvement, data-driven decision-making, and even drastic intervention where justified.

Second, as a constitutional matter, NCLB and other federal education statutes were enacted under the U.S. Constitution's Spending Clause, meaning that Congress is not overstepping its authority by simply issuing decrees. In effect, Congress is offering states and school districts funding in exchange for their agreeing to comply with the conditions that come with it. That's why you occasionally read about some state making noises about opting out of NCLB or about the rare school district that really

doesn't rely very much on Title I funding deciding NCLB just isn't worth it.

As a practical reality, few districts have that luxury, so school boards aren't exactly clamoring to put an end to the federal role in education. NCLB is the latest iteration of the Elementary and Secondary Education Act, the most important source of federal funding for schools. And for every onerous regulatory headache in federal law, there's an aspirational dimension for children and communities worth considering.

As a matter of fact, though, the constitutional question is very much at issue in the broadest and highest-profile lawsuits against NCLB that have been brought so far: the one instigated by the National Education Association in Michigan and the one brought by the state of Connecticut.

These challenges have been framed around the funding issue and the unfunded mandate provision in NCLB itself. That provision says: "Nothing in this act shall be construed to authorize an officer or employee of the federal government to mandate, direct, or control a state, local educational agency, or school's curriculum, program of instruction, or allocation of state or local resources, or mandate a state or any subdivision thereof to spend any funds or incur any costs not paid for under the Act."

How the constitutional issue comes into

play is this: The U.S. Supreme Court has said that Spending Clause legislation is like a contract between the feds and the funding recipients. And just like any other contract, the parties have to be put on clear notice what the terms of the deal are. So the plaintiffs in these lawsuits are arguing that when states and school districts accepted NCLB, they could well have assumed from the unfunded mandates language that the feds would come through with the money. When the feds reneged, the argument goes, not only did they violate NCLB itself, but they also violated the Spending Clause.

So far, neither lawsuit has fared very well in court. As of this writing, the Michigan case was dismissed in federal district court, and the dismissal is on appeal to the 6th Circuit. Meanwhile, three out of four claims in the Connecticut case were dismissed.

One final note about the Spending Clause and NCLB: The Spending Clause also has played a role in the fact that courts so far have dismissed lawsuits against states and school districts over NCLB. Because NCLB is Spending Clause legislation, the courts have found, people dissatisfied with a state or a district's NCLB implementation can't sue unless Congress unambiguously established this right in the legislation. It didn't.

But stay tuned: At least one prominent advocacy group, a private NCLB commission set up by the Aspen Institute, is urging Congress to add a new federal enforcement process into NCLB and to give people the right to sue in state court if the feds don't act on a complaint. ■