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Council News

Michigan Council of School Attorneys

President's Letter

Catherine Brechtelsbauer
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Life for school attorneys remains interesting, doesn't it? Staying current on legislative and regulatory changes and "Dear Colleague" letters, as well as court decisions, has always required us to be on our toes and to regularly reach out to each other to be sure we have evaluated these changes carefully enough to ensure our clients have the best counsel and representation. The last couple of years have been especially dynamic though!

Many of these changes have made headlines, such as the rights of gun owners to access school property, restriction of school employee collective bargaining rights, transgender student rights, service animals in schools, USDA "smart snack" limits on school fundraising efforts, identification of new teacher evaluation tools, new student testing systems as the basis for evaluating a teacher's impact on student growth, anticipated FLSA changes defining which employees may be considered salaried, and the recent proscription on using school resources to address ballot proposals during the 60 days prior to an election.

Changes that have not necessarily made the newspapers and talk shows this past year have included major changes in regulatory requirements applicable to federal grant recipients, the ever-changing school employee criminal background check process requirements, new legislative interpretations on how and when a school retiree may be employed/contracted to work as a coach/substitute/early childhood program quality evaluator, the impact of medical marijuana laws on school responsibilities to special education students, changing interpretations of what constitutes FAPE and how IEP teams must plan educational services and measure success in achieving them, and the list goes on.

We are blessed in the Michigan Council of School Attorneys to be associated with so many outstanding and collegial professionals. In fact, many of our Michigan school attorney colleagues are the state experts in these quickly evolving issues. Let's resolve in this New Year to never forget to reach out to each other to inquire about resources, to ask for an outside perspective on our own analyses, and to share our own successes and failures. We deserve no less and our school clients will need the most proactive support we can provide them in 2016.

Happy New Year!

What's Up With Regulating Drones?

Charyn K. Hain, Varnum LLP

Unmanned Aircraft Systems, otherwise known as drones, are everywhere. Literally. And their recreational use is likely to become even more prevalent given the hundreds of thousands of drones that were projected to be wrapped and placed under the tree during the 2015 holiday season. While it is one thing for Sally or Johnny to fly their new toy in their backyard, what happens when someone decides to fly a drone over a high school football game, the grade school playground or hover outside a classroom window? Is there anything a school district can do?

The answer depends largely on whether regulation of drones is solely within the realm of the federal government. Airspace and aircraft are historically the domain of the federal government. As a result, the doctrine of "field preemption" comes into play. Field preemption prohibits state or local governmental regulation in an area if the federal government's regulatory scheme is sufficiently comprehensive that it evidences the intent for federal law to occupy the entire field. As a result, it is important to consider the current federal regulatory system governing drones to determine what rights a school district may have to regulate their usage.

The federal government already has a complex regulatory framework that addresses hobbyists, commercial use and use of drones by public entities, such as school districts. Comprehensive Federal Aviation Administration regulations for civil operations of drones weighing less than 55 pounds are also in the works and are projected to be completed by June 2016. Recently, the U.S. Department of Transportation adopted regulations requiring registration of all unmanned aircraft "except for toys and those with minimal safety risk." In short, the federal government certainly appears to be "occupying" the field to a significant degree. For that reason, regulation of drone usage could be considered fully preempted by the federal government. Yet, there is an argument that UAS regulation within certain airspace is not solely within the authority of the federal government and may also be controlled by property owners and regulated by other governmental entities with specific limitations.

The argument against field preemption over all drone usage hinges on a 1946 U.S. Supreme Court decision that held that landowners have property rights in the portion of the airspace above the ground that is not within the navigable airspace.[1] The extent, or rather, height, of the ownership right has not been precisely defined. However, case law supports ownership rights in airspace up to at least 500 and perhaps up to 1,000 feet above ground. Although the case upon which such ownership rights are based is nearly 70 years old, it has withstood the test of time and there is room to argue, no matter how intensive and specific the FAA's UAS regulations, that a landowner maintains the right to control some airspace and, therefore, state and local governmental entities may exert control over drone usage within certain airspace. While the ownership right belongs to all property owners per the *Causby* decision, a school district, as a governmental entity, is uniquely situated to implement policy to regulate its airspace.

Indeed, many municipalities already impose restrictions on drone usage and almost every state in the union has and/or is considering legislation regulating drones. For example, in Michigan, it is against the law to use a drone to harass hunters or to use a drone to take fish or game. Several additional pieces of legislation relating to UAS use are currently pending in the Michigan House and Senate, including legislation to regulate drones flying over the State Capitol and legislation prohibiting drones within 1,500 feet of correctional facilities. Additionally, the Michigan High School Athletic Association has prohibited drone use for any purpose by any persons at MHSAA tournament venues since 2014. Many other state athletic associations have similar restrictions and school districts in other states have passed board resolutions adopting drone restrictions with respect to athletic events.

The issue of whether a government entity other than the federal government may regulate UAS usage has not been tested in Michigan. It does not appear to be subject to a direct challenge in other jurisdictions either. While this does not necessarily mean a policy or law will not ultimately be challenged, and perhaps successfully, the door remains open for some local regulation efforts, including regulation by school districts. If a school district wishes to adopt

[1] *U.S. v. Causby*, 328 U.S. 256 (1946).

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a UAS/drone policy, the following are guidelines to follow. These guidelines are based on suggestions from the FAA as well as a review of what other governmental entities, including school districts, across the country have adopted:

- Require registration and implement a certification process for the issuance of a permit if a person wishes to operate a drone over school property.
- Include a minimum operating age of 18 (this could be modified for supervised student usage) and a maximum drone weight of 55 pounds.
- Limit potential approval to drones that are incapable of flying over 500 feet.
- Only permit operation during daylight hours.
- Prohibit image capturing capability or require specific permission to use for specific purposes (think student privacy issues).
- Require users to sign a document acknowledging and agreeing to the terms of use and agreeing to hold the district harmless from damage to persons or property.
- Require proof of appropriate liability insurance.
- If implemented by the FAA (see above), require proof of registration of the drone with the FAA.
- Require the controllers to maintain visual contact with the UAS and prohibit flight paths over certain areas, such as seating areas, playgrounds, etc.

These guidelines apply if a district wishes to allow, but regulate, drone usage. A district could ban all drone use. An outright ban should be limited to drones flying under 500 feet to provide the most protection from successful legal challenge.

Enforcement is another issue. Who do you call when you see a drone on school property? The answer will depend on who is flying the drone. If it is an unidentified person off school grounds, there may be little a district can immediately do. (Beware: people have been found civilly liable for destroying drones even when flying over their property and destroying a drone in flight could even be a violation of federal law.) Communicating with local law enforcement and the pertinent municipality is critical to determine whether there are any supporting laws that may also control drone use and provide assistance from local law enforcement. Also, the district's drone policy should mandate compliance with the policy by students, employees and visitors, which will allow enforcement of appropriate disciplinary action for any violation by such a person under the district's normal disciplinary processes.

In summary, regulation of drone usage through limitation or prohibition within nonnavigable airspace will likely be permitted despite the FAA's regulation of the airspace in general and drones specifically. However, given the fact that the FAA is still developing its regulations, it may be wise for a district to wait until these are finalized to ensure that its policy is in compliance with the final regulations and does not need to be revised shortly after implementation. Additionally, legislation introduced in the Michigan House in October 2015, HB 5026, purports to regulate how a "political subdivision of this state," uses unmanned aerial vehicles for surveillance and evidence gathering purposes and also prohibits such an agency from disclosing information acquired through operation of a drone. As currently drafted, this pending legislation applies to schools and school districts and may require additions or amendments to drone policies if it becomes law.

In the meantime, the Board could adopt a resolution similar to the MHSAA's prohibitions with respect to athletic events, including practices and scrimmages. Any policy should be carefully thought out and crafted to address the district's specific needs and intentions after consultation with the district's attorney.

Please note that this article is limited to what a district may do to regulate drone use that is not otherwise sanctioned by the district. It does not address what the district may need to do to comply with FAA regulations if it wishes to, for example, record athletic practices using drones or use drones for research purposes. As noted above, the FAA has regulations addressing commercial use exemptions and allowing certain government agencies to obtain certificates of authority for aeronautical research purposes. The expected FAA regulations may also affect a district's obligations with respect to its own use of drones. Stay tuned.

MSU College of Law's Adrienne Anderson Wins Education Law Writing Competition

Kacie Kefgen, MASB Assistant Director of Labor Relations & Legal Services

This past fall, students at Michigan law schools submitted entries for the inaugural Michigan Education Law Writing Competition. Students were asked to draft a client letter based on the following hypothetical:

A parent openly carries a licensed gun to a high school band concert on school property. School officials ask him to store his gun in his car during the concert, but he refuses, so is put into handcuffs and taken to the police station. What are the parent's rights? Can the school district prohibit the parent from openly carrying this weapon? Evaluate these issues under Michigan Law.

Students were asked to draft a client letter on the presented issues, representing the parent or the school district. The submissions were evaluated on (1) writing quality and clarity, recognizing the client audience, and (2) analysis and legal reasoning.

The winning entry was penned by Adrienne Anderson, a third-year law student at Michigan State University College of Law. The following is Adrienne's client letter, which is addressed to the parent in the above hypothetical. The guidance in the letter does not reflect the opinion of the Michigan Association of School Boards or the Michigan Council of School Attorneys.

Adrienne Anderson, anderson.adrienne3@gmail.com

Dear Mr. Smith,

I hope that this letter finds you well. Recently you telephoned me that you were arrested for open carrying your gun while at your daughter's high school band concert. As you have described it, school officials claim that they have the right to prohibit you from open carrying on school property and you have asked for advice regarding that right. After researching the issue, and based on the facts set out below, I believe that a court would likely conclude that school officials cannot prohibit gun owners with a concealed pistol license [CPL] from open carrying on school property. CPL holders are likely exempt from the statutes that prohibit guns on school property. First, I will set out the facts as I understand them. Then, I will discuss the applicable law and apply them to your case. I will also give options as to what I think your next course of action should be.

The high school held a band concert for its students and their parents. You attended the concert to support your daughter in the band. You are a licensed gun owner and open carried your gun to the concert, which was held on school property. The school officials asked you to store your gun in your car during the concert, which you declined to do and were then put into handcuffs and taken to the police station. You are concerned that the school officials violated your right to open carry. You have asked for this law firm's opinion whether school officials are allowed to prohibit you from open carrying your gun on school property.

Under these facts, a court would likely conclude that citizens with CPLs are allowed to open carry on school grounds. Courts will consider the open carry question focusing on two issues. The first is whether federal and Michigan law permits gun owners with and without a CPL to open carry in pistol free zones. The second is whether individual schools or school districts can ban a CPL gun owner from open carrying on school property, even if federal and state law allows open carry. These two issues are related, meaning that a court must find it lawful to open carry under both state and local laws.

First, I will address the issue of whether federal and state law allows CPL holders or non CPL holders to open carry on school property. On the federal level, federal law banned individuals from having firearms in a school zone, however the statute made an exception for individuals who have a gun license issued by the state where the school zone is located.[1] Therefore, federal law allows individuals who have valid state gun licenses to have a gun in a school zone. Under Michigan law, an individual licensed to carry a concealed pistol is not allowed to carry a *concealed* pis-

[1] 18 U.S.C. § 922(q)(2)(A)-(B).

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tol on school property.[2] However, when an individual has a CPL from Michigan or another state, the individual can have the weapon in a weapon free school zone.[3] This might seem confusing to you because these two laws appear to contradict each other. Reading the laws together, Michigan law prohibits CPL holders to carry a ***concealed*** weapon on school property, but it does not prohibit CPL holders to carry an ***unconcealed*** weapon on school property. It is important to note that you have to be a CPL holder in order for this law to apply.

Second, I will address the issue of whether a school can ban weapons, concealed or unconcealed, even if state law permits them. For example, Michigan does not allow local units of governments to make laws dealing with the possession of firearms.[4] A local unit of government is a city, village, township, or county. A court ruled that local units of government are not allowed to create ordinances that make local public buildings gun-free zones. The court held that state law outweighs local law in this area.[5] When a district library tried to ban firearms on its property, a court ruled that Michigan law prohibits local units of government from regulating firearms because state law completely occupies the field of firearm regulation. The district library was not in the state law definition of a "local unit of government," however, the court said that it is still a part of a government agency and is regulated by the state. Therefore, state law applied.[6]

Most recently, a court ruled that the Clio school district could not make its properties weapon-free zones and ban CPL holders from open carrying on school district property. The court said that the school district did not have the legal authority to ban individuals from carrying weapons because it interfered with Michigan's authority, which allows for open carry on school grounds for some people.[7] However, in another very similar case, a court upheld Ann Arbor school district's "dangerous weapons and disruption-free zone" policy. The judge said that the state law does not define a school district as a local unit of government, and therefore its policy banning guns is lawful because it has the authority to provide for the safety of students.[8]

Applying these legal rules to the school officials likely supports the conclusion that you are allowed to open carry on school grounds, as long as you are a CPL holder. In your case, you are a licensed gun owner who open carried on school property. Since Michigan laws prohibit concealed carry on school property, but not open carry, it is likely that a court will rule that CPL holders can open carry on school property. The school district might argue that simply because the law bans individuals from carrying a concealed weapon, it does not thereby permit individuals to carry an unconcealed weapon. But, Michigan law has a clear exemption that permits CPL holders to carry on school property. It does not explicitly ban unconcealed weapons, like it bans concealed weapons, so it can be lawfully assumed that unconcealed weapons with a valid CPL are allowed.

Furthermore, a school is a local unit of government for the same reasons a library is—because schools are regulated by the state, making them a government agency. Because state law does not prohibit a CPL holder to open carry on school property, school officials were not allowed to ask you to leave nor have you arrested. The school officials will likely argue that the school is not a local unit of government and that it has the authority to make policies that keep students safe. Even though one judge ruled that school districts can ban weapons, a court will likely side with Michigan law, which clearly does not prohibit CPL holders from open carrying on school property.

To sum up, based on the facts and laws I have stated in this letter, I believe that a court would conclude that a CPL holder, has a right to open carry on school property and that the school district cannot stop you from doing so. In the future, to open the lines of communication, I would recommend that you offer to show the school officials your CPL. You do not lawfully have to, but it could possibly ease the tension. However, this might not stop the school district from arresting you again. So going forward you have a few options. We can file a lawsuit against the school dis-

[2] Mich. Comp. Laws § 28.425o (2001).

[3] *Id. §* 750.237a(4)-(5) (1994).

[4] *Id. §§* 123.1101-123.1105 (1990).

[5] *Michigan Coal. for Responsible Gun Owners v. City of Ferndale,* 662 N.W.2d 864, 866 (2003).

[6] *Capital Area Dist. Library V. Michigan Open Carry, Inc.,* 826 N.W.2d 736, 737 (2012).

[7] *Michigan Open Carry, Inc. v. Clio Area Schs.,* No. 15-104373-CZ (2015).

[8] *Michigan Gun Owners v. Ann Arbor Pub. Schs* (2015).

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trict using the laws I used above. We can also wait to file a lawsuit until after the Court of Appeals rules on the Clio Area Schools case I mentioned above. A benefit of waiting is that the Court of Appeals will likely uphold the ruling in the Clio Area Schools case and we could use that judgment against the school district—they would have to allow you to open carry. A downside of waiting is that the appeal could take up to a year, in which case you might not be able to open carry on school property during that time. Also, the Court of Appeals could rule in favor of the school district and that would hurt our chances of prevailing in the lawsuit. I believe the best option would be to file the law suit now because a court will likely rule in our favor. However, the decision is ultimately yours and I will respect whichever route you choose.

I hope that this was helpful and I would be happy to discuss this matter with you further. I will not make any decisions until I have spoken with you about your options. Please feel free to call my office if you have any questions.

Office of Civil Rights Issues Determination on Rights of Transgender Student

Scott Corba, Collins & Blaha, P.C.

On Nov. 2, 2015, the U.S. Department of Education's Office of Civil Rights completed an investigation and issued a determination regarding a transgender student's right to access facilities at Township High School District 211, a public school district composed of five high schools in Illinois. Though not binding on other school districts, the determination is a landmark interpretation of Title IX as it relates to transgender students.

The complaint alleged that the school district violated Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in schools that receive federal funding. The OCR found that the school district violated Title IX by denying the student the benefits of its education program, providing services for her in a different manner, and subjecting her to different rules of behavior and different treatment on the basis of sex.

In the case, the student was born male, but identified as female from a young age. During middle school, the student transitioned to living full-time as a female. The school district honored the student's request to be treated as a female in all respects (e.g., identifying her by a female name, giving her unlimited access to the girls' restrooms and allowing her to participate in girls' athletics), except her request to access the girls' locker rooms. Instead, the school district required the student to change clothes for her mandatory gym class in other restroom facilities or the school nurse's office, on the basis that it had to protect the privacy interests of all students.

In formulating its decision, the OCR balanced the right to equal access for the student against the right to privacy of all students. It concluded:

The evidence establishes that, given [the student]'s stated intention to change privately, the District could afford equal access to its locker rooms for all its students if it installed and maintained privacy curtains in its locker rooms in sufficient number to be reasonably available for any student who wants privacy. Here the totality of the circumstances weighs in favor of the District granting [the student] equal access to the girls' locker rooms, while protecting the privacy of its students.

According to the OCR, its determination applies only to the individual case, and "is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such." However, it may provide insight into how the OCR will apply Title IX to other issues involving transgender students. The federal government retains the authority to cut off funds to schools that violate Title IX, though this penalty has never been applied.

In this case, the parties reached a settlement agreement that will require the school district to "provide the student with access to the girls' locker rooms at her high school based on the student's request to change in private changing stations in the girls' locker rooms," and "protect the privacy of its students by installing sufficient privacy curtains in the girls' locker rooms at the high school to accommodate the transgender student and any students who wish to be assured of privacy."