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Defining the Phrase "Support Themselves by Their Own Labor" For Purposes of Tuition Obligation

On July 3, 2014, the Ohio Attorney General (OAG) defined the phrase "support themselves by their own labor" for purposes of determining student tuition obligation. The Ohio Revised Code provides fourteen categories in which a student is entitled to attend school tuition-free. One of the fourteen categories is provided in R.C. 3313.64 (F)(1), which states the following:

"All persons at least eighteen but under twenty-two years of age who live apart from their parents, support themselves by their own labor, and have not successfully completed the high school curriculum or the individualized education program developed for the person by the high school pursuant to section 3323.08 of the Revised Code, are entitled to attend school in the district in which they reside."

The recent OAG Opinion clarifies the meaning of "support themselves by their own labor." "'Supporting themselves by their own labor' means finance or otherwise to facilitate the furnishing of the necessities of life, including food, shelter, and clothing, by means of their own physical or mental effort" and does not include persons "who depend upon another for support." Therefore, if a student is dependent on his parents or others for "financing or furnishing the necessities of human existence," then the student does not "support themselves by their own labor."

Because the obligation to educate a student typically rests with the parent's school district of residence, determining that a student falls under the provisions of R.C. 3313.64(F)(1) shifts the obligation from the parent's school district of residence to the student's school district of residence. Additionally, if a student meeting the requirements under R.C. 3313.64(F)(1) attends a community school, state funding will be reduced from the student's school district of residence, as opposed to the parent's school district of residence.

The OAG opinion also provides guidance on how to determine whether students are supporting themselves by their own labor. First, the OAG clarifies that the fruits of labor could include various forms of compensation, including wages, imputed wages (i.e., services provided for his or her own benefit), or compensation in kind (e.g., room and board in exchange for services provided). Next, the OAG states that the "student's labor must be the means of his self-sufficiency." Lastly, the OAG provides examples for types of documentation that may support a finding that students "support themselves by their own labor." Evidence may include documentation of wages earned, the amount of wages earned compared to the cost of providing all the "necessities of life consistent with the standard of living enjoyed by that person," factors relating to the student's living situation, and the nature of chores performed for the head-of-household at the residence.

2014 Op. Att'y Gen. No. 2014-026.

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Defining the Phrase "Support Themselves by Their Own Labor" For Purposes of Tuition Obligation, Cont.

How this Affects Your District:

The OAG opinion makes clear that each situation is different, and the facts of each situation must be taken into consideration. Additionally, there is no one form of documentation that may establish whether a student is self-sufficient. The determination will be based on whether the amount of compensation allows the student to be self-sufficient. For questions regarding a specific situation, please contact and ERF attorney.

Sixth Circuit Finds Failure to Tell Police of Arrested Student's Disability Not a Fourteenth Amendment Violation

Chigano v. City of Knoxville, No. 12-6025 (6th Cir. Jul. 10, 2013).

Recently the Sixth Circuit Court of Appeals found neither school employees nor a police officer in violation of an autistic student's Fourteenth Amendment substantive due process rights when the school neglected to inform the officer, arriving to arrest the disruptive student, of the student's disability.

M.C. was a Fulton High School (FHS) student with autism. FHS has a school policy that phones must be turned off and not visible during the school day. If violated, the policy dictated that the phone would be taken, to be returned only to a parent or legal guardian. When M.C. violated the policy's cell phone provisions the school acted pursuant to its policy, and held her phone at the office. M.C. attempted to retrieve her phone at the end of the day. The office denied her request for the phone. M.C. refused to leave the office without it.

Two school security guards arrived in the office in an attempt to get M.C. to leave. Proving unsuccessful, a Knoxville police officer next entered to try to get M.C. to depart on her own. Instead of complying and leaving peacefully, M.C. and the officer engaged in a physical struggle as he tried to remove her involuntarily. As a result, the officer handcuffed M.C. and took her to a juvenile detention center. All charges against M.C. were later dropped.

However, M.C. and her parents filed suit against various school district and police department personnel in a Tennessee federal district court, alleging violations of (1) a federal claim under Title VI of the Civil Rights Act of 1964; (2) Fourth, Eighth, and Fourteenth Amendment rights; and (3) state law.

On Appeal, the Sixth Circuit panel affirmed the lower court's decision. In dismissing the Section 1983 substantive due process claim, the Court looked to a Supreme Court decision.

Summarizing *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the Court determined: "[W]hile the Due Process Clause prohibits the State from depriving any person of life or liberty, it does not explicitly require the State to protect the life and liberty of its citizens against actions by private actors." Here, the Court assumed the officer to be a private actor, which would not impute a duty on the school officials to protect M.C. from his actions, according to the *DeShaney* rule.

Two exceptions to *DeShaney* exist; in relevant part, M.C. and her parents argued the applicable exception existing for when the state actor (here, FHS) creates or increases the danger to a plaintiff. They argued that the school employees created the risk of danger to M.C. by calling the officer to the office, then thereinafter increased the created risk through their failure to inform the officer of M.C.'s disability. The Court found their "created risk" argument unavailing. In their analysis of the facts presented, the school employees had not requested the officer come to the office in M.C.'s circumstance — another individual had. The Court also disagreed with the "increased risk" argument made by M.C. Here, liability requires an affirmative act, i.e. the school employee's doing something and acting in some fashion. M.C.'s argument was, instead, based on the employees' failure to act — the claim was that the increased risk stemmed from the school employees' neglecting to inform the officer of M.C. autism. "For purposes of the state-created danger theory, a failure to act is not an affirmative act." Therefore, the Court denied M.C.'s appeal, finding that her liberty interest and thus Fourteenth Amendment rights were not compromised by the school officials.

How this Affects Your District:

This case is binding for Ohio districts. With regards to sub-

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Sixth Circuit Finds Failure to Tell Police of Arrested Student's Disability Not a Fourteenth Amendment Violation, Cont.

stantive due process state actors, or Districts, must not deprive students of their liberty interests. Additionally, the *DeShaney* rule adds that Districts must not create or increase the danger of a liberty interest violation by a private actor. Here, had school officials called the police officer to intervene, they may have created the risk.

The case also suggests that an affirmative act is required that causes an "increased risk." In this case the school officials did not call the officer in and further did not involved in any way with the student's arrest. Had they done so, the Court might have ruled differently, finding that the district had a duty to tell the officer of M.C.'s disability. Therefore, Districts should be mindful of affirmative acts that may compromise a student's liberty interest, and take steps to ensure no violations occur.

U.S. Supreme Court Limits Fair-Share Fees on Labor Unions

In a 5-4 decision, the U.S. Supreme Court ruled that partial-public employees could not be required to pay fair-share fees when the only reason the partial-public employees were deemed to be "public" employees was solely for union formation and collection of dues. The case arose out of Illinois, where lawmakers classified home health care workers, paid by federal Medicaid dollars, as State employees. The home health care workers were then required to pay dues/fair-share fees to the Service Employees International Union. SEIU was the exclusive union to bargain with Illinois over wages, hours, working conditions, and other terms and conditions of employment.

However, and key to the Court's decision in this case, the home health care workers were controlled by the customers they served, not the State of Illinois. The job duties of the home health care workers were set by customers and the customers' physicians. Customers have complete discretion in hiring any home health care worker meeting the State's criteria and qualifications. Customers control all supervision and evaluation(s) of the home health care workers, and the State has no power to enter a customer's home to evaluate job performance. The customer had the sole authority of discharge of the home health care workers; the State could not discharge a home health care worker from a customer's home for substandard performance.

In relying on the terms of their employment, the Court found the home health care workers to be partial-public employees, and therefore, different than public-school teachers or police officers who work directly for the government or a political subdivision. Because states often set wages for partial-public employees, like home health care workers, and because unions often do not conduct collective bargaining for them, the Court determined that the home health care workers could not be required to pay union fees.

The Court found that, except in the exceptional circumstances, "no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support."

Harris v. Quinn, 134 S. Ct. 2618 (2014).

How this Affects Your District:

In the short term, this decision is unlikely to impact most fair share arrangements in Ohio public schools. Some commentators read the decision as an invitation for a broader challenge to *Abood* and an indication that the Court is prepared to declare all public employer fair share arrangements unconstitutional.

Minimum Hours Requirements: Frequently Asked Questions

New minimum school year requirements went into effect July 1, 2014. The minimum school year requirement for all city, exempted village, local and joint vocational school districts changed from "days" to "hours." The hour requirements are as follows:

- 455 hours for half-day kindergarten
- 910 hours for full-day kindergarten
- 910 hours for grades 1-6
- 1, 001 hours for grades 7-12

"Hours of operation" include time spent during scheduled classes, supervised activities, and approved education options, but exclude lunch and breakfast periods, as well as extracurriculars. Hours may also include one or more of the following:

- An equivalent of 2 days per

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Minimum Hours Requirements: Frequently Asked Questions, Cont.

year for parent-teacher conferences and reporting periods;
- An equivalent of 2 days per year for professional development of teachers; and/or
- Morning and afternoon recess for grades K-6 (not to exceed 15 minutes in duration per period).

Frequently Asked Questions (FAQ):

1. **Can districts allow seniors to elect late arrival or early release?**

While many schools have done so in the past, ODE representatives have indicated recently that schools have no legal authority to offer the elective. The premise behind that conclusion is that the length of the school day must be based on the time all students are in attendance, and not just a subset of the student population. ODE likely will provide additional guidance on this issue in the future, including whether funding may be implicated.

2. **Can students still graduate early?**

Yes. Board policy on early graduation, including dual enrollment credit, is still allowable under the new law.

3. **Are students who are enrolled in alternative school programs during expulsions, etc., required to attend those programs for the minimum hours?**

Maybe. According to ODE representatives, even though the law does not allow part-day programs, the state superintendent may grant exceptions. A decision on this issue has not been finalized, but notification will be provided when a final decision has been made.

4. **Do calamity days/missed days constitute "reduction in hours," and thus require board resolution?**

No, calamity days do not count as a reduction. The district should consider the days included in the board-adopted calendar, not the number of hours the district was actually open, when making this determination.

5. **If a district remains on the old system for a year or two because of a Collective Bargaining Agreement that did not expire before July 1, 2014, how will days be reported in EMIS?**

According to ODE, there will likely be reporting two systems in EMIS. The school district select the appropriate system. Further, ODE has indicated that schools that are held over in the old system will need to enter into an MOU to convert early to the new "hours" requirement.

How Can Districts Maintain Student Privacy and Ensure Data Is Not Disseminated Through the "Cloud"

New online educational resources are gaining momentum. As the world of educational technology rapidly evolves, so does the need for schools to continue to protect student data – these online education resources generate massive amounts of data through their use. Therefore, the U.S. Department of Education (ED), through its Privacy Technical Assistance Center (PTAC), issued guidance on the proper use, storage, and security of that data, titled "Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices."

Historically, experts in the field of student data privacy agree that FERPA's core standard is that third parties should only use such data and information collected strictly for educational purposes. On the contrary, ED's guidance reveals that this protection may be overly broad in the new, highly technological era. It concludes that both FERPA and another relevant federal statute, the Protection of Pupil Rights Amendment (PPRA), are seemingly limited in their power to prevent such outcomes in "big data" and ubiquitous digital learning tools. As a result, "schools and districts will typically need to evaluate the use of online educational services on a case-by-case basis to determine if FERPA-protected information is implicated."

The guidelines note seven high-level recommendations for schools and districts, the cumulative purpose of which being to foster better understanding and implementation of "best practices." It is important to note that these guidelines contain no new regulations and are, thus, non-binding on school districts. Instead, they encourage better policies and self-policing by the schools. Some of the recommendations include:

- Maintain awareness of relevant federal, state, tribal, or local laws;
- Be aware of which online educational services are currently being used in your district;
- Have policies and procedures to evaluate and approve proposed online educational services;
- When possible, use a written contract or legal agreement; and
- A call on districts to be transparent with parents and students, and to analyze themselves whether consent would be appropriate in both cases where it is and is not required by FERPA.

For more information, view ED's guidance in full here: http://ptac.ed.gov/document/protecting-student-privacy-while-using-online-educational-services

Education Law Speeches/Seminars

SAVE THE DATE! 2014-2015 Administrator's Academy Seminar Series

Seminars will take place at the Great Oaks Instructional Resource Center or via live webinar from 9:00 a.m. to 11:30 a.m. unless otherwise noted. Additional registration information will be provided in the near future!

September 18 – Fostering Effective Working Relationships with Booster and Community Groups

January 22 – Managing Workplace Injuries and Leaves of Absence

April 23 – Special Education Legal Update

July 16 – 2014-2015 School Law Year in Review (webinar only)

Other Upcoming Presentations:

August 13: Legal Update — Mercer County Building Administrators
Ryan LaFlamme

August 13: Ohio State Bar Association School Law Workshop — "Guns in Schools"
Bill Deters

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Want to stay up-to-date about important topics in school law? Check out ERF's Education Law Blog at www.erflegal.com/education-law-blog.

Webinar Archives

Did you miss a past webinar or would you like to view a webinar again? If so, we are happy to provide that resource to you. To obtain a link to an archived presentation, send your request to Pam Leist at pleist@erflegal.com or 513-421-2540. Archived topics include:

- Education Law Legal Update - Including SB 316
- Effective IEP Teams
- Cyberlaw
- FMLA, ADA and Other Types of Leave
- Tax Incentives
- Prior Written Notice
- Advanced Topics in School Finance
- Student Residency, Custody and Homeless Students
- Ohio Budget Bill/House Bill 153
- Student Discipline
- Media and Public Relations
- Gearing Up for Negotiations

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