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Ennis Roberts Fischer SCHOOL LAW REVIEW

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Inside This Issue:

Tax Incentive "Cheat Sheet" for Ohio School Districts

With the Ohio economy rebounding, we are beginning to see more and more property tax incentives being offered to businesses by local governments. Ohio's school districts play a crucial role in a local government's ability to offer these incentives. Below is a quick reference guide to the most common types of property tax incentives. We've also specified when board of education approval is required prior to an incentive being awarded by a local government. Understanding this is very important because boards of education can request to be compensated for lost tax revenue in exchange for approving an incentive. In many cases, we are able to negotiate a deal with a local government or business where a board of education realizes no loss in revenue at all.

Tax Increment Financing (TIF)

- Local governments use this inventive to finance public infrastructure improvements that benefit private development
- Exemption Term – Up to 100% for 30 years
  * BOE Approval Required - if more than 75% is exempted and more than 10 years

Enterprise Zone Agreement (EZA)

- Designated zones within a governmental jurisdiction where businesses receive tax exemptions on eligible new investments
- Exemption Term – Up to 100% for 30 years
- City Provided Incentive:
  * BOE Approval Required - if more than 75% is exempted and more than 10 Years
- County/Township Provided Incentive:
  * BOE Approval Required - if more than 60% is exempted and more than 10 years

Community Reinvestment Area (CRA)

- Allows property owners (primarily residential property) within certain areas where investment has been discouraged to receive tax exemptions for investing in real property improvements
- Exemption Term – Up to 100% for 10-15 Years depending on type of remodeling or construction
- CRA Created Before July 1, 1994:
  * BOE has no approval authority
- CRA Created After July 1, 1994: Commercial & Industrial Property
  * BOE Approval Required - if more than 50% is exempted
- CRA Created After July 1, 1994: Residential Property
  * BOE has no approval authority

For more information, please contact Gary T. Stedronsky at 513-421-2540 or at gstedronsky@erflegal.com

Banning Parents from Board Meetings may Violate First Amendment Rights

In *Cyr v. Addison Rutland Supervisory Union,* the United States District Court for the District of Vermont held that a school supervisory union violated the U.S. Constitution when it barred a student's parent from attending school board meetings.

Marcel Cyr's children attended Benson Village School, a part of Addison Rutland Supervisory Union ("ARSU"). Mr. Cyr was unhappy with the quality of his son's education and publically spoke out against the school. In 2011, and again in 2012, Mr. Cyr was prohibited from entering onto school property, including during school board meetings.

School officials issued the ban after Mr. Cyr engaged in the following behaviors. He placed signs in his yard, decorated his car with slogans to express his disenchantment with the school, personally delivered letters to the school nearly every day, spoke loudly at school meetings, used intimidating gestures, drove by the principal's house in New York, and parked near school property to watch staff and board members leave meetings. Additionally, a psychologist hired to evaluate Mr. Cyr's son stated that the school should "require an independent mental health risk assessment to be conducted to assess Mr. Cyr's mental status, including his thinking processes, potential for violent actions, and ability to participate in the necessary school/home collaboration required with a student with a developmental disorder requiring individualized educational planning."

Mr. Cyr claimed that the notices against trespass issued by the ARSU violated his First Amendment right to free expression, his Fourteenth Amendment right to due process, and his First Amendment right of access to school board meetings.

The court issued a summary judgment ruling in favor of Mr. Cyr stating that the no-trespass orders were "a categorical ban on expressive speech." The court held that school board meetings were a limited public forum. Thus, the proper inquiry was whether the restrictions on Mr. Cyr's speech, by way of the no-trespass orders, were "justified without reference to the content of the regulated speech, …narrowly tailored to serve a significant governmental interest, …and leave open ample alternative channels for communication of the information." ARSU's ban against Mr. Cyr was not narrowly tailored to ensure the safety of school officials. Also, Mr. Cyr had no other comparable means of communicating with the school staff or other community members. Forcing Mr. Cyr to communicate by telephone or other technologies substantially diminished his ability to participate in the kind of discussion intended for school board meetings. Therefore, Mr. Cyr's motion for summary judgment was granted as to his freedom of expression claim.

Additionally, the court held that the ban violated Mr. Cyr's right to due process because the school did not offer any explanation of why the ban was issued, did not provide any way to contest it, and issued it in such a manner as to create a likelihood of misuse. The court held that notices against trespass violate a parent's Fourteenth Amendment due process rights when they deprive the parent of his or her First Amendment right to express his or her views at school board meetings without adequate process. Mr. Cyr had a strong interest in attending board meetings, the school did not issue the notices pursuant to any established protocol, and the legitimate government interest of protecting school staff did not outweigh the need for the school to set out the reasoning for the ban. Weighing the above factors, the court concluded that the ban against Mr. Cyr violated his due process rights.

Finally, the court denied Cyr's claim that the First Amendment afforded him the right to attend the school board meetings, concluding "there is no First Amendment right of access to a school board meeting." The court employed the "experience and logic" test to determine whether Mr. Cyr had a right to access the school board meetings. The test addressed whether the place and process had typically been open to the public and whether the public played a significant role in the process in question. In doing so, the inquiry was the experience of municipal meetings throughout the U.S, not the particular practice of a single jurisdiction. Although municipal meetings, such as school board meetings, existed at the time the First Amendment was written, there was no common law right to attend them. Because municipal meetings were not part of the historical "experience" of the U.S., the court reasoned that under the "experience and logic" test, there was no First Amendment right of access to school board meetings.

Cyr v. Addison Rutland Supervisory Union, 2014 WL 4925102 (D.D.Vt. Sept. 30, 2014).

How this Affects Your District:

School districts should use caution when making decisions to ban parents from school board meetings. Because student safety is not typically a strong factor in a decision to ban parents from a board meeting, the legitimate interest of the school district may have less weight than when it bans parents from school grounds during instructional hours. Consider developing alternatives to issuing meeting bans against disruptive or troublesome parents, such as hiring law enforcement to attend school board meetings when the need arises. If a notice against trespass is issued, the district should document the legitimate reasons to support the ban, such as actual threats, and communicate those reasons to the subject of the ban. When a ban is put in place, the district should ensure that the barred parent has alternative forms of communication that do not threaten the parent's ability to actually participate in the discussion.

OCR & DOJ Provide Guidance on "Effective Communication" Requirements for Students with Hearing, Vision, or Speech Disabilities

In November 2014, the U.S. Department of Education's Office for Civil Rights & U.S. Department of Justice (DOJ) provided joint guidance in the form of "Frequently Asked Questions" regarding the obligations of public schools to meet the communication needs of students with hearing, vision, and speech disabilities. Three federal laws outline these obligations: (1) The Individuals with Disabilities Education Act (IDEA), (2) Section 504 of the Rehabilitation Act of 1973 (Section 504), and (3) Title II of the Americans with Disabilities Act of 1990 (Title II). Although compliance with IDEA and Section 504 will typically meet the requirements under Title II, there are times when it will not.

Title II requires public schools to provide auxiliary aids and services to students with hearing, vision, and communication disabilities (including students with multiple disabilities who have one of these disabilities) to ensure that these students have effective communication opportunities. This requirement is not dependent on a request for an aid or service. Specifically, public schools have the following primary obligations:

- To provide auxiliary aids and services (including acquisition or modification of equipment or devices) so that a student can receive and convey information as effectively as students without disabilities such that the student has an equal opportunity to participate in and benefit from educational services and programs, unless doing so would fundamentally alter the nature of the program or be an undue financial and administrative burden.
- To give primary consideration to the auxiliary aid or service requested by the child or family member with knowledge of the child's disability and with the ability to provided relevant information about effective aids and services.
- To provide the auxiliary aids and services in a timely manner for all school-related communications (which may include extra-curricular activities) in a way that protects the privacy and independence of the student.
- To provide the same opportunities to any individual (in addition to students) who seeks to participate in or benefit from the school district's services, such as parent -teacher conferences, meetings, performances, open houses, field trips, and student registration.
- To continue to assess the auxiliary aids and services provided to ensure they continue to provide the student with effective communication.

The following factors can help determine which aids and services are needed to provide effective communication: the student's mode of communication, complexity of the student's communication needs, the context in which the communication is occurring, and the amount of people involved in the communication. Examples of auxiliary aids and services for students with vision or hearing needs include the following: audio recordings, qualified readers, Braille materials, magnification software, and large print materials. Examples for students with speech disabilities include the following: a computer, a portable device that writes or produces speech, spelling to communicate, and a qualified sign language interpreter.

When an interpreter is needed, the interpreter must be qualified to interpret both receptively and expressively with the individual. School districts are prohibited from requiring an individual to provide his or her own interpreter, although there are two exceptions to this prohibition. If there is an emergency involving an immediate threat of safety and an interpreter is not available, the school can ask a minor child or adult to interpret. Additionally, if the individual makes a request to bring his or her own interpreter, the individual may provide an adult to interpret, but not a minor child.

How are these requirements different than the requirements to provide a Free Appropriate Public Education (FAPE) under IDEA?

- Under Title II, a school district may need to provide auxiliary aids and services before determining IDEA eligibility (during the evaluation process).
- Additionally, Title II obligations may be triggered even with students who are not eligible under IDEA.
- Because the IDEA FAPE standard (provide a meaningful educational benefit) is different than the Title II standard (communication as effective as others), schools may need to provide auxiliary aids and services beyond those provided through the student's IEP.

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OCR & DOJ Provide Guidance on "Effective Communication" Requirements for Students with Hearing, Vision, or Speech Disabilities, Cont.

- Although schools can use an IDEA evaluation to determine a student's communication needs, the school may also need to provide additional assessments beyond those provided through IDEA.

- Any costs of providing aids, services, or evaluations for Title II that are not required under IDEA for FAPE, cannot be paid using IDEA funds.

What procedures are needed to comply with Title II?

- Each district must designate an ADA Coordinator, which may also be the district's Section 504 Coordinator. The ADA coordinator will either be the head of the school district or a designee who has authority to make spending decisions.

- If a school district denies the request for an auxiliary aid or service because it would fundamentally alter the nature of the program or be an undue financial and administrative burden, the decision maker must put the reasons for denial in writing.

- If a district denies an aid or service, the district would typically need to provide an alternate aid or service that doesn't alter the program or cause undue financial or administrative burden.

- If a dispute arises, parents can file a Title II complaint with OCR or a grievance under district grievance procedures. As long as there is not a remedy under IDEA, a parent can also file a civil action in federal court without the requirement of exhausting administrative remedies.

For additional information, go to the following link for the FAQ guidance document. http://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf

How this Affects Your District:

Title II effective communication requirements can be confusing due to the differing standards from IDEA. Although a school district is not typically required to provide the most effective aid or service for FAPE (instead, only one that provides meaningful educational benefits), Title II may require a district to provide a communication device requested by a parent even if not required under IDEA. To ensure compliance with Title II, each district should determine whether a member of the IEP team with authority to make spending decisions will be responsible for addressing Title II effective communication issues or whether the ADA coordinator or other designee will address the communication needs of students eligible for IDEA. If the district choses to have an IEP team member address these concerns, it is important to make sure that the designated team member is aware of the differing standards between IDEA and Title II. For specific questions regarding a district's obligations under Title II, contact an ERF attorney.

U.S. Supreme Court Hears First Cyber Speech Case

The U.S. Supreme Court recently heard arguments in a case regarding the extent of Constitutional protection of speech on social media. In *United States v. Elonis*, Elonis wrote graphic lyrics on Facebook which involved killing his estranged wife, law enforcement, and school students. *Elonis* is the Supreme Court's first freedom of speech case involving cyber speech.

The issue before the Court is whether "conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten" or whether "it is enough to show that a 'reasonable person' would regard the statement as threatening." Basically, under this "threat" statute, does is matter whether Elonis intended to cause fear or whether a reasonable person would consider his postings a threat?

To get an understanding of the context of this case, the following excerpts provide a brief glimpse into the speech that Elonis posted on Facebook:

"There's one way to love you but a thousand ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts."

"Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined. And hell hath no fury like a crazy man in a kindergarten class."

Elonis argued that, under the applicable statute, the government must prove that the speaker intended the speech to be threatening. His argument centered on the protections offered under the First Amendment. In making this argument, he tried to

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U.S. Supreme Court Hears First Cyber Speech Case, Cont.

relate his speech to the speech of famous rap artists, who are typically provided First Amendment protections despite the fact that they often express violent and threatening messages. On the other side, the government argued that the standard under the statute should be a reasonable person standard, requiring only that a reasonable person would consider the speech to be threatening.

The questions from the Supreme Court justices addressed both sides of the issue during oral arguments. Some of their questions included the following:

Justice Ruth Bader Ginsburg asked Elonis's attorney about how the government would prove whether a particular threat, "in the mind of the threatener, was genuine?"

Chief Justice John Roberts questioned the government's attorney on its interpretation of a "reasonable person." He used the example of teenagers making a threat while playing a video game and questioned whether the standard would be a "reasonable person" or a "reasonable teenager." He then expressed concerns over the reasonable person standard being applied consistently with the same speech.

Justice Elena Kagan took a middle ground proposing a "reckless standard," meaning a prosecutor would need to show only that the speaker should have known there was a substantial probability that the speech would cause fear, even if the speaker did not intent to threaten the listener. This standard would provide more protections for speech than the "reasonable person" standard, but it would not require the government to determine the speaker's subjective intent.

United States v. Elonis, 730 F.3d 321 (3rd Cir. 2013), cert. granted, 134 S.Ct. 2819 (2014).

How this Affects Your District:

It will be several weeks or months before the Supreme Court issues its highly anticipated decision in this case. Despite the fact that this case focuses on the interpretation of a specific threat statute, it will give insight into the justices' views on freedom of speech in the context of online speech. In the absence of any significant appellate case law governing Ohio schools, the Elonis decision will provide some guidance to schools as they determine how to address student cyber speech.

Upcoming Deadlines

As your school district prepares for the next couple of months, please keep in mind the following upcoming deadlines. For questions about these requirements, please contact an ERF attorney.

Feb. 4– Deadline to file, submit, or certify the following for the May election with the board of elections:

- Resolution of necessity, resolution to proceed and auditor's certification for bond levy (RC 133.18)
- Continuing replacement, permanent improvement, or operating levy (RC 5705.192, 5705.21, 5705.25)
- Resolution for school district income tax levy or conversion levy (including a renewal conversion levy) (RC 5748.02, 5705.219)
- Emergency levy (RC 5705.195)
- Phase-in levy or current operating expenses levy (RC 5705.251)

March 1—For districts who submitted a staffing plan due to an inability to provide the number of teachers needed pursuant to the Third Grade Reading Guarantee: Deadline to submit to ODE a report detailing the district's progress in meeting the staffing requirements (RC 3313.608)

March 31—End of ADM Reporting Period (RC 3317.03)

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!

April 23 – Special Education Legal Update
July 16 – 2014-2015 School Law Year in Review

Upcoming Workshop:

Feb. 21—ERF's Sunshine Laws Workshop

This workshop has been designed for school board members, public officials and administrators. The seminar will take place on Saturday, February 21st from 9:00 a.m. to 11:30 a.m. at the Princeton City School District Administrative Office. The cost of the seminar will be $75.00 per person. To register for the event, contact Pam Leist at pleist@erflegal.com, or call 513.421.2540.

Other Upcoming Presentations:

Feb. 9 (Columbus) & Feb. 10 (Dayton)—Ohio Special Education Law, National Business Institute (NBI)
Presented by: Jeremy Neff, Lisa Burleson & Erin Wessendorf-Wortman

Feb. 13–Collective Bargaining Roles for Superintendents and Board Members, BASA
Presented by: Bill Deters

March 6 (Cincinnati)—Lawfully Managing Student Records without Violating Privacy Rights, NBI
Presented by: Gary Stredonsky

March 10—Guns in Schools Webinar, Ohio State Bar Association
Presented by: Pamela Leist

March 20—Evaluations, OASPA
Presented by: Bill Deters

March 20—The Discipline Dirty Dozen, OSBA
Presented by: Jeremy Neff

March 27—Using District-Owned Property Off Campus, OSBA
Presented by: Pamela Leist

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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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Construction Contracts, Easements, Land Purchases and Sales, Liens, Mediations, and Litigation

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Ryan LaFlamme
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Workers' Compensation

Administrative Hearings, Court Appeals, Collaboration with TPA's, General Advice

Team Members:
Ryan LaFlamme
Pam Leist
Erin Wessendorf-Wortman

Special Education

Due Process Claims, IEP's, Change of Placement, FAPE, IDEA, Section 504, and any other topic related to Special Education

Team Members:
Bill Deters
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Pam Leist
Jeremy Neff
Erin Wessendorf-Wortman
Lisa Burleson

School Finance

Taxes, School Levies, Bonds, Board of Revision

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