Ennis Roberts Fischer
School Law Review

1714 West Galbraith Rd.
Cincinnati, Ohio
45239

PHONE
(513) 421-2540
(888) 295-8409

FAX
(513) 562-4986

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Supreme Court Issues Decision on Legality of Prayer before Public Meetings

Town of Greece, N.Y. v. Galloway, 134 S.Ct. 1811 (2014).

The U.S. Supreme Court recently concluded that a municipality did not violate the Establishment Clause of the First Amendment when it opened each town meeting with a prayer conducted by volunteer chaplains from local churches, even though the majority of the chaplains espoused a Christian-based ideology.

Since 1999, the town of Greece in upstate New York opened each legislative session with the pledge of allegiance followed by a brief prayer. The prayer was given by volunteer clergy selected from a list of congregations located within the town's borders. The vast majority of churches in the area were Christian. In fact, the prayer was led exclusively by Christian clergy from 1999-2007. However, the town permitted members of other religious faiths to participate if they volunteered to do so, and the legislators never reviewed or dictated the content of the prayers.

Two citizens of the town challenged the practice and claimed it violated the First Amendment's Establishment Clause by granting preference to Christian-based religious beliefs at the expense of other faiths. They also claimed that the practice was coercive in nature and forced non-adherents to either participate or risk censure from town legislators. The citizens sought an injunction in court that would limit the prayer to only nonsectarian expressions of faith.

After review of the case, the Second Circuit concluded that the town's practice violated the Constitution because, when viewed by an objective observer, the town appeared to endorse Christianity at the expense of other ideologies. The case was appealed to the U.S. Supreme Court, which ultimately reversed the Second Circuit's holding.

In its decision, the Supreme Court acknowledged that prayer given before legislative bodies is a widely accepted historical practice and generally does not violate the First Amendment. Rather, the Court concluded it "lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society."

The Court also considered whether the Constitution requires legislative bodies to moderate or restrict the content of prayers in an attempt to ensure they remain nonsectarian. The Court ultimately concluded that such a rule would be contrary to the historical purpose of the prayers, and would force legislators and courts to act as censors of religious speech, which would conflict with the Constitution. Therefore, the Court ruled that as long as the practice of prayer as a whole serves the legitimate function of lending gravity and reflection to a proceeding, and does not over time "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion," it is lawful. In this case, the Court pointed to facts such as the town's policy of nondiscrimination, and the town's lack of review or dictation of any content of the prayers, to support its conclusion that the town did not actively promote or attack particular beliefs.

Finally, the Court determined that the practice was not coercive in nature because the prayer was directed at the legislators themselves and not public participants. In addition, no facts were presented which indicated that citizens were treated any differently from others because they participated or failed to participate in prayer. Further, the Court held that even if citizens viewed the prayers as

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Supreme Court Issues Decision on Legality of Prayer before Public Meetings, Cont.

offensive, they did not rise to the level of coercing particular behaviors or beliefs.

How this Affects Your District

The U.S. Supreme Court's decision in this case supports the premise that public entities may lawfully engage in ceremonial practices, such as prayer, in some instances. In fact, many school boards across the nation incorporate invocations or prayers into their proceedings. However, the practice of prayer during public meetings will certainly remain subject to constitutional challenge, and districts that engage in the practice must be very cautious to ensure the practice does not discriminate or coerce citizens. It is recommended that school boards review any practices which may include religious themes or content, and, in the least, attempt to guarantee that public officials remain non-discriminatory and are removed from making decisions about the nature of the messages.

Determining LRE for ESY Services

To what extent are schools required to provide a least restrictive environment (LRE) with nondisabled peers during extended school year (ESY) services?

An April 2014 decision from the Second Circuit Court of Appeals ruled that LRE must be provided during ESY to the same extent it is provided during the regular school year. In *T.M. v. Cornwall Cent. Sch. Dist.*, a soon-to-be-kindergartener's parents rejected their son's IEP for ESY services because it provided ESY services in a self-contained special education classroom. The parents argued that the district did not provide their son a free appropriate public education (FAPE) because the ESY services were not offered in the child's LRE. Although it was undisputed that the child could be served in a general education setting with supplemental aides and services, the district argued that it was not required to provide services in the child's typical LRE because the district did not offer a mainstream summer program. The Court rejected this argument, concluding instead that the district did not provide the student's LRE because the district did not offer a continuum of educational services based on the student's needs. Additionally, because the parents were able to provide an appropriate placement for the child at a private school, the district was required to reimburse the parents for tuition.

Despite this Court's ruling, the application of this case may be very limited in Ohio. Also, any given case may turn on the specific facts presented. The Federal Register provides the following guidance. "While ESY services must be provided in the LRE, public agencies are not required to create new programs as a means of providing ESY services to students with disabilities in integrated settings if the public agency does not provide services at that time to nondisabled children. However, consistent with its obligation to ensure that each disabled child receives necessary ESY services in order to receive FAPE, nothing in this part would prohibit a public agency from providing ESY services to an individual disabled student in a noneducational setting if the student's IEP team determines that the student could receive necessary ESY services in that setting."

The Office of Special Education Programs has also provided guidance on the requirement of districts to provide a continuum of services and private placements for ESY. First, "the Department does not require States to ensure that a full continuum of placements is available solely for the purpose of providing ESY services; however, [IDEA] does require that options on the continuum be made available to the extent necessary to implement a child's IEP." Additionally, a district "would have to purchase a private school placement, if there was no available public placement, and the private placement was determined to be necessary to implement an individual child's IEP for ESY services," such as when an IEP team determines that a student must have interaction with nondisabled peers to receive FAPE for ESY services. Therefore, although an individual case may require that a student be provided ESY services with nondisabled peers due to nature of the students needs and the goals addressed during ESY services, districts are typically not required to provide the exact same services during ESY that are provided during the school year.

How this Affects Your District

IEP teams should be cognizant of the LRE requirement for all ESY services. Each team should address those needs on a case-by-case basis. Remember the standard for ESY services, regression and recoupment, is lower than school year services. If a district questions whether a child's needs can be met in the district's ESY program, the district should consult legal counsel.

T.M. v. Cornwall Cent. Sch. Dist., No. 12 -4301 (2d Cir. Apr. 2, 2014); Federal Register, Vol. 64, No. 48, 12577 (1999); Letter to Meyers 213 IDELR 255 (1989); Letter to Myers 16 IDELR 290 (1989).

Legislative Updates

Epinephrine Auto-Injectors Bill Signed into Law

HB 296, which authorizes schools to stock epinephrine auto-injectors (epi-pens), was signed into law on 4/21/2014 and became effective immediately. The enrolled provisions also permit drug manufacturers to donate epi-pens and allow schools to receive those donations. Any district that chooses to stock epi-pens must develop a policy that outlines the use of epi-pens in emergency situations, includes training requirements, and specifies authorized personnel who may administer epi-pens.

Although there is no requirement for districts to stock epi-pens for emergency situations, Boards should discuss whether it is in the best interest of the district to do so. Districts choosing to stock epi-pens should develop a policy that includes the components required by law based on the needs of the district. Please consult your attorney for advice on policy language.

Mid-Biennium Education Bill Pending

HB 487, the mid-biennium education bill, contains various educational law provisions and attempts to pass provisions from several bills that have been pending in the Ohio legislature over the past few months. The House passed a version of HB 487 on 4/9/2014, and the Senate passed an amended substitute version on 5/21/2014. HB 487 is expected to go to conference committee to propose a final version.

Among other provisions, HB 487 proposes changes to the following:

- Post-Secondary Enrollment Options
- EdChoice Scholarship Program
- Third-Grade Reading Guarantee
- Career-technical education
- Career advising
- Adoption of academic content standards (Senate version)
- Determination of value-added for the state report card
- Diagnostic assessments
- Online administration of state assessments for 2014-2015 (Senate version)
- Teacher evaluations (Senate version)
- Participation in public school extracurricular activities by community and STEM school students
- School Safety Plans (Senate version)

Additionally, HB 487 proposes the following:

- Volunteer patrol services by current or retired law enforcement (House version)
- A safe harbor for 2014-2015 related to the use of report card ratings for sanctions or penalties and employment decisions for teachers (Senate version)
- Guidelines for assessment of concussions sustained by athletes (Senate version)

Teacher Evaluation Bill Pending

Strong opposition to the House's proposed version of SB 229 caused the House to re-address several provisions in the amended bill. The original version of SB 229, which passed the Senate unanimously on December 4th, 2013, modified frequency and composition of teacher evaluations and reduced some of the burden on school administrators. The House Education Committee's initial proposal, however, would have modified both the OTES and OPES evaluation systems in ways that would have undoubtedly place additional strain on the relatively untested evaluation systems. Due to the opposition, the House proposed the following changes in its amended bill:

- Modification to the House's "student survey" framework provision, which previously required that 20% of evaluation ratings be comprised of student survey results, to allow districts to wait until 2016-2017 to use student surveys and to allow up to 20% of evaluation ratings to be comprised of student survey results
- Change to allow for the use of student surveys (not content or procedure) to be collectively bargained
- Only teachers rated "Developing" or "Ineffective" must be placed on an improvement plan (not teachers rated "Effective" as in the initial House proposal)
- Removal of the provision indicating that districts could not assign students to a teacher who has been rated ineffective for two or more years

The amended bill currently awaits approval in the House Education Committee before it will be sent to the full House for a vote. The bill will also need to be voted on again by the Senate before it proceeds to the governor for final signature. In addition to SB 229, HB 487 also addresses provisions related to teacher evaluations; therefore, these pieces of legislation should be closely monitored together. For additional information regarding SB 229, see ERF's education law blog. http://www.erflegal.com/education-law-blog

ERF will keep you posted on the progress of relevant pending legislation. For additional information on HB 487 and SB 229, sign up for ERF's Legal Updates Webinar on July 10th, http://www.erflegal.com/client-resources/erf-administrators-academy.

Florida Court Dismisses Challenge to State Teacher Evaluation Law

Cook v. Stewart, Case No. 1:13-cv-72 -MW-GRJ

A Florida federal district court recently concluded that a teacher evaluation law which linked merit pay increases and teacher retention to student performance on standardized tests was constitutional. In 2011, Florida passed a law which mandated that at least 40% of a teacher's performance evaluation must be based on a student growth measure derived from state or local assessments. Many districts elected to use a shared attribution score for those teachers who taught subjects which were not included on standardized tests.

A group of teachers, who were joined by the Florida Education Association and National Education Association, brought suit in court to challenge the constitutionality of the system. They alleged the system violated the Equal Protection and Due Process clauses of the Fourteenth Amendment. The teachers specifically claimed that the law was inherently unfair because it did not include a valid measure of teacher performance. They pointed to the fact that the standardized tests assessed performance on a limited number of students and subjects, specifically fourth through tenth grade reading and math, but was applied uniformly to all teachers through a shared attribution score regardless of whether they taught any of the subjects or students.

The Court agreed with the teachers that the law was indeed unfair. However, the Court ultimately dismissed the case on grounds that there was no legal basis to overturn the evaluation system. The opinion stated "[t]he standard of review is not whether the evaluation policies are good or bad, wise or unwise; but whether evaluation policies are rational within the meaning of the law." The Court concluded that the evaluations advanced a legitimate government purpose to assess teacher performance and incentivize teachers to focus on student growth. The Court also uniformly upheld use of shared attribution for teachers who taught subjects which were not included in formal assessments. While the Court recognized that some teachers may have a limited impact on a student's score in an unrelated subject, the evaluation method was nonetheless constitutional because it was based on advancement of legitimate state interests.

How this Affects Your District

The evaluation system adopted by Florida in 2011 is very similar to Ohio's OTES and OPES evaluation systems. While the Florida decision is not binding in Ohio, it certainly provides insight into how Ohio courts may approach any future challenges to our evaluation system.

Students Denied Use of Fictitious Names in Discrimination Lawsuit

Jessica K. v. Eureka City Schs. Dist., (N.D. Cal 02/21/14)

A California district court ordered students who brought a discrimination claim against their school to disclose their real names rather than use fictitious aliases in the case.

Four students filed suit against the school district alleging the district engaged in acts of discrimination against black and Native American students, and turned a blind eye when white students threatened or harmed minorities. The students attempted to use fictitious names in the case because they feared that they would be subject to physical retaliation from other students.

However, the Court disagreed that use of fictitious names would be proper. In its holding, the Court determined that due to the interference with a critical element of the defense — a need to investigate the alleged harassment — the school district retained the ability to require disclosure of the students' real names. The Court explained that the right to use a fictitious name rests on five factors: (1) the severity of threatened harm; (2) the reasonableness of the student's fears; (3) the student's vulnerability to retaliation; (4) the prejudice to the school district; and (5) the public interest.

Two of the students involved were disabled. Under factor three of the above test, the Court recognized these students were particularly vulnerable to retaliation due to their ages, disabilities and status as middle and high school students. However, the Court concluded a reasonable fear of severe harm was not present. The students presented conflicting evidence that weakened their position. Where one alleged that her harasser shoved her into a gym locker, she also stated that no incidents occurred over the course of a year when she played on the same basketball team with the harasser. Another student merely claimed her concern rested on a fear of being shunned by schoolmates.

In addition, the Court noted that the school district could not prepare a

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Students Denied Use of Fictitious Names in Discrimination Lawsuit, Cont.

defense and investigate the specific incidents claimed without questioning the alleged harassers. "[School officials] are entitled to meet the allegations against them by interviewing witnesses who will likely figure out from the nature of the questioning the identities of [the students] and the accused harassers." Therefore, all the other factors weighted against the use of fictitious names. Nonetheless, other safeguards were available to the students, such as a restraining order to prevent further harassment by any accused harasser.

How this Affects Your District:

This opinion is not binding in Ohio, however it yields interesting advice for school districts on what courts will require students to provide in harassment claims. Here, a mere fear of physical retaliation from alleged harassers was not enough to support use of fictitious names. In a harassment claim, a district's defense rests on the ability to question the alleged harassers and elicit information about the incident. Because of this inherent dependence, courts will likely require plaintiffs to use real names. Additionally, the conflicting concerns of student safety and a school district's need to investigate allegations can be balanced in other ways, such as through use of discipline and temporary restraining orders.

Protect the Ability to Maintain the Tax Base by Voicing Your Opposition to House Bill 483

ERF recently sent a memorandum to clients providing information on House Bill 483 and encouraging clients to contact their legislators regarding this bill.

House Bill 483 seeks to prohibit a board of education (and other political subdivisions) from filing original complaints with the county board of revision concerning the valuation of real property. This provision would prevent a board of education from filing a complaint to increase the value of real property. Many boards of education file original increase complaints when a property (typically commercial or industrial property) has transferred and the sales price is greater than the Auditor's current value.

As voters and taxpayers, we encourage you to voice your opposition to this provision in House Bill 483. It is extremely important to contact your Representative and Senator to voice your opposition because the Senate added this provision to House Bill 483 at the last stages of the legislative process, which prohibits opposition through committee hearings. Because the House and Senate passed different versions of the bill, the final version will likely require a vote from both the House and Senate. Make sure your legislators are aware of your opposition before they make their final vote.

See ERF's Memorandum for additional information about the ramifications of this bill. The memorandum also provides the contact link for your Senator and Representative, as well as a sample message you may use to voice your opposition to House Bill 483. For a copy of the Memorandum on House Bill 483, email Barbara Billow, bbillow@erflegal.com.

Firm News

ERF Partner Appointed Committee Chair

The Ohio State Bar Association has appointed William Deters II as Committee Chair for the Educational Law Committee for the 2014-2015 year. The Ohio State Bar Association is comprised of approximately 25,000 members. To provide continuing professional development and keep attorneys abreast of current issues, the OSBA schedules quarterly committee meetings for its members. The Education Law Committee Chair coordinates topics and speakers for the Education Law Committee. Mr. Deters is currently serving as the 2013-2014 Education Committee Chair. It is an honor for Mr. Deters to be appointed to this position for another year.

Education Law Speeches/Seminars

SAVE THE DATE! 2013-2014 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!

OTES and OPES Trends and Hot Topics – June 12th, 2014
Bronston McCord and Pamela Leist

Education Law Legal Updates 2013-2014 – July 10th, 2014 (Webinar ONLY)

Other Upcoming Presentations:

June 13th: 37th Annual OCSBA Spring Seminar
Reasonable Accommodations or Undue Burden? Disability Discrimination Claims
Erin Wessendorf-Wortman

June 23rd: Ohio School Resource Officers & D.A.R.E Officers Annual Conference
School Law Updates
Erin Wessendorf-Wortman

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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

Need to Reach Us?

William M. Deters II
wmdeters@erflegal.com
Cell: 513.200.1176

J. Michael Fischer
jmfischer@erflegal.com
Cell: 513.910.6845

Jeremy J. Neff
jneff@erflegal.com
Cell: 513.460.7579

Pamela A. Leist
pleist@erflegal.com
Cell: 513.226.0566

C. Bronston McCord III
cbmccord@erflegal.com
Cell: 513.235.4453

Gary T. Stedronsky
gstedronsky@erflegal.com
Cell: 513.866.1542

Ryan M. LaFlamme
rlaflamme@erflegal.com
Cell: 513.310.5766

Erin Wessendorf-Wortman
ewwortman@erflegal.com
Cell: 513.375.4795

ERF Practice Teams

Construction/Real Estate

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

Team Members:
Bronston McCord
Ryan LaFlamme
Gary Stedronsky

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
Pam Leist
Jeremy Neff
Erin Wessendorf-Wortman
Michael Fischer

School Finance

Taxes, School Levies, Bonds, Board of Revision

Team Members:
Bill Deters
Bronston McCord
Gary Stedronsky
Jeremy Neff