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School Law Review

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Delay in Reporting Suspected Child Abuse Bares the Appearance of Retaliation

Peter Wenk v. Edward O'Reilly, et al.

The student in the case, M.W., required special education services in the Grandview Heights City School District, and she was placed on an IEP. Her father, Mr. Wenk, was a strong advocate for her during her time at Grandview.

For the 2009 and 2010 school years, the teaching responsibilities of M.W. were shared — the intervention specialist was assigned the duty of keeping any documentation. The notes taken showcase various comments by and observation of M.W., which form the foundation of concern in the case. In the fall of the 2009 school year, M.W. began to make alarming comments about her father. She told the class that her father had very intimate contact with her genital area on a number of occasions. At an IEP meeting held shortly after, Mr. Wenk shared that he "really wanted [them] to find a boyfriend" for his daughter, and the teachers later observed him kiss M.W. on the lips. The comments persisted through January of 2010, upon which Mr. Wenk told M.W.'s teacher that he would shower with M.W. in order to help her wash her hair, with M.W. validating this claim by adding that her dad "takes off his clothes when he gets in the shower with her."

At the beginning of the 2011 school year and after a change in school principal and director of pupil services, the director began to comment on difficulties in interacting with Mr. Wenk and of his confrontational/controlling nature during their interactions. That fall, the intervention specialist that had been taking notes approached the director of pupil services regarding her "concerns" for M.W. Around the same time, M.W. made the comment that "she wasn't going to have sex again because it hurt," and this triggered the director to call child services. Before calling, the director consulted the superintendent, defendant O'Reilly. They both agreed that the call should be made. At the conclusion of the school year, M.W.'s teacher retired and O'Reilly filled the teaching position with the intervention specialist who had recorded M.W.'s comments, which resulted in assigning M.W. to the specialist's classroom.

In June 2012, Mr. Wenk brought action alleging First Amendment retaliation. Under 42 U.S.C. 1983, Mr. Wenk was required to show "that (1) a person; (2) acting under color of state law; (3) deprived him of his rights secured by the United States Constitution or its laws." The first two elements are not disputed, therefore, the question left for the court was whether the director of pupil services and superintendent acted to deprive Mr. Wenks of his rights under the United States Constitution. For this element and for his First Amendment retaliation claim to succeed without going before a jury, he was additionally required to prove that (1) he engaged in constitutionally protected activity and that (2) the acts of the school personnel, at least somewhat motivated as a response to the exercise of those constitutional rights, (3) caused him to suffer "an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity."

First, both parties agreed that Mr. Wenk engaged in constitutionally protected activity by advocating on behalf of M.W.'s education. Second, the defendants agreed that a *false* report to child services can be adverse enough to chill an ordinary person from continuing such speech. However, for the third factor they disputed that the report was false and therefore insufficient. The Court found that under 42 U.S.C. 1983, "retaliation for the exercise of a constitutionally protected right is actionable [...] even if the act, when taken for a different reason, would have been proper." Because Mr. Wenk

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Delay in Reporting Suspected Child Abuse Bares the Appearance of Retaliation, Cont.

was able to demonstrate that he suffered an adverse action, the Court determined that he had met this element as well.

The last element, or the causal connection that the adverse action was motivated by the protected conduct, was the most strenuous to prove. Here, the Court noted the precedent set by case law indicated how a lapse of a matter of months or less was sufficient to establish such connection. Here, the director made the report only a few months after she first met with Mr. Wenk, and even closer in proximity to when the director reported there to have been an aggressive interaction. In addition, the directors report was peppered with allegations of comments and actions that were not told to her by the teachers and with descriptions of Mr. Wenk as "creepy" and having an "unkempt" in appearance. Further, the fact that the director had the information previously but did not make the report until a couple months later concerned the Court and led them to determine that the director could have intended to use the allegations against Mr. Wenk as a means of retaliation based on his advocacy at the meetings rather than as a legitimate report of suspected child abuse. On the other hand, the allegations were not false and did raise an issue of fact. The Court determined that the facts and circumstances present presented facts material enough to make summary judgment inappropriate for both parties inappropriate.

How this Affects Your District:

Although a court has yet to issue a decision of whether retaliation was present, this case serves as a valuable lesson for districts, and does not just apply in the special education classrooms. When there are concerns with regards to student safety, school administrators should act quickly and report those concerns. In this case, district personnel received comments about potential abuse two years earlier in 2009, but did not pass concerns on to the superintendent, director of pupil services, or child services until 2011. Thus, the failure to act bears the appearance that district officials were motivated to withhold information until it could be used against the father – in this case, to stunt the father's aggressive advocacy.

It is also important to note that a school employee has a mandatory duty to **immediately** report suspected child abuse for any child under the age of eighteen or any disabled child under the age of twenty-one. Failure to report suspected child abuse to child services or the police may result in criminal or civil liability, as well as revocation of educator licenses.

Ohio Supreme Court Again Upholds Voluntary Abandonment Doctrine

State ex rel. Jacobs v. Indus. Comm.

This month, the Ohio Supreme Court upheld a denial of temporary total disability (TTD) benefits for an employee based on job abandonment. TTD benefits serve as wage replacement for employees who have suffered a workplace injury which causes the employee not to be able to return to work. Generally, an employee cannot be terminated for absenteeism while receiving TTD benefits.

Here, the employee was released to work with restrictions which the employer accommodated with a light duty assignment that met the restrictions in place. The employee accepted the light duty assignment, reported to work for one hour, and then left complaining of pain and indicating that she was going to visit her doctor. The employee did not return to work and the employer confirmed that the employee did not visit her doctor. The employer sent two letters to the employee over a 15 day period indicating that the employee was AWOL and in jeopardy of termination. The employee was then terminated for job abandonment after failing to respond to the letters.

Subsequent to the termination, the employee sought TTD benefits which were denied based on her termination for job abandonment. The employee argued that she was unable to return to work due the industrial injury (the basic standard for awarding TTD), that she had not abandoned her job because reporting her inability to continue her light duty work constituted a rejection of the employer's light duty offer, and that because the employer terminated her while she was disabled, the employer could not argue that she voluntarily abandoned her job. The Industrial Commission as well as the lower courts rejected these arguments.

The Ohio Supreme Court rejected the employee's arguments as well, holding that in accepting the employer's light duty offer, she was subject to the employer's absenteeism policy. Further, the employee failed to provide any medical certification that the light duty work was beyond her capabilities, let alone providing any explanation at all for her failure to return to work. The Court concluded; "When a claimant is discharged because of actions that were initiated by the claimant and that were not related to the industrial injury, a voluntary separation from employment has occurred that breaks the causal relationship between the industrial injury and the loss of earnings."

Accordingly, employers should be aware that employees serving in light duty assignments can be treated just like any other employee with regard to workplace rules and regulations.

Religious Dress by Employees in Public Schools

The U.S. Equal Employment Opportunity Commission (EEOC) recently released guidance regarding the rights of employees to wear religious dress in the workplace. Under Title VII of the Civil Rights Act of 1964, employers with at least 15 employees are generally prohibited from discriminating against employees on the basis of religion. As a general rule, employees have a right to wear religious articles of clothing and adhere to religiously-based grooming practices. Employers can only limit such practices if they can establish that the practices cause undue hardship.

The definition of religion is very broad, and includes beliefs not held by others of a religious sect, as well as beliefs that are not part of a formal sect. An employer need only have knowledge (or should have had knowledge) of the need for a religious accommodation for Title VII protections to be triggered. Knowledge occurs when an employee informs the employer of the religious reason for wearing the dress or garb that is in conflict with the employer's dress policy.

Discrimination against an employee due to the employee's religious dress can take various forms. Discrimination includes the following:

- disparate treatment in hiring practices, job duties, or promotion or termination practices
- denial of reasonable accommodations for religious dress, unless the accommodation would cause undue hardship on the employer
- Segregation in the workplace
- Harassment by other employees or supervisors due to religious dress
- Retaliation due to engaging in a protected activity, such as requesting an accommodation from the employer, claiming discrimination, or opposing discriminatory practices

Employers are only required to provide accommodations for religious beliefs that are "sincerely held." Despite this requirement, an employee's sincerity is not typically questioned, as an employee may have recently converted to a religion or may have changing religious beliefs over time. If the employer has a legitimate reason for questioning sincerity, however, the employer may request information from the employee to be able to evaluate the need for the request.

Additionally, employers are not required to provide accommodations if such accommodations would cause an undue hardship on the employer. For an "undue hardship" to occur, the employer must show more than minimal cost or burden. For example, jealousy of other coworkers or negative responses from the community do not equate to undue hardship. On the other hand, there may be situations in which allowing the accommodation would impact workplace safety, security, or health concerns causing an undue hardship on the employer.

What accommodations are appropriate/inappropriate?

- An employer may allow an employee to wear religious clothing with the requirement that the clothing be covered, as long as the requirement to cover the garb would not violate the employee's religious beliefs.
- An employer cannot require an employee to work "behind the counter" or in another non-public position due to the employee's religious dress.
- An employer may allow an accommodation for religious dress if employees are required to comply with workplace safety regulations, as long as the accommodation does not violate the employee's religious belief. For example, if an employer has a policy that requires employees to have short hair for safety reasons, the employer may need to make an accommodation for an employee whose religion mandates a need to wear long hair by requiring the employee to put her hair in a ponytail, but only if the accommodation does not violate her religious beliefs.

The EEOC specifically points out that government agencies are not exempt from allowing employees to wear religious garb. However, the specific nature of a public school can also impact the rights of employees. In general, public school employees have less freedom to wear religious garb than public school students do, in part because acts of public employees can be viewed as government endorsement of religion. When determining dress codes for school employees, it is important to make sure that any dress code policy is content and viewpoint neutral. If a policy is directed specifically at religious symbolic expression, it may be held to violate the Free Exercise Clause of the First Amendment.

How this Affects Your District:

1. Make sure administrators are informed of Title VII's requirement to provide accommodations for religious dress.
2. If the district refuses an accommodation, make sure there is documentation of the undue burden that the accommodation would have caused to the district.
3. Review your anti-harassment policies and ensure that there are confidential complaint systems for both victims and witnesses to report incidents of harassment due to religious dress.
4. If questions arise regarding whether religious dress should be accommodated, contact your legal counsel.

Religious Garb and Grooming in the Workplace: Rights and Responsibilities, U.S. Equal Employment Opportunity Commission (2014).

FERPA & Online Privacy of Students

As districts become more engaged in the world of online learning, the privacy rights of students becomes a greater concern. The Family Educational Rights and Privacy Act (FERPA) protects the educational records of students from unauthorized disclosure. FERPA requirements come into play when online activities require the use of personally identifiable data, such as students' names, passwords, or contact information. Providers of online educational services may obtain access to educational records through either the school official exception or the directory information exception under FERPA, subject to the following rules and limitations.

School Official Exception:

The school official exception under FERPA may allow districts to release student records to providers to set up student user accounts or profiles. The school official exception allows districts to disclose personally identifiable information to providers as long as the following applies:

- The provider performs a service that would otherwise be performed by school employees;
- The provider meets the district's criteria under the annual FERPA notice for being a school official with legitimate educational interests in the records;
- The district maintains direct control over the provider's use and maintenance of the records; and
- The provider only uses the educational records for the authorized purpose and does not disclose them to any third party without permission.

Districts should ensure that any contractual agreement with providers meets the requirements of FERPA. The contract should give the district the direct control over the educational records disclosed to the provider. Additionally, the contract should establish procedures to comply with FERPA's parental rights to access to educational records. This could include provisions to allow parental access to data within a reasonable period of time, not to exceed 45 days after a parent request is received.

If information is obtained through the school official exception, providers are limited to using the educational records for the sole purpose provided in the contact with the school. Therefore, the providers would be prohibited from using those educational records to market new products, target individual students with advertisements, or share the information with a third party. On the other hand, information that has been de-identified no longer falls under FERPA's limitations.

Directory Information Exception:

Districts may also be able to release students' information to providers under the directory information exception. Directory information is limited to educational records that would generally not be harmful or invasive to privacy if disclosed. To release students' records under the directory information exception, districts must determine the specific categories of directory information to be disclosed and publish those categories in a public notice. This approach limits the information that a district may disclose to a provider, as it only allows disclosure of information identified as directory information. Additionally, parents may be able to "opt out" of the disclosure, thereby barring providers from being able to create accounts or provide information to students who have "opted out." If a district uses this approach to releasing educational records, providers would not be subject to FERPA regulations regarding the use of the information or re-disclosure limitations.

Other Privacy Protections:

In addition to FERPA, the Protection for Pupil Rights Amendment (PPRA) provides protections for information that is obtained directly from students, as opposed to FERPA that applies to educational records of the district. PPRA is triggered when students provide personally identifiable information through engagement with online resources. Although PPRA has notification and "opt-out" rights for parents, parental notice and the opportunity to "opt-out" are not required when students' personal information is used exclusively to provide educational services.

In addition to FERPA and PPRA requirements, ODE recommends other student protection measures including the following:

- Establish policies and procedures for approving online educational services and providers
- Use clear contract language in service provider agreements to address student information guidelines, including the following provisions:
    - Security and Data Stewardship Provisions
    - Information Collection Provisions
    - Data Use, Retention, Disclosure, and Destruction Provisions
    - Data Access Provisions
    - Modification, Duration, and Termination Provisions
    - Indemnification and Warranty Provisions
- Use caution and establish procedures for determining whether to use "click-wrap" products or services that do not allow the district to negotiate the terms of service

How this Affects Your District:

It is important to review your current procedures for obtaining online educational service providers.

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FERPA & Online Privacy of Students, Cont.

The following questions may guide your review:

1. What procedures are in place for entering into online educational service agreements?
2. Who is authorized to enter into these service agreements?
3. Have those individuals been trained in the legal requirements regarding the release of educational records?
4. Have current service agreements released student records under the school official exception or the directory information exception? Is this the best approach for the district?

When negotiating contractual agreements with providers, districts should consult with legal counsel to help ensure the contractual agreement is compliant with FERPA restrictions on the release of student educational records.

Bus Driver's Decision to Drive Away From Disobedient Student Found Negligent

***Sallee v. Watts*, 2014-Ohio-717.**

In February, an Ohio Appeals Court determined that a bus driver was liable for negligent operation of a motor vehicle when she drove away from a bus stop before a student had safely crossed the street to her home.

The case involved a first grade student and a bus driver in the Three Rivers Local School District ("Three Rivers"). On the day of the incident, the bus driver dropped the student off at her designated stop. Instead of crossing the street to get to her house as she normally did, the student lingered at the stop with another student. Both students then proceeded to run down the street. The bus driver honked the horn in an attempt to get the two students' attention. The students ignored the driver's signal, and the driver continued with her bus route. When the bus was several blocks away and out of sight, the student attempted to cross the street and was struck by a car.

The student's mother filed suit on the student's behalf seeking damages for the personal injuries the student sustained from the accident. The District claimed that it was entitled to immunity for the claims made by the student and her family.

Pursuant to R.C. 2744.02(A)(1), political subdivisions receive immunity for "injury allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function," unless an exception found in R.C. 2744.02(B) applies. It was undisputed that The District was engaged in a governmental function while providing transportation for the students to and from school. Thus, the question remaining for the court to decide was whether or not an exception applied.

Of the exceptions available, the one in dispute in this case was R.C. 2744.02(B)(1) which holds political subdivisions liable for any injury "caused by negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority." When examining the exception, the trial court determined that the issue was not related to the driver's actual operation of the bus, but instead the driver's conduct in not supervising the students properly and ensuring that they had crossed the street before proceeding with the route. However, the trial court did not take into account a recent Ohio Supreme Court holding that defined negligent operation concerning school buses as "negligence in driving or otherwise causing the vehicle to be moved." Therefore, the student argued, that the bus driver had in fact "operated a motor vehicle" when she proceeded with the route. The student further argued that another statute, R.C. 4511.75(E), was also violated. If applicable, this second statute would consider the driver's conduct as negligence per se because the statute provides that "[n]o school bus driver shall start the driver's bus until after any child … who may have alighted therefrom has reached a place of safety on the child's … residence side of the road."

Examining the facts of the case, there is no dispute about whether the driver drove away before ensuring that the student had crossed to the side of the street where her house was located. Since the statute imposing negligence per se sets forth a specific requirement that the bus driver must abide by — not starting the bus until the child "has reached a place of safety on the child's residence side of the street" — there is no obligation under the law to consider what a reasonable person would do if faced with the same circumstances. The only analysis in the situation was if either the student crossed the street to her house before the bus driver started the bus, or if she had not. Therefore, the bus driver was found to be negligent per se in the operation of a motor vehicle by the Court of Appeals.

How this Affects Your District:

This case serves as an example of a delicate area in education law. R.C. 4511.75(E) was primarily enacted to protect students as they cross the street and go home at the end of a school day. Contrarily, the bus driver was left in a difficult decision. The student was the first on her route home and she had a full bus of students under her watch that she was also responsible for getting home. The driver had honked to try to get the student to cross and had notified school officials that the student had not crossed the street to go home. Under R.C. 4511.75(E), no matter what the circumstances were, the driver was supposed to remain parked until the child crossed the street. Thus, the driver is forced to either do as the statute prescribes and remain parked indefinitely with all the

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Bus Driver's Decision to Drive Away From Disobedient Student Found Negligent

other students remaining on the bus, or proceed on the route to take the other students home in violation of the statute. The statute, although well-meaning, does not allow for common situations such as the one presented in this case. Therefore, it will be interesting to follow the legislature in upcoming months to see if any revisions are made that would protect all three parties — the student exiting the bus, the children who remain on the bus, and the driver who transports the students. In the interim, school districts should remind their bus drivers of their responsibilities when delivering students home at the end of the school day.

Education Law Speeches/Seminars

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
Presented by Bill Deters and Bronston McCord

Education Law Legal Updates 2013-2014 – July 10th, 2014 (Webinar ONLY, from 8:00 a.m. to 12:00 p.m.)

Other Upcoming Presentations:

May 22nd: Section 504 and IDEA Compliance Seminar
Pam Leist, Jeremy Neff, and Erin Wessendorf-Wortman

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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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