Ennis Roberts Fischer
School Law Review

1714 West Galbraith Rd.
Cincinnati, Ohio
45239

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

FAX
(513) 562-4986

April 2009

Inside This Issue:

Ohio Court Rules for Schools in Extracurricular Suspensions 1

Legislative Happenings 2

COBRA Subsidy Notification Forms 3

New Records Retention Forms Available 4

Ohio Court Rules for Schools in Extracurricular Suspensions

The Court of Appeals for the First Appellate District in Ohio recently rendered a decision in a case where a local school district had removed a student from participating in extracurricular activities The specific issue in front of the court was whether a student may appeal a suspension or expulsion from extracurricular activities. The court held that while students have a right to seek redress in the courts from expulsions and suspensions from school, they have no similar right to appeal expulsions and suspensions from extracurricular activities.

The controversy in this case arose when the plaintiff, a senior at Loveland high school, was suspended for part of the football season after it was determined that he had violated the school's athletic code of conduct. The administration learned from a school resource officer, who was also a Loveland police officer, that the plaintiff had been arrested during the summer for possession of alcohol. Possession of alcohol was proscribed by the athletic code of conduct, and after meeting with the plaintiff and his parents, the school decided to suspend the plaintiff pursuant to the code of conduct provisions. The plaintiff subsequently sued the school seeking declaratory and injunctive relief. The court granted the plaintiff's temporary injunction, which prevented the school from enforcing its athletic code of conduct and allowed the plaintiff to participate in the football season. The lower court granted the injunction because it determined that the school had come across the information concerning the plaintiff's arrest illegally. The court reasoned that the plaintiff was a juvenile and that juvenile records were confidential.

On appeal, Ennis, Roberts, & Fischer attorney Dave Lampe argued on behalf of the school district. He argued that the trial court had erred by exercising jurisdiction because there is no statutory right to appeal a school district's determination about extracurricular activities. He alternatively argued that that the plaintiff had not established a likelihood of succeeding on the merits of his temporary injunction claim because nothing had prevented the school resource officer from informing the athletic director of the plaintiff's arrest.

The appellate court ruled in favor of the school on both issues. With respect to the first issue, the appellate court determined that there is no right to appeal a school board's decision absent an express statutory right to appeal. The court noted that Ohio Revised Code section 3313.66(E) originally gave students the right to appeal expulsions and suspensions from both curricular and extracurricular activities. In 1999, however, the Ohio legislature amended the statute, and removed the word "extracurricular." The court also mentioned the legislature's enactment of ORC 3313.664 in 1996 which allowed schools to adopt policies for prohibiting students from participating in extracurricular activities. Based on this legislative action, the appellate court determined that it was clear the right of appeal extended only to curricular activities. The court further relied on the federal sixth circuit case *Glenn v. Harper* to support its decision, which in 1978 held that there is no constitutional right to participate in sports. After the appellate court determined that there was no statutory or constitutional right to appeal, it then determined that the

(Continued on page 2)

Ohio Court Rules for Schools in Extracurricular Suspensions

trial court clearly erred in hearing the original case, and consequently erred in granting the plaintiff's temporary injunction.

Finally, the court also found that even if the courts had jurisdiction to hear the case, the school district would still have prevailed. The court noted that Ohio's public-records law requires that any record kept by a public office be available to the public, unless its release is prevented by either state or federal law. The trial court had relied on ORC 2151.14 to find that juvenile records were not subject to the public records law. The appellate court, however, determined that this statute provides confidentiality of juvenile records only for those kept by the probation department. Juvenile arrest records on the other hand, are not subject to confidentiality. The court subsequently found that no statutes removed the plaintiff's arrest records from the public records law and, thus, the police officer was entitled report the arrest of the student to the school.

How this impacts your district:

This case confirms that students do not have a right to appeal a school district's decision concerning extracurricular activities to the courts. Previously, many schools have in the area had removed students from participating in extracurricular activities due to violations of the athletic codes of conduct, only to have the court grant a temporary injunction effectively barring the school from enforcing its policy. Now schools should be confident that they have the authority to enforce their code of conduct concerning extracurricular activities without fear that the courts will simply undermine any decision to discipline. If your district has any questions pertaining to the athletic codes of conduct or disciplinary procedure, please do not hesitate to contact Ennis, Roberts & Fischer.

Legislative Happenings

Employee Free Choice Act (EFCA)

In our January newsletter, we discussed the likelihood that the EFCA would be enacted into law shortly after President Obama took office. The EFCA would transform American and labor law in a number of ways. Most importantly, the unionization process would be altered to allow employees to unionize via a card-signing process. The card-signing process would remove the current right of employees to vote in order to decide whether to be represented by a union in a supervised election. It was estimated that the EFCA could result in an increase in the unionization of American business from the current rate of eight percent to as much as twenty-five percent. Clearly such a change would have a considerable affect on American business.

Currently, we are a few months into the new administration and it seems as if enactment of the EFCA is in doubt. Pennsylvania Senator Arlen Spector had been the only Republican who voted in favor of the EFCA during the last Congressional session. Spector, however, recently announced that he would oppose the EFCA, and his opposition to the bill is likely to prevent its supporters from having enough votes to override a filibuster in the Senate. While this news may likely be welcomed by employers, it is important to note that it certainly does not end the debate in the future. While the currently proposed EFCA has gone from inevitable to unlikely, employers must be aware that the pro-labor sentiments of the administration and throughout much of Congress may result in future proposed legislation which advances many of the changes sought in the EFCA.

Ohio Dating Violence Bill

The Ohio legislature may be considering a new bill concerning student relationships in the near future. Rep. Sandra Harwood sponsored House Bill 19 in an effort to address "Dating Violence" in schools. The proposed bill would require schools to adopt a dating violence policy, include education on the subject as part of the health education curriculum, and provide faculty training on the topic. Specifically, the bill provides that pupils in grades seven through twelve receive instruction defining dating violence, typical warning signs, and the characteristics of healthy relationships. The bill also requires that school employees receive education on the subject to coincide with the instruction responsibilities. To accomplish this goal, the legislation requires school districts to provide dating violence training for administrators, teachers, nurses, and mental health staff working in grades seven through twelve.

The Bill also requires each board of education to adopt a dating violence policy, which will be applicable to students "at school." The proposed legislation defines "at school" as, a classroom, on or immediately adjacent to school property, on a school bus or at any school sponsored activity or event, whether or not it takes place on school grounds.

The bill further requires that each board of education must, at minimum, include the following provisions: a statement that dating

(Continued on page 3)

Legislative Happenings

violence will not be tolerated, reporting procedures, guidelines describing how employees should respond to school incidents of dating violence, and disciplinary procedures pertaining to at-school dating violence violations. Currently the bill is being debated in the House Education Committee.

Ennis, Roberts, & Fischer will keep your district updated on any developments in the Ohio legislature concerning the bill.

Possible "Sexting" Bill in Ohio

The Ohio legislature may also be considering a proposal to change the law with respect to "sexting." "Sexting" occurs when students take explicit photos of themselves and others and send them to fellow students via cell phones. Sexting has become a growing concern among school administrators throughout the nation. Recently, students at Mason schools were caught with sexually explicit pictures of a teenage student girl on their phones.

While schools are developing disciplinary procedures to handle these problems internally, many citizens are upset with school districts for reporting this information to the police. Criminal prosecution for sexting poses quite a risk for students because under Ohio law, prosecutors may charge the students with a felony and require them to register as sex offenders. For this reason, State Rep. Ronald Maag from Lebanon plans to introduce legislation next week that would make the "creation, exchange, and possession of nude materials between minors by a telecommunications device" a first-degree misdemeanor. This legislation would only apply to individuals under the age of eighteen.

Ennis, Roberts, & Fischer will keep you updated on any legislation regarding the "sexting" issue. Schools must be prepared to address any "sexting" issues with disciplinary measures and, may want to consider preventative education on the issue.

While misdemeanor convictions certainly are a better option for students than registering as felony sex offenders, such a conviction may still have a large impact on any student's future potential whether it be through the college admissions process or job prospects. If your district has any questions pertaining to these issues, please do not hesitate to contact Ennis, Roberts, & Fischer for consultation.

COBRA Subsidy Notification Forms

The U.S. Department of Labor (DOL) recently issued four sample notices intended to explain the COBRA subsidy that became law under the American Recovery and Reinvestment Act (ARRA) on February 17, 2009. Ennis, Roberts, and Fischer highlighted many of the complicated provisions pertaining to the Cobra subsidy in our March newsletter. Essentially, employees who were involuntarily terminated between September 1, 2008 and December 31, 2009 may qualify for a subsidy which would cover sixty-five percent of the COBRA premium.

The COBRA provisions in the ARRA also mandate that employers provide "assistance- eligible individuals," and their dependents when necessary, with notice of the COBRA subsidy. The bill requires that employers provide notice by April 18 that eligible individuals may now elect coverage under these terms, even if the individuals had declined COBRA coverage originally. The bill provides that a general notice of the new provisions must be provided to all persons who incur a COBRA qualifying event between September 1, 2008 and December 31, 2009. Furthermore, a more specific notice pertaining to the subsidy coverage and the extended election period must be provided to any former employees who were involuntarily terminated between September 1, 2008 and February 17, 2009.

The DOL has posted four model notices on its website in an effort to help plans and individuals comply with the new requirements. The DOL designed each model notice for a particular group of qualified beneficiaries. The following information is taken from the DOL website and provides a brief description of the model notice forms that are available at http://www.dol.gov/ebsa/COBRAmodelnotice.html.

General Notice: (Full version)

Plans subject to the Federal COBRA provisions must send the General Notice to all qualified beneficiaries, not just covered employees, who experienced a qualifying event at any time from September 1, 2008 through December 31, 2009, regardless of the type of qualifying event, AND who either have not yet been provided an election notice or who were provided an election notice on or after February 17, 2009 that did not include the additional information required by ARRA. This full version includes information on the premium reduction as well as information required in a COBRA election notice.

General Notice: (Abbreviated version)

The abbreviated version of the General Notice includes the same information as the full version regarding the availability of the premium reduction and other rights under ARRA, but does not include the COBRA coverage election information. It may be sent in lieu of the full version to individuals who experienced a qualifying event during on or after September 1, 2008, have already elected COBRA coverage, and still have it.

(continued on page 4)

COBRA Subsidy Notification Forms

Alternative Notice:

Insurance issuers that provide group health insurance coverage must send the Alternative Notice to persons who became eligible for continuation coverage under a State law. Continuation coverage requirements vary among States, and issuers should modify this model notice as necessary to conform it to the applicable State law. Issuers may also find the model Alternative Notice or the abbreviated model General Notice appropriate for use in certain situations.

Notice in Connection with Extended Election Periods:

Plans subject to the Federal COBRA provisions must send the Notice in Connection with Extended Election Periods to any assistance eligible individual (or any individual who would be an assistance eligible individual if a COBRA continuation election were in effect) who:

1. Had a qualifying event at any time from September 1, 2008 through February 16, 2009; and
2. Either did not elect COBRA continuation coverage, or who elected it but subsequently discontinued COBRA.

This notice includes information on ARRA's additional election opportunity, as well as premium reduction information. This notice must be provided by April 18, 2009.

How this impacts your district:

The April 18 deadline on which to provide notices of the available subsidy is quickly approaching. The DOL's website and model notices should help employers ensure that they comply with the notice requirements set forth in the ARRA. If your district has any questions pertaining to the COBRA subsidy requirements, please do not hesitate to contact Ennis, Roberts, & Fischer.

New Records Retention Forms Available

The State of Ohio has recently issued new public record forms that should help local school districts comply with Ohio's public records law. In light of the many cases that have been detailed in this newsletter concerning public records requests, it is essential that school administrators develop and implement a records retention plan that complies with Ohio law. The new forms provide a more efficient process for schools to handle the maintenance and destruction of records.

The new retention schedule, Form RC-2, provides the foundation for records management. It lists the records that the office maintains and the length of time the records should be kept. When the retention period expires, the records may be disposed. The first part of the RC-2 provides a place for signatures and certification of several entities including: the local government unit, the records commission, the Ohio Historical Society (OHS), and the Auditor of State's Office. The second part of the form provides columns that should be filled in to represent the records associated with the form. The columns provide for a schedule number, a record title and description, a retention period, and media type. No dates should appear on this part of the form. This form must be submitted to OHS which will keep a copy on file, and return a copy after forwarding it to the Auditor's office. Any revised retention schedules must also be resubmitted to OHS. The retention schedule provides for ongoing disposal and helps to avoid the accumulation of unnecessary records. Furthermore, it is in the best interests of school districts to comply with the retention schedule and file with the appropriate government entities to protect their legal interests in the face of public records requests.

Often times, government bodies will encounter records that are no longer created and have become obsolete. These records should be listed on Form RC-1, which is an application for a one-time records disposal of obsolete records. RC-1 is essentially the same format as RC-2, however, the inclusive dates should be provided after each record series title on the RC-1.

After copies of the RC-1 or RC-2 are returned, it is now time to determine which records can properly be disposed. These records must be listed on a Form RC-3, Certificate of Records Disposal. This form provides OHS with a final opportunity to choose records of historical value. It also provides an administrative record of the records which were disposed, when they were disposed, and that they were disposed according to a retention schedule. The first part of Form RC-3 is similar to the other two forms, and requires contact information and signatures. The second part of the form is where the records that are to be disposed of should be listed. The title, schedule number, and RC approval date must all be provided from the retention schedule. Then the media type to be destroyed or retained must be provided, as well as the inclusive dates of the records and the proposed date of disposal, which must be at least fifteen business days after the date the RC-3 was submitted. The original form should be sent to OHS, and a copy should be sent to the Records Commission. If OHS wants to select some of the records for archival purposes it will contact you prior to the date selected for destruction.

How this impacts your district:

School districts should be aware that the new RC forms are available and should start using them immediately. The forms should help to efficiently track the retention schedules of public records and provide documentation of compliance with Ohio Public Records Law. If your district has any questions pertaining to these forms, or with respect to your maintenance and retention policies in general, please contact Ennis, Roberts, & Fischer for consultation.

Education Law Speeches/Seminars

Ennis, Roberts & Fischer regularly conducts seminars concerning education law topics of interest to school administrators and staff.
Popular topics covered include:

Cyber law
School sports law
IDEA and Special Education Issues
HB 190 and Professional Misconduct

To schedule a speech or seminar for your district, contact us today!

UPCOMING SPEECHES
May 7, 2009—C. Bronston McCord III at the Center for Dispute Resolution
"Student Discipline in Cyberspace"

May 12, 2009 - Jeremy Neff at OSBA Cyberlaw 2009: Technology and the Law Seminar
"Who can view, who can sue?"

Contact One of Us

William M. Deters II
wmdeters@erflegal.com

J. Michael Fischer
jmfischer@erflegal.com

Jeremy J. Neff
jneff@erflegal.com

Ryan M. LaFlamme
rlaflamme@erflegal.com

C. Bronston McCord III
cbmccord@erflegal.com

David J. Lampe
dlampe@erflegal.com

Gary T. Stedronsky
gstedronsky@erflegal.com

Rich D. Cardwell
rcardwell@erflegal.com