



Ennis Roberts Fischer SCHOOL LAW REVIEW



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Ennis, Roberts & Fischer's School Law Review has been developed for use by clients of the firm. However, the review is not intended to represent legal advice or opinion. If you have questions about the application of an issue raised to your situation, please contact an attorney at Ennis, Roberts, & Fischer for consultation

Legislative Update

Numerous Ohio bills have recently or will soon become effective. Below is a synopsis of the most important ones that school districts should be aware of:

HB 225 — effective March 22, 2012

County auditors, rather than the tax commissioner, now have the power to review exemption applications for certain types of property located within the auditor's county. Those properties include public roads and highways, additions to currently-exempt properties owned by a state or political subdivision, property of the federal government and property of the state or boards of trustees and housing commissions of state universities and the northeastern Ohio universities college of medicine, exemptible under R.C. § 3345.17.

As a result of this change, R.C. § 5715.27(B) now requires any board of education that normally would have requested applications for exemption from the tax commissioner to also submit a request to the county auditor for them to provide any applications for exemption of property which may now be exempted by the county auditor. This does not change any notifications that are currently on file with the tax commissioner, but only requires that a new notification be provided to the county auditor.

HB 66 — effective May 4, 2012

This legislation requires the state auditor to establish a fraud reporting system. This type of system has already been in place, but the legislation codifies its existence. The purpose of the fraud reporting system is to provide a method for public employees and other citizens to file anonymous complaints of fraud and misuse of funds by public offices or officials.

Most important to school districts are the following new requirements:

- ◆ Each district must provide information about the fraud reporting system and the means of reporting fraud to new employees. Each new employee must confirm that he or she received the information. The state auditor will provide a model form to be used by new employees for verification they received this information. Currently the form is not available, but it should be available in early April.
- ◆ Each district must make all current employees aware of the fraud reporting system by May 4, 2012.
- ◆ A district may provide the information about the fraud reporting system

and the procedures for reporting fraud in the employee handbook and, so long as the employee signs and verifies receipt of that handbook, that will qualify as providing notice to employees.

HB 96 & HB 157 — HB 96 went into effect March 22, 2012 and HB 157 went into effect December 21, 2011.

Both of these bills deal with dyslexia. HB 96 alters R.C. § 3323.01 by now specifically stating that dyslexia is a "specific learning disability." This makes it clear that a child with dyslexia is a "child with a disability." Prior to this bill, the Ohio Administrative Code, along with federal statutory law and federal administrative regulations already specified that one of the specific learning disabilities is dyslexia. Therefore, the primary purpose of this provision of the bill was to update the statutory language to be consistent with other federal and state regulations.

In addition to expressly including dyslexia as a specific learning disability, HB 96 requires the Superintendent of Public Instruction to establish a pilot program for school districts to test the delivery of early screening and intervention services for children with risk factors for dyslexia. The pilot program will begin operation in the 2012-2013

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Legislative Update, Cont.

school year and continue for three years. During the third year, the Superintendent is required to submit to the General Assembly an evaluation of the pilot project. The Superintendent will choose three school districts, one of which must be located in an urban setting, one in a suburban setting, and one in a rural setting. In order to be considered for the project, school districts must submit a proposal to the Su-

perintendent.

HB 157 also deals with dyslexia. This bill allows ESC's to bring in a "dyslexia specialist" to provide training to K-4 teachers and schools in its districts on the indicators of dyslexia and the types of instruction that children with dyslexia need. Further, if a district's ESC chooses not to provide training, the district can directly en-

gage the services of a dyslexia specialist.

The bill goes on further to talk about the contracting requirements between ESC's and school districts. Districts should note that all service agreements for the 2012-2013 school year must be filed with ODE by July 1, 2012.

Another Case to Watch Dealing With Student Internet Speech

Bell v. Itawamba County School Board, 11-00056 (N.D. Miss. Mar. 15, 2012).

A Mississippi Federal District Court ruled in favor of a school district that punished a student for writing, performing, and posting a rap song to Facebook and YouTube.

The rap was written about two coaches at Itawamba Agricultural School, where the student attended school. The student alleged that these two coaches were engaging in inappropriate relationships with female students and the lyrics of the rap included statements such as "going to get a pistol down your mouth." Since the rap was posted to both Facebook and YouTube, most students and many faculty members became aware of it, at which point the student was suspended pending a hearing.

After a hearing, the school board's disciplinary committee concluded that the student's conduct (writing, recording, and posting the rap song) constituted "harassment and intimidation of teachers and possible threats against teachers." The committee decided to suspend the student for seven days and transfer him to an alternative school for five weeks. After an appeal, the school board upheld the disciplinary action because they too believed that the publication of the rap had "threatened, harassed, and intimidated school employees."

The student and his mother sued the school district alleging that his pun-

ishment violated his First Amendment right to free speech and that the punishment violated his mother's right to determine how to best raise, discipline, and educate her child. The court was sympathetic to neither of those claims.

The court looked at various cases to make its decision, but based most of its decision on the *Tinker* analysis. The court narrowed the questions down to (1) whether the student's song caused or tended to cause a material and/or substantial disruption at school; or (2) whether it was reasonably foreseeable that the song would cause a material and/or substantial disruption at school. The specifics of the rap are quite vulgar and thus will not be included in this article, however the lyrics referenced actions that both coaches had allegedly engaged in with female students, referenced one of the coach's wives, and made references to shooting both coaches. The court was persuaded by the threatening nature of the lyrics that the rap song constituted "harassment and intimidation of teachers and possible threats against teachers."

Further, the court held that the songs caused an actual disruption at school for various reasons. First, one of the coaches found out about and first heard the rap while at school, when another student played it for him. Then, both coaches testified that they felt the need to change their teaching style because of their perception that students would be wary of them due to the suspected inappropriate behavior. Moreover, one of the coaches testified that he did feel threatened by the ref-

erences to shooting him.

The court stated that in addition to the actual disruption, it was reasonably foreseeable that a song written and published that levies charges of serious sexual misconduct along with threats would cause a material and substantial disruption at school.

As to the mother's right to determine the best way to raise her child, the court was unmoved. The court stated that "there may be circumstances in which school authorities, in order to maintain order and a proper educational atmosphere..., may impose standards of conduct on students that differ from those approved by some parents." The school's decision to suspend and require the student to attend an alternative school for five weeks was tied to the school's interest in maintaining order. The student was given two hearings, both of which his mother was present at, and therefore, both his rights and his mother's rights related to due process were met.

How This Affects Your District:

This will be a case to watch as it moves through the court system. It will likely be appealed to the 5th Circuit Court and, possibly, then to the U.S. Supreme Court. Up to this point, the U.S. Supreme Court has declined to hear any cases dealing with internet speech and discipline at school related to that speech. Schools have been looking for some type of bright line test that gives them an idea of when they can and cannot discipline students for

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Another Case to Watch Dealing With Student Internet Speech, Cont.

off-campus internet speech, but the Supreme Court has left them wanting.

From the cases the Court declined in January, we can generally state that if the student speech is harassment against students then schools have more leeway in disciplining. However, if the speech is harassing teachers and staff, courts are less likely to allow disciplinary action to be taken against the student. If the 5th Circuit agrees with the current decision, the case will pos-

sibly stand for the notion that when the harassment is pointed at particular staff members, and in addition to harassment there are threats of violence, the school will be able to discipline the student for the actions.

Regardless, decisions related to off-campus student internet speech are highly fact specific. We encourage districts to make sure all of your policies are updated to include an ability to

punish off-campus conduct when that conduct could reasonably cause a disruption on campus. Further, your policies should include the idea that harassment, intimidation, and threats towards district employees, not just other students, are punishable. This will provide notice to students of the behaviors that are inappropriate and make any challenges to discipline easier to uphold.

Accountability for Students with Disabilities to be Re-Evaluated by U.S. Department of Education

In early March, the Department of Education ("ED") announced that it will implement new steps in order to help close the achievement gap for students with disabilities. It plans to move away from the current compliance-based approach to a system that looks at the level of education students are receiving and the results of the instruction these students receive.

The ED contends that while stu-

dents with disabilities are now ensured access to educational resources, the actual outcomes of the education the students are receiving have not been greatly improved. Arne Duncan commented that the best way to ensure that all students receive the supports and services they need is to focus on results.

Over the next year, the ED will work to "develop and implement a new

review system that takes a more balanced, results-driven approach to assessing how states are educating students with disabilities." Therefore, the ED will not be conducting visits scheduled for the 2012-2013 school year, but instead will be devoting its time to creating a review system that focuses on student outcomes and not just procedural compliance.

Student Activity in City Owned Parking Lot Was Covered By Code of Conduct

Judd v. Bergant, 2012-Ohio-979

Recently, the 11th Appellate District Court in Ohio upheld a district's decision to expel two students after the students were observed removing drug paraphernalia and tobacco products from their vehicle during the school day. The two students were siblings and, after their mother was notified of the school's intent to expel them, she filed an appeal in order to stop the expulsion.

The mother's claim was based on two main arguments: (1) that the record did not support a finding that her children's actions violated any of the four rules of the Code of Student Conduct; and (2) the conduct of her children did not occur on school property and, thus, could not provide a basis for expulsion.

As to the first claim, the court looked at each school rule that the students had allegedly broken and came

to the conclusion that the students had indeed violated each school rule.

The first rule violated stated that no student shall "by use of violence, force, noise, coercion, threat, harassment, intimidation, fear, passive resistance or any other conduct, cause, attempt, or threaten to cause the disruption or obstruction of any lawful mission, process, activity, or function of the school, nor encourage others to do so." Based on testimony from two other students at the school, both of these students had attempted to sell drugs during the school day. This attempt to sell drugs was a disruption of the function of school and, therefore, the rule was violated.

The second rule violated stated that students were not to "use, possess, handle, transmit, sell or conceal any object that can be classified as a weapon or dangerous instrument or instruments that may be disruptive to

education." The court noted that this rule generally applies to weapons, but that the idea that attempted drug sales or use are disruptive to education is not a faulty conclusion. Therefore, it was within the right of the school to count the student's actions as disruptive to the educational process and thus a violation of the rule.

The third and fourth rules were closely tied together and the court analyzed them as one. The rules stated that students "shall not possess, offer to sell, or conceal any drug of abuse, instrument or paraphernalia" and neither should a student possess "tobacco or tobacco containers." Based on the evidence, the students possessed both of these types of objects and therefore, the third and fourth rules were violated.

Since it was reasonable for the district to find that the students violated

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Student Activity in City Owned Parking Lot Was Covered By Code of Conduct, Cont.

these four rules, the court found the expulsion proper.

As to the second claim – i.e. the conduct did not occur on school property – the court found the mother’s argument unpersuasive mainly because the Code of Student Conduct stated that the code was “applicable on school grounds at all times or off school grounds during a school-sponsored activity, on any school conveyance and at any other time when the student is subject to the authority of the school.”

When observed removing the drug and tobacco paraphernalia from their car, the students were in a park-

ing lot that was owned by the City and not the school. However, the school held an easement from the City for the use of that parking lot for student parking during any school day or activity. The clause in the paragraph above clearly states that all school rules apply to activities that occur on any school conveyance. The easement from the City was a conveyance and therefore, the rules applied to the students when they were located on that property during the school day.

How This Affects Your District:

Most important to the success of the school district in this case was its

inclusion in the Student Code of Conduct the clause that stated that all school rules applied to any student activity occurring on or off school property during school events or activities and on school conveyances. Had the district not had this statement in the Code of Conduct it is probable that this case would have been decided differently. This case should serve as a reminder that in order to implement your policies regarding student conduct on and off campus, you must include statements similar to the one discussed above in your Student Code of Conduct.

Introducing ERF Practice Teams

All of our attorneys are well versed and experienced in general education law topics such as employment and labor relations, as well as student discipline. However, there are times when you or your administrative staff may have questions in more spe-

cialized areas of education law. In order to help you obtain legal support quickly in these areas, we have created topic specific practice teams. The teams are comprised of attorneys who already have experience in and currently practice in these specialized ar-

reas. The practice teams are Special Education, Workers’ Compensation, Construction/Real Estate, and School Finance. Below you will find descriptions, as well as the attorneys that belong to each practice team.

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

School Finance

Taxes, School Levies, Bonds, Board of Revision

Team Members:

Bill Deters
Bronston McCord
Gary Stedronsky
Jeremy Neff

Education Law Speeches/Seminars

Administrator's Academy Dates at Great Oaks Instructional Resource Center

You can enroll in an Administrator's Academy session using the form on our website or by emailing Pam Leist at pleist@erflegal.com.

June 14, 2012 — *Special Education Update*

July 12, 2012 — *Education Law Legal Update*

Other Upcoming Presentations

Gary Stedronsky
OASBO on April 18
Maintaining Property Values Through the Board of Revision Process

Jeremy Neff
Clermont County ESC on April 26
Legal Tips for New Teachers

Jeremy Neff
OCSBA Spring Seminar on June 15
Technology Trends and Troubles

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:

- FMLA, ADA and Other Types of Leave
- Tax Incentives
- Prior Written Notice
- 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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