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Ohio Supreme Court Invalidates Deed Restriction

***Cincinnati City School District Board of Education v. Conners*, Slip Opinion No. 2012-Ohio-2447 (June 6, 2012).**

In early June, the Ohio Supreme Court held that a deed restriction in the contract for the sale of an unused school building preventing the use of property for school use is unenforceable because such a restriction is against public policy. The issue arose after Cincinnati Public Schools ("CPS") sold an old school building to a group who later wanted to use the building to open a community school.

In 2009, CPS conducted a public auction of nine of its vacant school buildings. At the time, R.C. 3313.41(G) required districts to offer vacant school buildings first to community schools only if the district believed the buildings were suitable for classroom use. CPS determined, prior to the public auction, that the buildings were not suitable for classroom use. The property involved in this dispute was only bid upon by one group and the purchase price was $30,000. Attached to the purchase agreement was a section asking how the buyers planned to use the property. The buyers responded that they were not sure, but they might re-sell. Further, CPS included in the deed the following: "Buyer agrees not to use the Property for school purposes, and that the deed to the Property will be restricted to prohibit future use of the Property for school purposes. Such deed restriction will not apply to the Seller, and will not prevent the Seller from repurchasing any portion of the Property in the future and using the Property for school purposes."

About three months after purchasing the property, the buyers received permission from the Zoning Hearing Examiner to reopen the building as a community school. Subsequently, the buyers informed CPS that they believed the deed restriction was void because the restrictions contravened Ohio's public policy.

The Ohio Supreme Court agreed with the buyers. First, the court stated that a board of education has the duty to "manage schools in the public interest." Therefore, the Supreme Court asserted that while a board of education does have the authority to contract, any contract entered into must be within its duties.

One of the statutes reviewed by the court was R.C. 3313.41, where it states that community schools should have right of first refusal on any school property. Then, the Court looked at R.C. Chapter 3314, which makes clear that the legislature allows parents a choice in their children's academic environments. Further, the legislature stated that community schools are part of the State's program of education. Based on all of this, the Court concluded that the General Assembly has a strong interest in the creation and maintenance of community schools.

The Court determined that a district's right to contract freely is restricted when the district tries to keep community schools from developing in school buildings disposed of by the district.

How This Affects Your District:

Even though the Court determined that the inclusion of a deed restriction preventing the use of an unused school building for school purposes was improper in this case, courts will continue to analyze each situation where a deed restriction is used on a case by case basis.

The Court seemed focused on the fact that CPS did not offer the property to community schools use prior to putting the property up for public auction. At the time, the statute only required CPS to offer the property to community schools if CPS deemed the property to be useful as a classroom building. This would not be an issue now, because the statute now demands that all real property to be disposed of must first be offered to community schools, regardless of whether a district believes the property

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Ohio Supreme Court Invalidates Deed Restriction, Cont.

can be used as classroom space. If your district is planning to dispose of property, then it should be sure to always offer the property first to community schools.

Also, when there is a public auction and a district does not like the price offered, the district is under no obligation to accept that offer. In this case, the district accepted an offer that was probably much below the fair market value. Districts do not have to accept a low offer and can instead reject the offer and sell to a private purchaser.

We maintain that deed restrictions are still valid, so long as your district adheres to its statutory obligations by allowing community schools to have the right of first refusal. As long as that occurs, the buyers cannot later assert that your district was trying to avoid allowing a community school to open on property formerly owned by the district.

Alternative to .412 Certificate

Last year's HB 153 made changes to the rules regarding "qualifying contracts." According to R.C. 5705.412, a "qualifying contract" is any agreement for the expenditure of money under which aggregate payments from the funds included in the school district's five-year forecast will exceed the lesser of (1) $500,000; or (2) 1% of the total revenue to be credited in the current fiscal year to the district's general fund.

If a district adopts a qualifying contract, the district must attach to the resolution a certificate stating that the school district has the authorization to levy taxes including the renewal or replacement of existing levies which, when combined with the estimated revenue from all other sources available to the district at the time of certification, are sufficient to provide the operating revenues necessary to enable the district to maintain all personnel and programs for all the days in its adopted school calendars for the current fiscal year and for a number of days in succeeding fiscal years equal to the number of days instruction was held or is scheduled for the current fiscal year.

However, HB 153 changed R.C. 5705.412 so that some contracts entered into by boards of education do not need the .412 certificate. If a qualifying contract (1) is a multi-year contract for materials, equipment, or non-payroll services essential to the educational program; and (2) provides savings compared to a single-year contract allowing the district to reduce the deficit it is currently facing in future years, then an alternative certificate can be attached to the contract rather than the .412 certificate. The alternative certificate must affirm both of the statements made above regarding the contract being multi-year and providing savings and it must be signed by the Treasurer, Superintendent, and Board President, just as the normal .412 certificate is signed by those parties.

How This Affects Your District:

If your district is planning on entering into a multi-year contract for materials, equipment, or non-payroll services that are essential to the educational program and that contract will provide savings compared to a single year contract, therefore allowing your district to reduce its deficit, then your district can do an alternative certificate rather than a .412 certificate.

Teacher With Depression Has Disability Under the ADA

***Ekstrand v. School District of Somerset*, No. 11-1949 (7th Cir. June 26, 2012).**

A Federal Appellate Court found that a jury was reasonable when it ascertained that a teacher was a qualified individual with a disability under the ADA, and that the school district was aware of her disability.

Renae Ekstrand was an elementary teacher at an elementary school in Wisconsin for five years before she asked to be reassigned to teach first grade. The school's principal granted that request, and Ekstrand was given a new room on the interior of the building, with no windows. After being assigned the new room, Ekstrand asked the principal numerous times to move her into a room with a window, but those requests were denied.

In the fall of 2005, Ekstrand began to suffer from a form of depression, seasonal affective disorder. In October, her psychologist and primary care physician told her that she should take a leave of absence, which lasted three months. During that three month period, Ekstrand talked with the principal and superintendent about her disorder and explained her need for natural light in her classroom. In November, her psychologist sent a letter to the district office explaining Ekstrand's need for natural light and further noting that her condition had likely been caused by having no natural light in her current classroom situation.

After no changes were made to the classroom situation, Ekstrand's physician wrote a note to the school district informing it that Ekstrand would not come back to school at all during the 2005-2006 school year. Ekstrand filed suit against the school district, claiming the district had failed to comply with the ADA by not affording her appropriate accommodations for her disability.

The district argued that Ekstand was not a qualified individual with a disability and, even if she was, the district was not aware of her disability at the time decisions were made regard-

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Teacher With Depression Has Disability Under the ADA, Cont.

ing a new classroom. The jury found in favor of Ekstrand based on testimony from the psychologist and from Ekstrand regarding her conversations with the principal and superintendent.

How This Affects Your District:

The two arguments the district made, that the teacher was not a qualified individual with a disability and that even if she was the district was not aware of her disability, were faulty for various reasons.

First, districts should realize that forms of depression are a disability in most cases after the establishment of the Amendments Act to the ADA ("ADA -AA"). A disability is any "physical or mental impairment that substantially limits one or more of the major life activities of an individual." Prior to the ADA-AA, courts construed this definition narrowly. However, the implementation of the ADA-AA requires a more liberal interpretation. For example, the ADA-AA adopted a non-exhaustive list of major life activities which includes activities such as concentrating, thinking, and caring for oneself. A person suffering from depression is going to be less likely to be able to complete these types of tasks.

Further, the ADA-AA addressed how courts looked at whether there is a "substantial limitation." The ADA-AA specifies that the precedent regarding substantial limitations is far too restrictive. Now, courts must interpret a substantial limitation in favor of broad coverage. Therefore, if there is any doubt as to whether a substantial limitation exists, then the decision must be made in favor of a person having a disability. In the case of Ekstrand, she was not able to work because of her depression. Her inability to work was likely tied to her inability to concentrate or think while she was in her classroom setting. Therefore, the depression she suffered from was a disability.

As to whether the district was aware of the disability, it was a weak argument for the district to state that it was not aware. The district had notice of Ekstrand's issues with depression, because she, her psychologist and her physician informed the district.

Because of the ADA-AA, employers need to recognize when an employee is unable to work and a reasonable accommodation can be made in order to remedy the person's inability to work, then the accommodation should be made. Ekstrand's continuous request for an accommodation and her inability to be at work because of her depression should have tipped the district off to the fact that she likely had a disability under the ADA.

This case is a great example of how Congress, through the ADA-AA, expects employers to treat employees who have disabilities. The new standard greatly expands the class of protected individuals, and employers who receive requests for accommodations should try to provide accommodations to those people who are likely to be able to claim that they have a disability, under the ADA.

Changes to Bus Driver Eligibility

The Joint Committee on Agency Rule Review (JCARR) released the final changes to the Ohio Administrative Code section 3301-83-23 and those changes became effective July 1, 2012. This section of the administrative code deals with which criminal offenses will make a person ineligible to work as a bus driver in Ohio. The changes include additions, deletions, and creating time limits for how long a particular offense will affect a person's ability to drive a school bus. Where there are time limits, a person is only excluded from working as a bus driver for the amount of time noted after the offense occurs. When the time limit runs out, the person is again eligible to work as a bus driver in Ohio.

Added to the list:

- Vehicular manslaughter and assault
- Abduction

Deleted from the list:

- Permitting child abuse
- Extortion
- Soliciting; after positive HIV test
- Displaying matter harmful to juveniles
- Aggravated arson
- Making terroristic threat
- Impersonating an officer
- Inciting to violence
- Aggravated riot
- Bribery
- Intimidation
- Retaliation
- Perjury
- Escape
- Improperly furnishing firearms to a minor
- Deception to obtain a dangerous drug
- Illegal possession of drug documents
- Tampering with drugs
- Trafficking in harmful intoxicants
- Illegal dispensing of drug samples
- Possession of counterfeit controlled substances
- Contaminating substance for human consumption or use

Added to the list, with time limits:

- Failing to provide for a functionally impaired person – 5 years
- Aggravated menacing – 5 years
- Patient abuse and neglect – 5 years
- Voyeurism – 5 years
- Public indecency – 5 years
- Contributing to unruliness or delinquency of a child – 5 years
- Domestic violence – 5 years
- Carrying concealed weapons – 5 years
- Having weapons while under disability – 5 years
- Driving under suspension – 6 years
- Driving under OVI suspension – 6 years
- Operating a motor vehicle under the influence – 6 years
- Physical control while under the influence – 6 years
- Reckless operation – 6 years
- Railroad crossing violation – 1 year
- Violation of school bus warning lights while operating a school vehicle – 1 year
- School zone speed limit while operating a school vehicle – 1 year
- Possession of controlled substance that is not minor drug possession – 5 years

Offenses that now have time limits:

- Felonious assault – 20 years

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Changes to Bus Driver Eligibility, Cont.

- Aggravated assault – 20 years
- Assault – 5 years
- Aggravated robbery – 20 years
- Robbery – 20 years
- Aggravated burglary – 20 years
- Burglary – 10 years
- Unlawful abortion – 20 years
- Corrupting another with drugs – 10 years
- Trafficking drugs – 10 years
- Illegal manufacture of drugs or cultivation of marijuana – 10 years
- Funding of drug or marijuana trafficking – 10 years
- Illegal administration or distribution of anabolic steroids – 10 years
- Placing harmful objects in food/ confection – 20 years

Alternatives Must Be Attempted Before Excluding Parents From IEP Meetings

***Lake Oswego Sch. Dist.*, 112 LRP 14681 (SEA OR 01/18/12).**

The Oregon Education Department ("ED") found that this district should have taken more steps to ensure the parents of a child with a disability were included in IEP meetings.

The parents alleged they were not given the opportunity to participate in their child's IEP meeting after a verbal altercation between one parent and a district employee. The student involved was a student with autism and his original IEP allowed him to go to the school closest to his home and attend kindergarten with typical peers. There were various supplemental services provided, but the IEP noted that after the child's kindergarten year there would be another meeting to assess the child's placement.

After the child's kindergarten year, the IEP team (including the parents) agreed the student would be better served in the "ACCESS" program. This program was not limited to children with autism, but was small and focused on the individual needs of the students in the program. The child attended the ACCESS program, but after only a few days the parents reported the student no longer wanted to attend and the parents stopped taking the child. At that point, the parents asked to convene a meeting to discuss the student's placement. The district sent out an IEP meeting notice a month before the meeting was to take place and the parents agreed to attend.

The problems began when the parents arrived at the IEP meeting. The district's Special Education Director ("Director") met the parents at the door and introduced himself. At that point, one of the parents told the Director that the student was going to resume going to his original placement, in a regular education class, rather than the ACCESS program and that there was nothing the Director could do about it. An argument ensued and the parent became irate. The parent was asked to leave and did, taking the other parent as well.

The Director held the IEP meeting anyway, stating that the meeting had to be completed, because it was February 15 and the IEP had to be done by February 22. The ED stated that the IEP meeting should not have been held at that time, but rather the district should have made efforts to ensure that at least one of the parents participated in the meeting.

The ED stated that while IDEA regulations do not account for situations where parents come to school for IEP meetings and engage in abusive or hostile actions toward the district administrators, IDEA does require parents be allowed to participate in some meaningful way even if alternative methods must be used to ensure that participation.

One suggestion was that since only one of the parents was irate, the other parent could have participated on the original date, February 15. Another option was to move the date to another day prior to the February 22, the IEP deadline. The ED did not agree that there was too little time for the meeting to be rescheduled. It is possible that if the meeting had been rescheduled that the parent who was causing problems may have been able to calm down enough to participate in the meeting. If on-site participation was not possible, the district could have offered the parents the opportunity to participate via conference call.

By conducting the meeting with no parental participation, the district was in violation of IDEA. Had the district made a better effort to ensure the parents were aware of the various ways they could still participate, the district may have fared better in this decision.

How This Affects Your District:

There are some parents who will inevitably be difficult to deal with, particularly in a situation where they feel as if their child's placement is not appropriate. The best way to deal with these parents is to be patient and make sure that all conversations are well documented. If the time comes where a parent becomes a danger to the district staff, it is proper procedure to disallow that parent to attend, in person. However, the district cannot discontinue that parent's right to participate in the IEP meetings at all.

Parents, regardless of their relationship with the district, should be notified of any IEP meetings. If a parent cannot come to campus for a meeting, then the district should offer the opportunity to participate via telephone. Further, if your district is aware that a parent has a tendency to be hostile, the district should schedule IEP meetings far enough in advance of any deadlines, in order to allow time for rescheduling. If rescheduling is necessary, the district should immediately contact the parents about when to reschedule. Any and all communications regarding rescheduling and offers of alternative methods of participation should be documented.

Recently, in our Special Education Administrator's Academy presentation, we covered the topic of how to deal with hostile parents. That presentation has been archived and if you would like access, please let Pam Leist know and she will be happy to assist you.

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.

September 27th, 2012 — *Sports Law*

December 6th, 2012—*Navigating Workers' Compensation and Unemployment Law Issues*

March 7th, 2013—*Advanced Topics in School Finance Law*

June 13th—*Special Education Legal Update*

July 11th—*Education Law Legal Updates 2012-2013*

Other Upcoming Presentations

Bronston McCord
Mercer ESC Administrative Retreat on August 2, 2012
Legal Update

Pamela Leist & Erin Wessendorf-Wortman
NWOESC Administrative Retreat on August 2, 2012
Legal Update

Jeremy Neff
Hopewell SERCC/SOESC on August 3, 2012
Special Education Legal Update

Erin Wessendorf-Wortman & Ryan LaFlamme
Defiance Administrative Retreat on August 3, 2012
Legal Update

Erin Wessendorf-Wortman
OSBA Attendance, Tuition and Custody Workshop on August 3, 2012
Territory Transfer Troubles

Jeremy Neff
Warren County Career Center on August 20, 2012
Social Media Legal Update

Erin Wessendorf-Wortman
SOESC Superintendent's and Administrator's Retreat on September 14, 2012
Legal Update

Jeremy Neff
Greater Cincinnati Human Resources Association on September 20, 2012
Basics of FMLA

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
- 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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Workers' Compensation

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

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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

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School Finance

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