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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

Transportation of Students Attending Private Schools

Mills v. Maumee City School District, 6th Appellate District, December 5, 2008

The Sixth Appellate District of Ohio recently affirmed a trial court's decision in favor of Maumee City School District in a case involving the transportation of a student to a private school. In this case, the student lived in the Maumee City school district yet attended a private school located outside of the district and more than two miles from the student's residence. Since 2005, the student requested that the public school district provide him with yellow bus transportation to the private school. The District initially determined that providing such transportation in this individual's circumstance would be impractical, and therefore, offered payment as an alternative. The student and his parents, however, refused payment and a hearing in front of the Ohio Department of Education followed. After the hearing, which determined that transportation was not impractical, the local board of education adopted a resolution agreeing to provide transportation to the private school. The District, however, provided the student with a public transportation schedule and a pass, rather than providing yellow bus service.

Consequently, an action was brought against the school district alleging that the student met the statutory requirements in Ohio Revised Code section 3327.01, in order to be provided yellow bus transportation, and that the district had agreed to provide him with such transportation. The student further argued that use of public transit was not practical because the company's bus schedule was outside of the district's control, and therefore, the public transit was not a reasonable alternative to yellow bus transportation indicated in Ohio Administrative Code section 3301-83-19. In arguing that this section was inapplicable, the student asserted that a previous case, *Hartley v. Berlin-Milan Local School District*, mandated the use of "actual school bus transportation."

The District countered by arguing that the transportation it provided to the twenty-five students in the district attending private schools was practical. The transportation plan combined the use of public transit and yellow school busses, and the District argued that the busses used in the transportation plan qualified as "public transit vehicle[s]" in order to be compliant with OAC 3301-83-19.

The trial court ruled in favor of the school district finding that OAC 3301-83-19 allowed the district to use the public transportation to fulfill its statutory requirements under ORC 3327.01 to provide transportation to students attending private schools. The Sixth Appellate District affirmed the trial court's decision on all grounds. The appellate court initially noted that reliance on *Hartley* was misplaced, because the case only dealt with payment in lieu of transportation, not the use of public transit in lieu of yellow bus transportation. The appellate court then determined that the resolution did not mention a specific mode of transportation to be used to transport the private school students, therefore, OAC 3301-83-19 governed the method of transportation that could be used by the school district, and the public bus system used in this case met the requirements of the code. Specifically, the bus system implemented in the transportation plan allowed the

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transportation of fare paying passengers and students simultaneously, and the company was under contract to provide transportation to the students because the District had purchased the public transit passes for the students

How this decision impacts your district:

Subject to certain limitations, ORC §3327.01 requires the board of education of a city, local, or exempted village school district to provide transportation to all pupils who live more than two miles from school. This provision requires the board of education to provide transportation to students in the district attending nonpublic and community schools. OAC §3301-83-19 provides the vehicles authorized to transport students to school and school-related events. Subsection (B) specifically allows for the use of public transit vehicles to transport students: "Public transit vehicles includes vehicles owned and operated by regional transit authorities or community transit authorities, or which are privately owned, under contract with a board of education or county board of mental retardation and developmental disabilities and operated on routes designed for the purpose of transporting fare-paying passengers and eligible students simultaneously."

In this case, once it was determined that transporting the student was "practical," the District was required to provide transportation pursuant to ORC §3321.01. The District did so by combining the use of yellow busses and public transit vehicles which fell under the guidelines of OAC §3301-83-19. Therefore, the District properly fulfilled its statutory duties in transporting the student. This case should serve as a reminder to other districts faced with transporting students within the district to private and community schools. School districts should be aware of the circumstances in which they are required to provide such transportation, and of the different types of transportation available for use. If your district has any questions pertaining to student transportation, please do not hesitate to contact Ennis, Roberts, & Fischer for consultation.

Ohio Ethics Commission Issues Two Advisory Opinions

Last month, the Ohio Ethic Commission issued its final two Formal Advisory Opinions for 2008. Both opinions offer advice that relates to public school employees.

Hiring of family members

Advisory Opinion No. 2008-03 addressed the question as to whether a public official or employee can hire her step-child. The Commission noted that Ohio Ethics Law and relevant statutes prohibit a public official or employee from hiring a member of her family. The Commission further determined that a step-child or step-parent is a member of the official or employee's family, regardless of age. Therefore, the Commission held that a public official could not hire her step-child, or use her public position to get a job for her step-child. The Commission clarified that its opinion applies to all individuals who are elected or appointed to, or employed by, any public agency, including but not limited to any state agency, county, city, township, school district, public library and regional authority. The restriction applies regardless of whether the public official or employee is compensated/uncompensated, full-time/part-time, or temporary/permanent.

Supplemental Education Services

Advisory Opinion 2008-04 confronts the issue of teachers selling Supplemental Education Services to school districts. Supplemental Education Services are tutoring and other academic services for eligible students in schools that have not met state targets for school achievement. The opinion specifically sought to answer the question as to whether a teacher or other school district employee can sell Supplemental Education Services to the school district by which she is employed. The Commission determined that Ohio Ethics Law and Ohio Revised Code sections 2921.42 and 2921.43 prohibit a teacher or school district employee from selling Supplemental Education Services to the district by which she is employed, unless the teacher or employee can: (1) demonstrate that he or she is providing the services to the district at a lower cost than any other provider; and (2) meet other requirements in an exception to the Ethics Law. Furthermore, the Commission determined that even if the all the requirements were satisfied to allow such a purchase, the school district is not required to purchase the services from the teacher or other school district employee. The Commission clarified that this opinion applies to teachers and school district employees who do not exercise, or have the authority to exercise, administrative or supervisory authority regarding contracts or programs of the district. The Commission further asserted that school board members, superintendents, treasurers, and other administrators who are exercising or are empowered to exercise such authority are subject to these restrictions and also to *additional* restrictions.

Please contact Ennis, Roberts, & Fischer for consultation if you have any questions pertaining to these opinions.

E-mails and Public Records Retention

State ex rel. Toledo Blade Co. v. Seneca County Board of Commissioners
Slip Opinion No. 2008-Ohio-6253
December 9, 2008

The Supreme Court of Ohio recently rendered an important decision regarding e-mails and records retention. In this case, Toledo Blade Company issued two public records requests to the Seneca County Board of Commissioners. The company requested to review all outgoing and incoming e-mails, including both deleted messages and drafts of messages, between January 1, 2006 and August 6, 2007. The Board of Commissioners complied with the request, but when the company received the records there were significant gaps in dates of the e-mails received. After noticing the gaps, the company reiterated its requests, and the commission was able to provide additional e-mails through the use of an information technology services company. Even after these e-mails were produced, however, there remained a number of deleted e-mails that were not readily available. The Commission argued that it would take considerable time and money for the Board to provide the remainder of these e-mails.

Significantly, the Board of Commissioners record retention plan required it to retain e-mails that had a significant administrative, fiscal, legal, or historic value. The retention plan further allowed for the computer user to make the determination of whether her e-mail fell into one of the specified categories. Some of the deleted e-mails which had still not been provided to the company fell into one of the categories enumerated in the retention plan.

Based on these facts, the Court determined that the Board of Commissioners had improperly deleted the e-mails at issue. It further found that the Board was capable of retrieving these e-mails, despite the potential cost or time it may take to retrieve the information from the server. Most importantly, the Court held that Board was responsible for bearing the cost of retrieving the e-mails which it had improperly deleted.

How this decision impacts your district:

The Court's decision should highlight some of the responsibilities of public offices pertaining to record keeping duties and public records requests. One such requirement is to maintain a record retention plan. E-mails may be listed as part of an RC-2 plan which grants a public office the ability to categorize, maintain, and destroy certain information. If a school district properly lists and destroys e-mails pursuant to a valid RC-2 plan, these e-mails are no longer public records that must be presented upon request. This case should also serve as an important reminder of the additional expense to public offices for failing to comply with the Ohio Public Records Act's disclosure and retention requirements. A school district could be compelled to pay the expenses associated with recovering deleted e-mails as part of a public records request if they were destroyed improperly. If your district has any questions concerning record retention plans contact Ennis, Roberts, & Fischer for consultation.

Employee Free Choice Act

As the United States prepares to inaugurate a new president, employers should be aware of some possible changes that may develop in the near future under the guidance of a new administration. One such change, that several commentators have speculated may occur within the first 100 days of the new administration, is the Employee Free Choice Act (EFCA). The EFCA would represent a change in American labor law as it currently stands and would greatly affect the unionization process. Should the EFCA survive in its current form, a number of major changes would be implemented. One change in particular includes the possibility of removing the current right of employees to vote in a supervised election over whether to be represented by a union. Commentators further speculate that if the EFCA were to pass in its current form, an employer could be unionized through a card-signing process. This process could be conducted by the union without any knowledge on the employer's part.

How this impacts your district:

While the EFCA has yet to be signed into law, employers should be aware that this law may be implemented sometime in the near future. Some estimates report that if the EFCA is enacted, unionization of American businesses could increase from the current rate of 8% to as much as 25% or higher. This change may have a dramatic impact on employment and labor relations. Ennis, Roberts, & Fischer will continue to monitor the legislation that is passed by the new administration and provide your district with any necessary information. Please do not hesitate to contact us if you have any labor-related questions or concerns.

Booster Clubs and Tax Implications

In general, booster clubs are most often formed as charitable organizations defined in relevant part as any tax-exempt educational or youth athletic organization. Under Ohio Revised Code section 2915.01, booster clubs formed as an educational organizations are non-profit, have the primary purpose of education and developing the capabilities of individuals through instruction, and support schools, academies, universities or colleges. Booster clubs formed for youth athletic organizations are non-profit, have the sole purpose of financially supporting or operating athletic activities for persons age 21 or younger, and support or operate athletic teams, clubs, leagues, or associations. These booster clubs enjoy tax exempt status upon letter from IRS stating organization is exempt from federal income tax under IRC 501 (c)(3). Contributions are deductible only if charitable organization has obtained this 501(c)(3) status.

Recently, several booster clubs in Kentucky were issued large fines by the IRS for improper fundraising activities. In response to inquiries from the state of Kentucky concerning these fines, the IRS has explained that any booster club that raises money to benefit an individual student rather than a group is in violation of federal law and is at risk of losing its tax-exempt status. The IRS penalized these groups for giving parents monetary credit for fundraising. Some parents received credit for fundraising which was subtracted from annual fees they paid for extracurricular activities. The IRS indicated that this practice is against federal law. Lois G. Lerner, Director of Exempt Organizations for the IRS, wrote "The requirement that each parent/ member of the club must participate in the fund-raising activities in direct proportion to the benefits they expect to receive toward their children's expenses directly benefits specific individuals and the parents instead of the class of children as a whole." The IRS, however, reassured that booster clubs may engage in fundraising activities, so long as the organizations raise funds the benefit the group as a whole.

In light of the recent sanctions handed down by the IRS, some of which have exceeded $60,000, it is useful to review the Ohio law governing booster clubs. Even though booster organizations are independent entities, the public's perception is that booster organizations and their activities are school sponsored and approved by a board of education. In order to prevent disruption to the school district's educational program and injury to its reputation from conduct and activities by a booster organization which is inconsistent with the school district's mission, it's advisable for your Board of Education to adopt a policy which provides that only booster organizations recognized by the Board of Education will be permitted to use the school district's name, the names of its athletic teams, any logos, insignia or emblems associated with and used to identify the school district and/or school sponsored programs and activities. A Board policy should require booster organizations to comply with certain conditions prior to being recognized by the Board of Education. Such a policy should require Board-recognized booster organizations to provide by August 1 a balance sheet along with income and expense reports for the preceding year. The requirement to provide financial records alone should help deter individuals from committing acts of fraud or otherwise engaging in inappropriate financial matters. Additionally, the Board's review of the financial records should help ensure that no financial impropriety occurred in the preceding year. The primary benefit to this policy is that it gives the Board some control over booster organizations and helps ensure that booster organizations do not disrupt the educational program and injure the Board's reputation.

If you have any questions or concerns about your district's booster club policy, please contact Ennis, Roberts, & Fischer.

Important Dates

The following list highlights some important dates to keep in mind:

January 1, 2009

Ohio's minimum wage increased to $7.30 per hour. Each district should change its payroll accordingly.

January 8, 2009

FERPA amendments take effect

January 15, 2009

1st evaluation in year of non-renewal of teachers and administrators unless otherwise indicated in the CBA.

January 25

Written report of evaluation due unless otherwise indicated in CBA

January 16, 2009

New FMLA regulations take effect

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

Bill Deters and Jeremy Neff recently gave a speech regarding residency and Extracurricular activities before the alternative licensure cohort

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

UPCOMING SPEECHES
C. Bronston McCord at the Ohio Association of Local School Superintendents on January 21:
Student Discipline in Cyberspace

Dave Lampe was recently named an Ohio Super Lawyers Rising Star in Schools & Education Law for 2009. Ennis, Roberts, & Fischer would like to congratulate Dave for this prestigious award.

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