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School Law Review

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Inside This Issue:

Local Government Tax Incentives and School District Compensation

Ohio school districts are often called upon by local governments to approve tax incentives for businesses. These incentives usually involve the exemption of real property taxes and can be in the form of tax increment financing (TIF), enterprise zone agreements (EZA), community reinvestment areas (CRA), and other similar incentives. Board approval is often necessary if a given incentive exceeds a certain number of years or exemption percentage. Compensation to a school district may be due even if board of education approval of the exemption is not required, particularly if the local government levies an income tax.

ERF has recently seen an increase in the number of errors made by local governments or businesses who owe compensation to boards of education. These errors have resulted in boards of education receiving less money than what they otherwise would be entitled to receive per the terms of a compensation agreement or Ohio law.

There have also been instances where local governments have misinterpreted Ohio law with respect to tax incentives, permissible expenditures of payment in lieu of tax dollars, and compensation owed to boards of education. Because of this, ERF strongly advises that school district treasurers carefully review the tax incentives that have been granted by local governments in their school districts. It is quite possible that school districts are being shortchanged on compensation owed, either through error on the part of local governments or misinterpretation of Ohio law.

ERF will be conducting a two-hour webinar addressing the most relevant information that treasurers need to know concerning the available tax incentives that are routinely presented to boards of education for approval. This webinar will be held on February 8, 2012. More details on this webinar will be provided in the future.

If you have any further questions, please do not hesitate to contact either Gary Stedronsky or Bill Deters on this matter.

No Secret Ballots for School Boards

2011 Op. Att'y Gen. No. 11-038

An opinion released in October 2011 by the Ohio Attorney General stated that, according to Ohio's open meetings law, no public body is allowed to vote by secret ballot. Ohio's open meetings law is contained in R.C. 121.22 and states that the section must be "liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law." The opinion goes on to say that the purpose of the law is to ensure openness and accountability in government.

Numerous court cases over the years have construed the law liberally and have given a strong basis for the Attorney General's opinion. For example, in 1996 the Ohio Supreme Court stated in *State ex. Rel Cincinnati Post v. City of Cincinnati*, that the purpose of the open meetings law is to prevent elected officials from "meeting secretly to deliberate on public issues without accountability to the public." While the law does not specifically prohibit public bodies from conducting secret ballots, there is a piece of the law which requires a roll call vote when the board is voting to go into an executive session. This roll call vote requires each member to have their vote recorded as part of the public record. This requirement shows that the legislature enacting the

(Continued on page 2)

No Secret Ballots for School Boards, Cont.

open meetings law did intend for constituents to be able to know how their representatives voted.

The open meetings law is meant to protect the public's ability to oversee governmental decision-making as well as ensure all public bodies can be held accountable by their constituents. In order for the public to be able to do both of these things they must not only be able to ascertain why decisions are made, but also what decision was made and how the final votes were cast. The Attorney General notes that any vote done by a secret ballot denies the public the ability to hold members of the public body accountable for their final decisions, which is the clear intent of the open meetings law.

Also noted is the fact that R.C. 121.22(G-H) requires that any public body that is in an executive session must return to an open meeting before voting. It would be counter-intuitive for the law to require the public body to return to an open session for voting purposes, but then to allow that public body to cast votes secretly. The intent of this provision is for the public to know how its public officials are voting.

Some public bodies, up to this point, may have believed secret ballots were permitted because of 1980 Op. Atty. Gen. No 80-083. This opinion reasoned that the meeting itself had to be open to the public, but that the plain language of the statute did not prohibit voting by secret ballot. Essentially, that opinion rejected that the idea that the open meetings law's mandate to construe the law liberally extended to voting methods.

The current opinion overrules the 1980 opinion on the basis of the numerous court decisions that have endorsed a liberal reading of the open meetings law's requirements. These court decisions, including ones made by the Ohio Supreme Court, have found it favorable to ensure that the public's interest in holding each public body accountable for decisions. Part of that accountability is knowing how representatives are voting. Therefore, secret ballots are not permissible for use by a public body.

How This Affects Your District:

If your Board of Education has been conducting votes using secret ballots, then the Board should cease using that method of voting. It is important to remember that the intent of the legislature when enacting the open meetings law was to provide the public with the ability to know what and how decisions of public bodies are made. In order to fully realize that goal, it is important for the public to know which members of the public body are voting for particular issues; that way accountability can be more fully realized.

Policy Restricting Recording During IEP Meetings Is Permissible and Attorneys Can Be Present

***Horen v. Board of Education of the City of Toledo Public School District*, Case No. 09-4254 (6th Cir. 2011).**

The 6th Circuit Court of Appeals recently decided that there is no reason that a school district could not restrict the recording of IEP meetings and allow the district attorney to be present at those meetings.

The case stemmed from a situation where the parents of a child with a disability refused to be a part of their daughter's IEP meeting unless they were allowed to record the meeting. The parents also objected to the presence of the school board's attorney at these meetings. Therefore, for more than two years leading up to this case, no IEP was developed for the student. From March to June 2007, the district tried to hold IEP meetings, but the parents were adamant about recording the meeting. During each of these attempts, the district's attorney was present at the meetings, which the parents objected to and the district ultimately refused to conduct the meetings unless the parents agreed to not record the meetings.

The parents asserted that R.C. 2933.52(B)(4) gives them the right to tape IEP meetings, because they interpret the law to state that they do not need the consent of all parties in order to record. However, the court points out that this law only provides that these types of recordings are not criminal acts. The parents then argued that if someone at the IEP meetings was averse to the idea of being recorded, then that person could just keep silent. However, that would serve to negate the purpose of having that person in the meeting at all. IDEA requires that certain people be in attendance so that they can contribute to the conversation in order to find the best solution for the child discussed. If people are uncomfortable participating in the IEP process, then the child is not getting the service(s) required by all parties involved.

While no provision of IDEA prohibits the recording of an IEP meeting, the Toledo School District's collective bargaining agreement (CBA) included a no-recording policy. The U.S. Department of Education's policy regarding recordings is that a school district can limit or prohibit the recording of IEP meetings. Further, R.C. 3313.20(A) gives districts the authority to adopt any rules regarding individuals entering the school grounds, and under Ohio law a court has no authority to substitute its decision for the decision made by the board where the board

(Continued on page 3)

Policy Restricting Recording During IEP Meetings Is Permissible and Attorneys Can Be Present, Cont.

has been granted the discretion to make that decision.

While the parents argued that the district did not have a "policy" regarding recordings, they did not dispute that the CBA with the teacher's union did include a no-recording policy. Therefore, the court held that the district was within its right to prohibit the recording of IEP meetings.

As to whether the district's attorney could be present, the court also ruled in the district's favor. According to the IDEA, an IEP team can include "at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child." The assessment of whether a particular person has the requisite knowledge required for attendance is up to the party who invited the individual. Therefore, if the district assesses that the attorney has knowledge or special expertise regarding the child, then the attorney has every right to be present. Since the district had the discretion to decide that its attorney had "special knowledge" of the child based on the attorney's involvement in previous due process hearings and appeals, the parents had no basis to refuse to attend IEP meetings on the basis that an attorney would be present.

How This Affects Your District:

If your district's CBA with the teachers' union stipulates that there can be no recordings done at particular meetings or all meetings, then the district is within its rights to deny a parent the ability to record the meetings. Nothing in IDEA or Ohio law prohibits a school district from having such a policy. The most important thing is that the district needs to have that policy and uniformly apply it.

While this court held that the CBA was enough to enable the district to prohibit recordings, the court also points to the idea that the court cannot make an adverse decision regarding policies that a school board has the express discretion to develop. The importance of this is that it is a good idea for that board to also adopt a district policy regarding recordings. That way, parents are made aware of what they can and cannot do before coming to district meetings. Further, as with all policies, the implementation should be uniform so that there can be no claims of discriminatory enforcement.

If your district does have a policy regarding recordings, the district should be careful that there are no secret recordings going on. With the amount of technology now available, many are able to hide the fact that they are recording a meeting. One example is a program that could be installed on a person's phone that will record meetings, but give no indication on the phone that anything is happening. One way to be proactive about this issue is to have everyone turn off their phones. In truth, if someone wants to secretly record a meeting, they can probably find a way to do so, but district officials should be aware of some tactics that may be used.

Also, according to this Court, any person that the district assesses might have special knowledge of a child can be present at an IEP meeting. This includes an attorney. So, if an attorney has worked on a due process hearing for a particular child then the district could decide that the knowledge obtained from that case would give the attorney the knowledge requisite for attendance.

Another Change in Election Dates

HB 369 was passed by the Ohio General Assembly and acts to repeal sections 3 and 4 of HB 318. In November, we informed you that there were going to be two primary dates (March and June) and a general election in 2012. However, the General Assembly has decided not to have two primary dates. Now, the election dates are as follows:

March 6, 2012 – Primary for candidates for all offices scheduled for election in 2012 and to elect any candidates scheduled for election at the 2012 primary election.

November 6, 2012 – General Election

In addition to these two dates, a political subdivision may conduct a special election on August 7, 2012. Therefore, the opportunities to place a bond issue or levy on the ballot are in March, August, and November. If you intended to run a March 2012 issue, action should have been taken in November and therefore your next possible date to run the issue would be at the special election in August.

School Search of Adult Student's Car Permissible

***State of Idaho v. Voss*, No. 38366 (Idaho Nov. 23, 2011)**

The Idaho Court of Appeals held that school officials who searched an 18 -year old student's car for evidence of cigarettes did not violate the student's Fourth Amendment search and seizure rights even though the officials did not have probable cause and the student could legally possess tobacco products.

In April 2009, the assistant principal of an Idaho high school was told that a particular student was driving unsafely on school grounds. When the assistant principal approached the student with the allegations, he smelled cigarette smoke on him. The assistant principal then sought the help of the school resource officer and both school officials conducted a search of the student's car, with the goal of finding evidence that the student had cigarettes on campus. During the search, the officials found a glass pipe with marijuana residue and a set of brass knuckles. The student was charged with possession of drug paraphernalia and carrying a concealed weapon.

The student filed a motion to suppress the evidence found in the car on the basis that the search violated his Fourth Amendment right to be free from unreasonable search and seizure. When courts make decisions regarding search and seizure in the school setting, they look to a two part test to decide whether the search was reasonable. First, the search must be justified at its inception, meaning there must be reasonable grounds to believe the search will turn up evidence of the violation of a school rule or a law. Second, the search must be reasonably related in scope to the circumstances.

The student argued that the first prong of this test was not present. He asserted that the search was not justified because there is no rational basis for applying a school policy in a way that prohibits the possession of cigarettes in an adult student's car. The school policy he was referring to was a policy that forbade students to possess alcohol, tobacco, and drugs on school property.

However, the Court stated that it is the school officials' responsibility to determine what rules might be necessary to protect order in the schools. A ban on tobacco products is not arbitrary just because some students could legally possess the tobacco products. Rather, the ban is in order to protect the majority of students attending schools who are minors.

The point here is that the student felt his rights were violated because he could legally possess tobacco and thus a search for tobacco would be unjustified. However, the law clearly states that a search can be done by a school official if they have a reasonable belief that either a law or a school rule is being broken. As long as the school rule being enforced is rational, the Court will allow the school to enforce that rule through searches on school property.

How This Affects Your District:

While this case is not binding on Ohio courts, it gives insight into how courts may look at the issue of searching a student for contraband items that may not be illegal under state law. Students sometimes believe that they have the right to carry certain items on campus, because there is no state law telling them that they cannot. However, this case shows that courts are willing to uphold the rights of schools to search students for items that show that school rules are being broken, even though state laws are not.

Ohio Wins Early Education Grant

Ohio will be receiving $70 million from the federal government to fund programs for disadvantaged children in order to get them ready for kindergarten.

Over the next four years, the money will be used to meet three particular goals. First, the State will provide an additional 37,000 children with access to preschool programs. Second, the State plans to increase the number of high-rated early education programs from 206 currently to 1,300. Third, the State will develop a more effective way to assess whether a child is ready to attend kindergarten. Currently, the assessment only looks at reading readiness, but the new assessment may include an assessment of social and emotional skills that are necessary for success in school.

Thirty-Seven states competed for early-learning grants funded by Race to the Top, and nine states emerged as winners. Joining Ohio in the winner's circle are California, Delaware, Maryland, Massachusetts, Minnesota, North Carolina, Rhode Island, and Washington. Each state will receive grants ranging from $50 million to $100 million, based on the student population in each state.

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
Employee Misconduct

Bill Deters
Butler County on January 10, 2012
Legal Update

Bronston McCord
January 12, 2012
Bryan City Evaluations Webinar

Bronston McCord
OALSS Conference on January 18, 2012
Negotiations After Issue 2

Bronston McCord and Erin Wessendorf-Wortman
Northwest Ohio ESC on January 25, 2012
Administrative Retreat

Bill Deters
Brown County on January 26, 2012
New Board Member Training

Bill Deters and Gary Stedronsky
ERF Webinar on February 8, 2012
Everything School Districts Need to Know About Tax Incentives

Erin Wessendorf-Wortman
Reading Community City Schools on February 9, 2012
A Workshop on Suspensions and Expulsions

Administrator's Academy Dates at Great Oaks Instructional Resource Center

March 22, 2012 — *New Teacher Evaluation Procedures*

June 14, 2012 — *Special Education Update*

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