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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

Supreme Court Rules on Student Strip-Search Case

Safford Unified Sch. Dist. v. Redding

The United States Supreme Court delivered an opinion last month in a case dealing with the ability of school administrators to strip search a student. In a near unanimous decision, the Court ruled that the search in question violated the student's Fourth Amendment right to be free from unreasonable search and seizures.

In this case, the assistant principal relied on a student tip when he ordered the search of a thirteen-year-old female student who, according to the tip, possessed prescription-strength ibuprofen pills. Initially, the student's backpack was searched but no pills were found. The assistant principal then instructed two female staff members to search the student's undergarments. The student was required to strip down to her underwear and shake her remaining attire to demonstrate that she was not carrying any contraband on her body.

In determining the outcome of this case, the Supreme Court relied on its 1985 decision, *New Jersey v. T.L.O.,* which set the standard for searches in the public school context. In that case, the Court upheld the search of a student's purse for contraband. In its decision, the Court determined that searches conducted by school officials are governed by a "reasonableness" standard, which requires the satisfaction of two factors before the search is deemed legal. The first factor is whether the search is justified at its inception. This factor is satisfied if at the time of the search, reasonable grounds existed for suspecting that the search would yield evidence that the student was violating either the law or school policy.

The second factor is whether the scope of the search is reasonably related to the circumstances surrounding the search. This factor is satisfied when measures are adopted which reasonably relate to the objective of the search and are not excessively intrusive in light of the age and sex of the student, and the nature of the violation.

After reviewing the law and the facts of the case, the Court determined that the school administrators had no reason to believe that dangerous quantities of the drugs were being hidden in the girl's clothing. The majority said that strip-searches are justified only when school officials have "specific suspicions" that a student is hiding contraband in his or her underwear or other "intimate parts." There was also no reason to believe that there was any danger to the student herself or other students based on the suspected power and quantity of the drugs alleged to be possessed by the student. As a result, the school officials acted unreasonably and violated the student's Fourth Amendment rights by conducting the strip search.

After determining that the search violated the student's rights, the Court then declared that the assistant principal and two staff members were entitled to qualified immunity from personal liability because of a lack of clarity in lower-court rulings about whether strip-searches violated the Constitution. The Court then remanded the case to the 9th Circuit to consider whether the school district was subject to any liability.

How this impacts your district:

It is worth taking notice anytime the Supreme Court renders an opinion in an education case. *Safford v. Redding*, however, did not change the standards that the Supreme Court laid out in *New Jersey v. T.L.O.* over twenty years ago. This case should serve as reminder to school officials that all aspects of a student search must be reasonable. In particular, the search must be both reasonable at its inception and reasonable in its scope. Strip-searches, due to their very intrusive nature, require heightened suspicions and dangers in order to be considered reasonable under this two-part inquiry. School administrators must be certain to consider the source of the information and the potential danger of the contraband when considering searching a student. Schools must also consider the age and sex of the student and be sure to use staff members of the same sex if conducting such a search. If your district has any questions pertaining to student searches, please do not hesitate to contact Ennis, Roberts, & Fischer.

Public School Ordered to Pay for Private Special Ed. Tuition

Forest Grove Sch. Dist. v. T.A.

The United States Supreme Court recently held that the Individuals with Disabilities Education Act (IDEA) authorizes reimbursement for private special-education services when a public school fails to provide a "free appropriate public education" (FAPE) and the private school placement is appropriate. This holding applies regardless of whether the child previously received special-education services through the public school.

The facts giving rise to this case concern a student who had demonstrated problems focusing in class and completing coursework since he began attending school in kindergarten. As the student progressed through high school his condition worsened. School psychologists evaluated the student after his freshman year and concluded that he was ineligible for special education services and that further testing for learning disabilities or ADHD was not necessary.

However, he student's condition worsened further, and two years later the parents turned to private professionals who determined that their son suffered from ADHD and a number of other disabilities related to learning and memory. Based on the advice from the private specialist, the parents enrolled their son in a private academy focused on educating children with special needs.

The parents then requested an administrative due process hearing regarding eligibility for special-education services. The school district declined to provide an IEP because it determined that ADHD did not have a sufficiently significant adverse impact on the student's educational performance.

When the administrative review process resumed months later, the hearing officer issued a decision finding that the student's ADHD adversely affected his educational performance and that the district failed to meet its obligations under IDEA by not identifying the student as eligible for special-education services. Because the district did not provide the student with a FAPE and his private school placement was appropriate under IDEA, the hearing officer ordered the district to reimburse the parents for the cost of tuition. The district sought judicial review, arguing that the hearing officer erred in granting reimbursement.

After a series of appeals, the Supreme Court eventually agreed to hear the case and to consider the question as to whether the IDEA Amendments of 1997 categorically prohibit reimbursement for private-education costs if a child has not "previously received special education and related services under the authority of a public agency." The Supreme Court determined that the amendments do not pose such a categorical bar. In its analysis, the Court first noted that there was no evidence that Congress had intended to supersede two other Supreme Court decisions, *School Committee of Burlington v. Dept. of Education of Massachusetts* and *Florence County School Dist. No. 4 v. Carter*, which authorized reimbursement for private school tuition under IDEA. Notably, the Act provides that tuition may be available for students with disabilities "who previously received special-education" services in public school, if the school did not make a FAPE available in a timely manner. According to the majority opinion, this provision gives courts broad authority to grant "appropriate" relief, including reimbursement for the cost of private special-education when a school district fails to provide a FAPE. The Court reasoned that in enacting the amendments, Congress intended to rein in costs of private school placements but did not remove the power of hearing officers and federal judges to order reimbursements under the proper scenarios. The opinion reasoned that, "a reading of the act that left parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress' acknowledgment of the paramount importance of properly identifying each child eligible for services."

How this impacts your district:

Very few special education disputes result in a parent unilaterally placing his or her child in a private school or institution. Until this case, parents were discouraged from doing so when their children had never received special education services in a public school because it was not clear whether the parent could seek reimbursement. This case resolved this uncertainty in favor of parents, and as a result there is less of a deterrent for unilateral placements prior to a child receiving special education services in a public school. Your district should continue to seek to identify students who require special education services and to work with parents to implement appropriate IEPs. Proper evaluation, identification, and service provision remains the best way to avoid liability. Please contact Ennis, Roberts, & Fischer if your district has any questions relating to its duty to provide special education services.

ERF Wins Important Ruling in Worker's Comp Case

David Lampe is currently litigating a workers' compensation claim that may have an impact on state-fund employers across the State of Ohio. The case is titled *Linda Stanley v. Karen Sanson, et al*., Hamilton County Court of Common Pleas Case No. A0610801. The plaintiff in this case worked for the Kings Local School District Board of Education (the Board) as a bus driver. On September 11, 2006, the school bus that she was driving was struck by another automobile. The plaintiff suffered injuries in the motor vehicle accident, which prevented her from working for the Board.

Thereafter, she filed a workers' compensation claim and was approved to participate in the Workers' Compensation Fund for the injuries she suffered in the September 11, 2006 motor vehicle accident. The BWC granted her temporary total disability ("TTD") status from her job with the Board. The Board was advised by its third party administrator to continue paying the plaintiff's wages, in lieu of these wages being paid by the BWC. The Board was advised that the resulting workers'

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ERF Wins Important Ruling in Worker's Comp Case

compensation premium increase caused by the BWC paying the wages would be greater than the cost of the Board directly paying these wages to the plaintiff.

The plaintiff subsequently filed a personal injury action against the other driver for the injuries and damages caused by the motor vehicle accident. The Board intervened in the personal injury action in order to recover the wages it paid directly to the plaintiff as part of her workers' compensation claim.

Both parties filed separate motions asking the court to dismiss the Board's claim for subrogation. The parties argued that because the Board was a state-fund employer, it had no statutory right of subrogation to recover from the plaintiff any wages that she may be awarded in a jury verdict against the defendant. The parties argued that only a "statutory subrogee" (in this case the BWC) had a right to subrogation in such a lawsuit.

In response, the Board argued that although it was not a "statutory subrogee" as that term is defined by statute, it nonetheless had an equitable right to subrogation because it "stepped in the shoes" of the BWC by paying the wage component of the plaintiff's temporary total disability claim.

In a June 24, 2009 entry denying plaintiff's motion for summary judgment, the court agreed with the Board's argument that it had continued to pay the plaintiff's wages to satisfy a legal debt owed to her under the Ohio Workers' Compensation Laws and out of compulsion to save itself from a greater monetary loss had these benefits been paid by the BWC. The court reasoned that because these benefits were paid by the Board out of compulsion to satisfy a legal debt owed to the plaintiff, the Board had an equitable right of subrogation to her right of recovery against the driver of the other automobile.

Furthermore, the court held that while the Board did not neatly fit within the definition of a statutory subrogee, equity and justice demanded that the Board be afforded the corresponding right to equitable subrogation to recover these wages because it fulfilled the legal responsibility of the BWC by paying the wage component of the plaintiff's TTD claim, .

Although this was not a final appealable order, by the court's reasoning, it appears that the Board will be granted equitable subrogation rights in this case.

How this impacts your district:

Although the court's ruling will likely be subject to appeal, this case is an important first step to possibly recognizing an equitable right of subrogation in state-fund employers who pay a claimant's wages while the claimant is on TTD. Should an employee be injured while within the scope of her employment by a third party, and both a workers' compensation claim and personal injury lawsuit ensue, a state-fund employer may have a right to recover wages paid as part of a TTD claim from any jury verdict entered in favor of the injured worker and against the third party whose negligence caused the injuries. As many school districts have encountered, it has become more costly oftentimes to allow the Bureau of Workers' Compensation to pay wages to an injured worker than to simply pay these wages directly. The aforementioned court decision is an important first step in recognizing a state-fund employer's right to equitable subrogation in situations similar to the one at hand. Please feel free to call Ennis, Roberts & Fischer should your district have questions in regards to this case or other workers' compensation matters.

High Court Backs Employers in Age Discrimination Case

Gross v. FBL Financial Services

The United States Supreme Court decided another case last month that has implications for all employers, including school districts. This case involved a disparate-treatment claim under the Age-Discrimination in Employment Act (ADEA). In this case, the Court held that a plaintiff bringing such a claim under the ADEA must prove by a preponderance of the evidence that age was the "but-for" cause of the adverse employment action taken by the employer.

This case provides some clarification between two categories of claims often brought by employees who suffer an adverse employment action. One such category of claims falls under Title VII of the Civil Rights Act of 1964, which prevents employers from discriminating based on race, color, religion, sex, national origin or disability. Many Title VII cases involve "mixed-motive" claims where plaintiffs demonstrate that one of these protected categories was a factor in the employer's decision to terminate, suspend, transfer, or take any other adverse employment action against the plaintiff. In mixed-motive cases, if the plaintiff presents enough evidence to demonstrate that the employer may have based its decision on one of these categories, the burden shifts to the employer to demonstrate otherwise.

The issue considered in *Gross* was whether this burden shifting jurisprudence was appropriate for age-based discrimination claims brought under the ADEA. The Supreme Court considered the text of the acts to determine that ADEA claims require a different analysis. The Court noted that Title VII allows a plaintiff to show discrimination based on "a factor," but the plain language of the ADEA requires the plaintiff to show discrimination "because of age." This difference in the language between the two acts caused the Court to decide that the ADEA requires age to be the "but-for" cause of the discrimination. In other words, for a plaintiff to meet her burden of demonstrating age discrimination under the ADEA, she must show that the employer's decision would not have been made but-for the plaintiff's age. Therefore, the ADEA does not permit the burden-shifting exercise common to Title VII claims of employment discrimination.

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High Court Backs Employers in Age Discrimination Case

How this impacts your district:

It first must be noted that *Gross* was decided by a mere 5-4 margin, which was split along the conservative and liberal ideology of the current Justices. Therefore, any change in the composition of the Court could easily affect future decisions. As of now, however, it appears that the decision will benefit employers when defending ADEA claims, as plaintiffs will have a more difficult time meeting the burden of proof required in showing that age was the "but-for" cause of the adverse employment action. On the other hand, it is still unclear as to what the decision will mean for age discrimination claims brought under state law. In Ohio, age-discrimination claims are frequently brought under Ohio Revised Code section 4112.99, rather than under the federal ADEA. In any event, the decision should make it slightly easier for employers to make reductions in force. If your district is faced with any employment decisions please contact Ennis, Roberts, & Fischer for consultation.

Ohio Supreme Court Weighs in on Immunity Laws

Doe v. Marlington Local Sch. Dist.

The Supreme Court of Ohio has determined that the exception to political subdivision immunity in Ohio Revised Code section 2744.02(B)(1) for "negligent operation of any motor vehicle" does not encompass supervision of the conduct of the passengers of the vehicle. The facts giving rise to this decision are very disturbing and unfortunate. Parents of a fourth grade special needs student sued after learning that their daughter had been repeatedly molested by another special needs student on the bus that both students rode to school. The parents sued the board of education, the director of transportation, and the bus driver. The claims in the lawsuit included negligent, reckless, and/or wanton operation of the school bus and that the defendants failed to safely transport and supervise the students on the bus.

The issue in this case was whether a school bus driver's supervision of the conduct of children passengers on a school bus amounts to operation of a motor vehicle within the statutory exception to political subdivision immunity under ORC section 2744.02(B)(1). The parents argued that "operation of any motor vehicle" encompassed all of the essential functions that the bus driver is trained or required to do by law. The board claimed that it was entitled to immunity under ORC section 2744.02 despite the statutory exception for the negligent operation of a motor vehicle. It argued that the facts in this case did not fall within this exception to immunity because operating a motor vehicle is tied to the movement of the vehicle or the equipment on the bus, and therefore, does not include the supervision of the conduct of students on board.

The court began its analysis of the case by noting that the purpose of the political subdivision immunity law contained in ORC Chapter 2744 is the "preservation of the fiscal integrity of political subdivisions." ORC section 2744.02(A)(1) provides that political subdivisions, such as school districts, are generally immune from liability for damages "for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." The school district was thus immune from liability stemming from the acts on the bus unless one of the five statutory exceptions creating liability applied. These statutory exceptions are contained in ORC section 2744.02(B)(1) through (5). The parents relied on the first statutory exception to immunity involving the negligent operation of a motor vehicle.

The court focused much of its discussion on the meaning of the word "operate." After reviewing relevant case law and statutory definitions, it concluded that the exception to immunity at issue pertained only to negligence in driving or otherwise causing the vehicle to be moved. The court then clarified that bus drivers may have supervisory duties of their passengers, however, it insisted that every duty required of a school bus driver does not necessarily constitute operation of the school bus within the meaning of ORC section 2744.02(B)(1).

How this impacts your district:

The Ohio Supreme Court clarified this particular exception to political subdivision immunity by finding that negligent operation of a motor vehicle pertains only to negligence in driving the vehicle, or otherwise causing the vehicle to be moved. School districts need to be aware, however, that there are several exceptions to the immunity laws. Negligent acts by the district or district employees may subject the district to liability in several instances. In general, the statutory exceptions to immunity include negligent operation of a motor vehicle, negligent acts by employees, physical defects of property, or where the law otherwise expressly allows for liability. Please contact Ennis, Roberts, & Fischer if your district has any questions relating to political subdivision immunity.

Important Dates

July 31

Semiannual campaign finance reports due (by 4 pm) detailing contribution and expenditures thr4ough June 30, 2009 – RC 3517.10(A)(4)

August 10

Last day to submit certification for November income tax levy to Ohio Department of Taxation – RC 5748.02(A) (85 days prior to election)

August 15

Last day to submit November emergency or current expenses levy to county auditor for November general election – RC 5705.194, 5705.213 (80 days before election)

August 20

Last day for school district to file resolution of necessity, resolution to proceed and auditor's certification for bond levy with board of elections for November election – RC 133.18(D)

Last day for county auditor to certify school district bond levy terms for November election – RC 133.18(C)

Last day to submit continuing replacement, permanent improvement or operating levy for November election to board of elections – RC 5705.192, 5705.21, 5705,25

Last day to certify resolution for school district income tax levy for November election to board of elections – RC 5748.02 (C)

Last day to submit emergency levy for November election to board of elections – RC 5705.195

Last day to submit phased-in levy or current operating expenses levy for November election to board of elections – RC 5705.251(A)

Education Law Speeches/Seminars

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

Ryan Laflamme at the NWOESC Retreat - Pokagon State Park on September 7, 2009
2009 School Law Update

C. Bronston McCord III at the OSBA Capital Conference on November 9, 2009
Student Homelessness

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