



# Ennis Roberts Fischer SCHOOL LAW REVIEW



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## Ennis, Roberts & Fischer Successfully Defends Levy Committee

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ERF attorney, Gary T. Stedronsky, successfully represented the Citizens for Three Rivers (the "Committee") in an Ohio Elections Commission complaint brought by a citizen alleging that the Committee published a false statement concerning a bond issue. The complaint alleged that the Committee's claim that the Ohio School Facilities Commission's (the "OSFC") funding was "guaranteed for this election only" was false because the Board of Education still had to apply for the OSFC funds if the bond issue passed at the May 4, 2010 election.

The complainant alleged a violation of R.C. 3517.22(B)(2), which prohibits the publication of false statements in campaign literature. To prevail, the complainant had to show: (1) that the statement at issue was false and that the Committee acted with actual malice and published it anyway; or (2) that the Committee acted with reckless disregard as to the truth of its statement.

Due to a special OSFC environmental contamination program that the Board of Education qualified for, it was eligible under a provision of House

Bill 1 to receive 50% of the cost of a new school building from the OSFC, which equates to \$25,000,000. However, the provision providing for this level of funding is temporary in nature and expires on June 30, 2011. Because OSFC approves funding of its school construction projects in July of each year, the Board of Education may not have been eligible to receive the same 50% level of funding if it waited to place the bond issue on the ballot after May 4, 2010 because OSFC would not be able to approve the project until July, 2011, which is after the expiration of the temporary provision of law providing for OSFC's 50% share.

Testimony from the Committee's co-chair and the CFO of the OSFC revealed that the Board of Education would receive priority status for OSFC funding in July, 2010 if the bond issue passed at the May 4, 2010 election. Testimony also revealed that the Committee had no reason to doubt that the OSFC would fund the Board of Education's construction project if the levy passed in May because OSFC has never failed to approve or fund a school district construction project once a

district has successfully passed its bond issue to meet its local share for the construction of a school building. For these reasons, the Ohio Elections Commission granted the Committee's motion to dismiss the complaint because the complainant did not prove that the Committee acted with actual malice or with reckless disregard to the truth when it published its statement that the \$25,000,000 funds from OSFC were guaranteed for the May 4, 2010 election only.

### ***How this impacts your district:***

This decision helps demonstrate that the publication of campaign literature is granted great First Amendment protection as a complainant has to show that the entity that published the literature acted with actual malice or reckless disregard when it published a false statement. This is a high standard to meet and means that campaign statements open to one or more interpretations are not likely to rise to the level of a violation of R.C. 3517.22(B)(2) because a finding of actual malice is not likely to exist.

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

## Union Activity and First Amendment Rights

***Cowan v. Board of Educ. of the Borough of Carteret***,  
No. 06-5459 (D.N.J. Feb. 22, 2010)

A Federal District Court in New Jersey recently determined that a teacher who was suspended with pay for distributing pro-union essays to three other teachers stated a valid First Amendment retaliation claim against the school district. The teacher who filed suit against the school district in this case was also the president of the teachers' union. The facts giving rise to this decision include a series of school decisions in response to actions taken by the teacher acting in his capacity as president of the union.

After the teacher was elected as president of the union, the district arranged his schedule to include three consecutive non-teaching periods in order to provide the teacher with ample time to engage in union activities. Shortly thereafter, the teacher was involved in a union-related incident and an altercation with another teacher. The principal subsequently changed the teacher's schedule for the following school year by assigning him to teach a class which he had never taught before, but for which he did have the proper certification. The new assignment also interrupted the consecutive non-duty periods that the teacher had previously been afforded, however, the new schedule did maintain a period set aside for union activities. The teacher filed a grievance as a result of the schedule change which was denied. After the denial, he filed charges against the district and several school officials alleging that they retaliated against the teacher for engaging in union activities by assigning him a new subject to teach and by altering the non-duty periods in his schedule.

Shortly after the initial lawsuit was filed, the teacher was involved

in another incident where he was forced to leave his classroom unattended. As a result, the superintendent suspended the teacher with pay. The teacher then amended his first lawsuit and claimed that the superintendent's actions represented further retaliatory efforts on behalf the school district to punish the teacher for his union activities.

Finally, the teacher amended his lawsuit to include the facts surrounding an additional suspension as evidence of retaliation. In this instance, the teacher had organized a legal picket before school hours, during which, three of the teachers in the union failed to participate. As a result, the teacher placed copies of Jack London's essay, "The Scab" in their school mailboxes. The essay condemns workers who refused to honor strikes and other pro-union job activities. The teacher was charged with violating a district policy which prohibited teachers from engaging in union activity in the presence of students while on school property and he was suspended for one week with pay.

The school district and school officials filed a motion for summary judgment in this case, seeking to have the case resolved before trial by asserting that there was a lack of an adverse employment action in all three instances, and that qualified immunity protected them from liability. The New Jersey Court began its analysis by considering the teacher's claim with respect to the schedule change. The Court noted that the new schedule still allowed the teacher a period of time to engage in union activities. The Court emphasized that the school officials were entitled to qualified immunity unless their conduct violated a constitutional right that was clearly established at the time the violation occurred. The Court determined that the principal clearly has dis-

cretion to alter a teacher's schedule, and that there was no evidence to suggest that the alteration violated the teacher's First Amendment rights to engage in union activities. Therefore, the Court found that the defendants were entitled to qualified immunity on this claim.

The Court then considered whether the defendants were entitled to qualified immunity with respect to the second incident, where the teacher was suspended for leaving his classroom unattended. The teacher claimed that he actually left his classroom with a substitute teacher. The Court suggested that the suspension may have constituted an adverse employment action taken against the teacher in retaliation for his union activities, however, the teacher never explained to the school officials that he had actually left his class attended. Because the school officials did not know that the teacher had left his class attended, they were entitled to qualified immunity with respect to this claim as well.

Finally the Court determined that the defendants were not entitled to immunity with respect to the retaliation claim concerning the distribution of "The Scab." The Court determined that the distribution of the essay constituted protected speech. A reasonable administrator should recognize that suspension for this activity would implicate the First Amendment right of association. The Court said that under *Pickering v. Board of Education*, it was up to the jury to determine whether the disciplinary charge was in retaliation to the union activity, or whether it was a legitimate employment action in accord with the facts. Therefore, the district's motion for summary judgment with respect to this issue was denied.

## Union Activity and First Amendment Rights

### ***How this impacts your district:***

This case should serve as a reminder for school districts to exercise caution when dealing with union-related situations. Teachers, and other school employees, have a First Amendment right of association to engage in union activities. While the exercise of union activities is subject to reasonable limita-

tions, school districts must not take an adverse employment action against an individual for engaging in appropriate union activities. If the district decides to take action against an individual for properly engaging in union activities, the employment action will likely be found to violate the individual's constitutional rights and the district

will be liable. As a result, your district should carefully document any employment action it decides to take and specifically articulate its grounds for doing so in order to avoid the appearance of retaliatory actions.

## New Law Targets Dating Violence and Bus Driver Qualifications

Substitute House Bill 19, enacted by the Ohio General Assembly in March, contains two provisions relevant to local school districts throughout Ohio. The first provision is known as the "Tina Croucher Act." This Act requires school districts to incorporate "violence within a dating relationship" into their policy prohibiting student harassment, intimidation, or bullying. The Act also directs the State Board of Education to update its model policy to include dating violence.

In addition to maintaining an anti-bullying policy which targets dating violence, each school district must also educate its students and staff about dating violence issues. School districts are specifically directed to include dating violence as a subject in the district's health curriculum for students in grades seven through twelve. This instruction should recognize dating violence warning signs and stress the characteristics of healthy relationships. The Ohio Department of Education (ODE) will provide free curricula on its web site addressing dating violence prevention in order to assist school districts in developing their own curriculum in this subject matter. Furthermore, each board of education must incorporate lessons in the prevention of dating violence into the in-service

training for certain middle and high school employees. The employees subject to the in-service training include school nurses, teachers, counselors, psychologists, and administrators.

The second provision relevant to Ohio school districts concerns the criminal offenses that disqualify school bus drivers from employment. This provision directs ODE to amend rule 3301-83-23 of the Ohio Administrative Code which specifies the offenses that disqualify a person from employment as a school bus or school van driver and establishes rehabilitation standards for school bus and school van drivers. Under the prior law, school bus drivers were disqualified for the same offenses that applied to licensed educators. However, this legislation specifies that bus drivers will now be subject to the disqualifying offenses applicable to other non-licensed school personnel until ODE effectively amends the rule regarding employment of bus drivers with criminal histories.

### ***How this impacts your district:***

This legislation became effective in March. As such, schools must be sure to amend their harassment, intimidation, or bullying policy to include "violence within a dating relationship" as a targeted area.

Furthermore, schools must develop curriculum to address student relationships and train the appropriate personnel to deal with dating violence issues.

With respect to the transportation provisions, it appears that the intent of the new law is to equate school bus drivers with non-licensed school employees. The old law, on the other hand, subjected bus drivers to the same disqualifying offenses and rehabilitation standards that were applicable to licensed educators. Licensed educators, who deal directly with students in the education system, are obviously subject to more stringent conditions than non-licensed staff who often have more indirect contact with students. Until ODE adopts a new rule, bus drivers must be treated the same as other non-licensed individuals. It remains to be seen whether ODE will simply incorporate these standards into the new law, or if it will set the bar of disqualifying offenses and rehabilitation standards somewhere in between those required of non-licensed employees and licensed educators. Ennis, Roberts, & Fischer will continue to monitor ODE's progress with respect to amending this rule, and notify your district when a new policy is chosen.

## Legislative Update

### Enacted Legislation:

#### House Bill 67

- Effective 10/6/2009
- Permits 16-year-old to donate blood with parental consent
- Current law: 17-year-old can donate blood without parental consent; Blood donor program must arrange for dissemination of written donor information for students to be shared with parents

#### House Bill 19

- Effective 3/29/2010
- Each school district must incorporate “violence within a dating relationship” into its policy prohibiting student harassment, intimidation, or bullying
- SBE to update its model policy to include dating violence
- Requires dating violence prevention education for grades 7-12 within district’s health curriculum
- Staff training added to 3319.073 requirements

#### House Bill 48

- Signed by Governor on 4/2/2010
- Would provide up to two weeks unpaid leave for employee whose spouse or child is called to active duty or injured, wounded, or hospitalized while on active duty. Active duty does not include basic training
- Would prevail over collective bargaining agreement if

agreement contains benefits less than those in the legislation

### Proposed Legislation:

#### House Bill 373 and Senate Bill 210

- Reducing childhood obesity a top priority of the Ohio Business Roundtable
- Would require thirty minutes of “moderate rigorous physical activity” daily in K-12
- Would require 1 credit of PE to graduate
- Would remove PE exemption for extra-curricular participation (students entering grade nine after July 1, 2010)

#### Senate Bill 8

- Expansion of allowable charges to political subdivisions
- Some form of subsidy for maintenance/replacement of voting machines

#### House Bill 366

- Would permit board of education to adopt resolution exempting district from rules on expenditure for core and specialist teachers rather than apply for waiver
- Would permit board to adopt resolution exempting district from all day kindergarten
- Would require the School Funding Advisory Council to identify unfunded or underfunded mandates in House Bill 1

#### House Bill 407

- Would permit board of education to submit to ODE a plan to require students to “access and complete classroom lessons posted on the district’s web portal or site” in order to make up calamity days
- Plan to be submitted by August 1 each year and must have written consent of union
- Teachers must develop lessons
- Lessons submitted by September 1 of each year
- Two week period for student to submit lesson

#### House Bill 353

- Would authorize school districts to sell commercial advertising space on outside of school buses
- Limits on sale of advertising space
- Intent is to sell to for-profit entities
- Would provide for a committee of district administrators and attorneys to approve all school bus ads

#### Senate Bill 192

- Would re-enact a recently repealed law that permits the board of education of a local or exempted village school district to terminate district transportation employee positions for reasons for economy and efficiency, and to contract with independent agents to provide transportation services



## 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

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

### Upcoming Speeches

Gary Stedronsky at the OSBA Cyberlaw Technology and the Law Seminar  
on May 11, 2010 in Independence, Ohio:  
*Cell Phone Searches and Discipline*

Bronston McCord at the OSBA Cyberlaw Technology and the Law Seminar  
on May 19, 2010:  
*Cell Phone Searches and Discipline*

Bill Deters and Gary Stedronsky  
at the 33rd Annual OCSBA Spring Seminar on June 11, 2010:  
*New Issues with Student Discipline*

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