Ennis Roberts Fischer
School Law Review

1714 West Galbraith Rd.
Cincinnati, Ohio
45239

PHONE
(513) 421-2540
(888) 295-8409

FAX
(513) 562-4986

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State Board Issues New Rehabilitation Rules

The State Board of Education has issued new rehabilitation rules to govern the employment of licensed, nonlicensed, and transportation employees of school districts. The final regulations were issued in August to clarify the background check requirements and establish standards by which school districts may employ an individual with certain convictions if the district deems that the individual has been "rehabilitated." A new regulation has been promulgated for three different categories of employees: licensed, nonlicensed, and bus/van drivers.

In all three cases, the rules begin with a stated purpose to provide for the safety and well-being of students and to establish rehabilitation standards for individuals with certain criminal convictions who are employed by, or are seeking employment with, a school district. The following summarizes the changes which have occurred in each category.

A. Licensed Individuals

Not much has changed substantively for licensed individuals. The definitions of "applicant" and "educator" have been expanded to include certificates covered by all of Chapter 3319 as well as Sections 3301.071 (teachers in nontax-supported schools) and 3301.074 (treasurers and business managers). The definition for the term "teacher" has been removed. Beyond the definitions, the regulation also contains a blanket statement that, "The provisions of this rule apply to teachers, substitutes, educational aides, holders of pupil activity supervisor permits, and any other position which requires a license issued by the state board of education." The list of criminal offenses affecting the employment of licensed individuals is essentially the same and there are still a few offenses which are disqualifying but subject to rehabilitation.

B. Nonlicensed Individuals

The rule governing nonlicensed individuals with certain criminal convictions is contained in Ohio Administrative Code section 3301-20-03. Nonlicensed employees have been subject to the most change since the 2007 expansion of criminal background checks.

The list of non-rehabilitative offenses for nonlicensed individuals is similar to the offenses which prevent licensed and transportation employees from employment with a school district though a bit shorter. The new rules, however, distinguish nonlicensed applicants/employees by granting "look back" periods for certain enumerated offenses. Offenses which take place outside of the period of time established by the regulations are not considered non-rehabilitative offenses; rather they are disqualifying offenses subject to rehabilitation. The "look back" period is established as of the date of the current application for a position with the district or, for a current employee of a district, prior to the date of the current criminal records check. The "look back" period for certain violent offenses is twenty years. For certain drug and theft offenses the period is ten years. For various "miscellaneous" offenses, the "look back" period is five years.

Finally, as a condition of initial or continued employment, and as part of rehabilitation, the district may

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now request an evaluation by a licensed provider (e.g. physician, psychologist, psychiatrist, independent social worker, professional counselor, chemical dependency counselor, etc.) or completion of professional programs geared towards addressing the issues raised by the applicant's or employee's criminal conviction. Unless the employment contract states otherwise, the cost of such evaluation or program can be made the responsibility of the employee or applicant. This provision is only found in the regulations pertaining to nonlicensed and bus/van drivers. We do not yet know if this is a simple oversight or if there is some purpose behind not including this option for licensed individuals.

C. Bus/Van Drivers

Bus/van drivers are now governed by a separate regulation found in OAC 3301-83-23. This regulation duplicates the list of offenses applicable to licensed individuals. It applies to drivers of both district owned and privately owned buses and vans.

D. The Rehabilitation Decision

The rehabilitation process and the criteria therein have received little change through the new rules. It is worth noting that the ultimate decision regarding whether an employee has been rehabilitated now rests with the district for all employees, not just nonlicensed employees. The decision cannot be appealed to the State Board. Of course, if an individual's license has been revoked or suspended, the district retains little discretion regarding employment. Also worth noting is that sealed convictions are to be considered and treated as any other conviction.

Finally, as a condition of initial or continued employment, and as part of rehabilitation, the district may now request attendance and completion an evaluation by a licensed provider (e.g. physician, psychologist, psychiatrist, independent social worker, professional counselor, chemical dependency counselor, etc.) or completion of professional programs geared towards addressing the issues raised by the applicant's or employee's criminal conviction. Unless the employment contract states otherwise, the cost of such evaluation or program can be made the responsibility of the employee or applicant.

As always, Ennis, Roberts & Fischer will keep you informed of any further developments in this area of the law. If you have any questions or comments regarding the new background check regulations, please do not hesitate to contact us.

Franklin City Prevails in Property Transfer Case

Ennis, Roberts, & Fischer recently defended the Franklin City School District in a request for a transfer of territory pursuant to Ohio Revised Code section 3311.06. This section of the revised code provides for a transfer of territory between school districts after territory has first been annexed for municipal purposes. Such a transfer, however, requires approval of the State Board unless the district in which the territory is located was a party to the annexation agreement. Pursuant to this provision of the code, Middletown filed a request with the State Board in 2005 for a school territory transfer which included six tracts of land located within the Franklin City School District. The State Board sided with Franklin and denied the transfer request.

Middletown appealed the decision to the Franklin County Court of Common Pleas. The Court of Common Pleas agreed with the State Board's decision and denied the transfer request. Middletown then appealed this decision to the Tenth District Court of Appeals, arguing that the State Board incorrectly weighed and applied the factors it was required to consider in ruling on the transfer request, and that the evidence available did not support the Board's decision. The Court of Appeals, however, found that there was substantial evidence available to support the Board's decision, and as such, the trial court did not abuse its discretion in affirming the Board's order.

How this impacts your district:

Ennis, Roberts, & Fischer successfully represented the Franklin City School District in its defense of the territory transfer request at all stages of this litigation. The Court of Appeal's decision in favor of Franklin was rendered on May 28, 2009, three years after the initial transfer request. Three years of negotiations and court proceedings forced the two districts involved to incur substantial legal fees. However, Franklin City, represented by Ennis, Roberts, & Fischer, incurred less than sixty percent of the legal fees that the opposing law firm billed to Middletown. The substantial savings to Franklin in this case coupled with the successful defense of the transfer request demonstrate Ennis, Roberts, & Fischer's commitment to provide first-class legal services to its clients at a reasonable rate.

Student Speech on the Internet

The American Civil Liberties Union (ACLU) of Ohio recently disseminated information to local superintendents regarding student online speech and discipline. The ACLU advised superintendents as to its interpretation of the law concerning disciplinary matters for this type of student speech. In response to this information, Ennis, Roberts, & Fischer has provided its interpretation of the law governing school district decisions relating to the increasingly important and contentious issue of student cyberspeech.

Initially, it should be noted that Ohio law requires each district to maintain a Student Code of Conduct. The Code of Conduct may apply to misconduct that occurs off school premises if the misconduct is connected to activities that have occurred on district-owned or controlled property, or is directed at a district official or employee or the property of the official or employee. If your district policy does not have language allowing the board of education to regulate off-school conduct it may not do so.

In order to comprehend a district's ability to regulate student activity on the internet it is important to understand the extent of the protection of free speech guaranteed by the United States Constitution. In general, the First Amendment guarantees of free speech apply to students in public schools. The right of free speech is not absolute, however, and may be restricted by reasonable regulations as to time, place and manner of the speech.

The Supreme Court's landmark decision in Tinker v. Des Moines Independent Community School District set the standard for interpreting these First Amendment rights as they apply to public school students. The Court held that these rights applied as long as the students did not materially and substantially interrupt the educational process or invade the rights of others. Material and substantial interruption may be shown if it is reasonably foreseeable that the expression would cause such disruption. In other words, a school may justify prohibition of expression if it shows that the measures taken were not motivated by a mere desire to avoid the discomfort and unpleasantness associated with an unpopular viewpoint.

In Bethel School District v. Fraser, the Supreme Court further clarified that the rights of students in public schools are not necessarily co-extensive with free speech rights accorded to citizens in other settings. Specifically, the Court held that schools could prohibit from school property speech considered vulgar, indecent, and generally contrary to educational objectives. The Court's decision in Hazelwood v. Kuhlmeier further added that schools may place reasonable limitations on speech that appears to be school-sponsored, such as the views conveyed in a school newspaper.

While the above limitations to on-campus student speech have been defined by the Supreme Court, the law regarding off-campus internet activity is much less clear. The ACLU suggested that schools cannot discipline students for online activity or speech that occurs entirely outside of the school setting. Its opinion did note one exception for "true threats" made against someone else in the school. "True threats" are those statements where the speaker intends to communicate his intent to commit an act of violence. True threats indeed fall within the category of speech that a district may regulate according to school policy.

While the Supreme Court has yet to render an opinion on student cyberspeech rights, other courts have indicated that schools may take several actions to address offensive or threatening internet postings generated by students. For instance, schools may always request that a website such as myspace.com remove threatening content form the site without violating the First Amendment. In fact, the Communications Decency Act provides website managers with virtually limitless discretion to remove any information posted to the site by another party without facing the threat of liability. Schools may also discipline students that generate offensive internet content off school premises as long as the school proves that the content materially disrupted the educational process, or presented a reasonable risk of disruption. Schools are encouraged to document everything relating to the discipline as this is a very high standard to meet.

Districts should also require all students to sign acceptable use policies that limit internet activities on school grounds. Internet use in school should be for educational purposes only, and the policy should enforce the rule that school computer use is a privilege, not a right. These policies should include a statement that students have no expectation of privacy when using school computers. Disciplinary procedures resulting from a violation of the agreement should also be explained. Finally, district administrators should contact parents if threatening material about their students is brought to their attention. Administrators should inform parents that they may contact the police to report any threatening or harassing behavior that targets their children.

District Examinations Exempt from Disclosure as Trade Secrets

State ex rel. Perrea v. Cincinnati Pub. Schools, Slip Opinion No. 2009-Ohio-4762.

The Supreme Court of Ohio recently ruled that the questions used in semester examinations administered to all ninth grade students in the Cincinnati Public School District (CPS) are not "public records" subject to disclosure under the Public Records Act. The court's decision was based on its determination that the examination questions fall within a statutory exception to the Public Records Act for trade secrets.

The case arose out of a request for the examinations by a high school teacher in the Cincinnati Public School system who purportedly sought copies of the examination questions in order to evaluate them for fairness, accuracy, and validity. CPS denied the teacher's public records request, asserting that they were not subject to disclosure under the Public Records Act because they qualified under an exemption for trade secrets and copyrighted materials. As a result, the teacher filed a mandamus action with the Ohio Supreme Court, requesting that the court compel disclosure of the documents.

The court began its analysis by noting that the examinations clearly fell within the definition of public records in Ohio Revised Code section 149.43. Therefore, the documents would be subject to disclosure unless an exception applied. The court then considered CPS's argument that the examinations were excepted by The Ohio Uniform Trade Secrets Act. This Act is a state law exempting trade secrets from disclosure under the Public Records Act. Ohio Revised Code section 1333.61(D) defines "trade secrets" as any information that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

CPS established that it spent over $750,000 on the development of ninth, tenth, and eleventh grade exams. Estimates suggested that replacing just half of the questions would likely cost over $270,000. Due to the expenses involved, CPS argued that it would not be able to continue giving yearly assessments if the examinations were made public. CPS also established that it had taken numerous steps to keep the examination questions private and secure by preventing students from making copies of the exams, preventing students from possessing cell phones or cameras at the exam location, and even limiting the faculty's ability to access exams.

The court further noted that even if the examination questions were not trade secrets, forcing disclosure of the examination questions would frustrate the intent of the Public Records Act. The court determined that if the questions were made public, CPS would not be able to effectively administer the examinations and its ability to evaluate student learning would be greatly hampered. At any rate, the court decided that the teacher was not entitled to the examination questions because they qualified as trade secrets, and as such, were not subject to the Public Records Act.

How this impacts your district:

Many districts maintain similar tests or common assessments which the district plans to use for a number of years. This case indicates that if your district has developed its own examinations and has strived to keep the questions and answers secret so as to not render the tests worthless, the tests will fall within the trade secrets exception to the Public Records Act. Ennis, Roberts, & Fischer currently maintains a sample policy and non-disclosure agreement which is available on request. If your district wishes to discuss this sample policy, or has any questions pertaining to common assessments in general, please do not hesitate to contact Ennis, Roberts, & Fischer for consultation.

Nonrenewal Deadline for Treasurer Contracts

Ennis, Roberts, & Fischer wants to remind your district of the changes to contracts for school district treasurers that were enacted in House Bill 671. In the past, the contract year for treasurers spanned a term that began and ended at a yearly organizational meeting. House Bill 671 changed the contract year for treasurers to begin on August 1, and to conclude on July 31 of the following year. In an effort to phase in these changes, the bill provides that if a school district intends to nonrenew any treasurer granted a contract under the old law, it must provide notice of this intent at least ninety days prior to the expiration of the contract term. This includes treasurers whose contracts will expire at the end of 2009 or at the organizational meeting of 2010. Failure to nonrenew at least ninety days prior to the expiration of such a contract will result in the contract continuing until July 31, 2011.

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

Jeremy Neff at the National Business Institute Seminar on October 7, 2009
Special Education Law

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

Contact One of Us

William M. Deters II
wmdeters@erflegal.com

C. Bronston McCord III
cbmccord@erflegal.com

J. Michael Fischer
jmfischer@erflegal.com

David J. Lampe
dlampe@erflegal.com

Jeremy J. Neff
jneff@erflegal.com

Gary T. Stedronsky
gstedronsky@erflegal.com

Ryan M. LaFlamme
rlaflamme@erflegal.com

Rich D. Cardwell
rcardwell@erflegal.com