Ennis Roberts Fischer
School Law Review

1714 West Galbraith Rd.
Cincinnati, Ohio
45239

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

FAX
(513) 562-4986

March 2013

Inside This Issue:

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

ERF Wins Appeal of Arbitration Award Regarding RIFed Employees

***Princeton City School District Board of Education v. Princeton Association of Classroom Educators*, Appeal No. C-120469**

In 2009, the Princeton City School District ("Board") faced a large projected deficit and made the decision to replace its own vocational-education program with programs taught by instructors from Great Oaks. In April 2009 the Board adopted a resolution abolishing 13 teaching positions and authorizing a contract with Great Oaks to provide vocational-education services within the Princeton City School District.

The Princeton Association of Classroom Educators ("PACE") filed a grievance complaining that the Board violated the collective bargaining agreement for failing to first offer the vocational-education teaching positions to PACE members. The arbitrator decided in favor of PACE and determined that the Board must post for a bid by PACE members all of the positions that had been filled by Great Oaks employees. Further, the arbitrator ordered that the Board must reimburse any PACE members who had lost wages or benefits as a result of the Board's use of Great Oaks instructors.

The Board appealed, arguing that the arbitrator interfered with the Board's discretion to reduce the number of its teaching positions. Ohio R.C. 3319.17(B)(1) permits a board of education to reduce the number of teachers it employs for "financial reasons." Further, in the collective bargaining agreement between PACE and the Board, the parties recognized the Board's power to reduce its teaching force "for lack of funds, abolishment of positions, or for any reason provided for under the Ohio Revised Code."

According to the Court the arbitrator misconstrued how the collective bargaining agreement applied in this situation. The arbitrator believed that the district was replacing the PACE teachers with non-member teachers. Instead, the Board eliminated its teaching positions altogether, so there was no responsibility to offer positions to the vocational teachers. The Board was no longer the employer of those vocational teachers; Great Oaks was. Since Great Oaks was not a party to the collective bargaining agreement, and the Board was not the employer of the new instructors, neither party had any responsibility to offer members of PACE the right of first refusal. Therefore, the Court found that the arbitrator was incorrect in her findings and the Board was not responsible for damages related to this case.

How This Affects Your District:

Many collective bargaining agreements include provisions similar to those discussed above. It is inappropriate for a district to offer a bargaining unit position to a non-member of the bargaining unit. However, it may be appropriate for a district to eliminate teaching positions and contract with a third-party provider to provide the services formerly provided by the bargaining unit members, when there is financial necessity.

In this time of fiscal restraint, districts are forced to develop money-saving methods. One of those methods is to eliminate teaching positions through reduction in force ("RIF") procedures and contract with third-party service providers to provide the services formerly provided by the RIFed employees. The Ohio Revised Code specifi-

(Continued on page 2)

ERF Wins Appeal of Arbitration Award Regarding RIFed Employees, Cont.

cally gives districts the right to RIF employees when there are financial issues. This statute's provisions prevail over any conflicting provisions in a collective-bargaining agreement. Therefore, regardless of what your district's collective bargaining agreement states, your district has the ability to RIF employees when finances become a problem.

What your district cannot do is replace RIFed employees with non-bargaining unit employees. Rather, the district can contract with a third-party provider to provide the needed instructors or other types of employees to replace the ones who have been RIFed.

This appears to be a relatively untested area of the law, and this decision was as much about the misapplication of the CBA language by the arbitrator as it was about Ohio Revised Code on RIFs. It is possible that a different arbitration with different CBA language could lead to a different result. Moreover, courts are generally reluctant to overturn arbitration decisions. What this case shows is that, at least in some circumstances, RIFs for financial reasons paired with contracting out work can be a viable way to reduce expenses.

New Parental Consent Regulations Related to Accessing Public Benefits

Under soon-to-be revised regulations, school districts have been required to repeatedly get consent in order to access insurance or public benefits (e.g. Medicaid) that are used to help pay for services provided at school. This scenario most often arises in the special education context. On February 14, 2013 the final regulations changing the requirements in 34 CFR 300.154(D) were published. These final regulations will take effect on March 18, 2013 and will make it easier for school districts to access public benefits, while also protecting family rights.

In order to access a child's or parent's public benefits or insurance, a school district must provide written notification to the parent. After the initial notice, the written notification must be provided annually from that point forward. This written notification must explain all of the protections available to parents under Part B, as described in 34 CFR 300.154(d)(2)(v), in order to ensure that the parents are fully informed of their rights before the school can access their or their child's public benefits or insurance to pay for services under IDEA. The notice must be written in language that can be understood by the general public, and also must be provided in the native language of the parent. If the parent uses some other mode of communication and would not be able to read the notification, then that mode of communication must be used to give the parent the information in the notice.

With the revised regulation, after providing the written notification, the school must obtain a one-time written consent from the parent. The consent must specify: (a) the personally identifiable information that may be disclosed (e.g. records or information about services that may be provided to a particular child); (b) the purpose of the disclosure (e.g. billing for services); and (c) the agency to which the disclosure may be made (e.g. Medicaid). This consent must also specify that the parent understands and agrees that the school may access the child's or parent's public benefits or insurance to pay for services.

Both the written notification and the written consent must be completed prior to a school seeking to access a parent's or student's public benefits or insurance to pay for services. Therefore, whenever a school needs to access public benefits or insurance to pay for services, it must first provide the written notification to the parent and then obtain written consent from the parent. Once these two requirements are met a school district may access the public benefits and insurance without any other notice or consent needed, so long as the access falls within the consent granted by the parent. This should help schools by eliminating the need to obtain consent each time access to public benefits and insurance is sought.

District Not Liable in Peer Bullying Case

***Vidovic v. Mentor City School District*, 10-01833 (E.D. Ohio Jan. 31, 2013).**

This case regarding peer bullying and harassment relieved the district of liability for a student's suicide.

The parents of a student who committed suicide sued the school district, claiming that the student was repeatedly harassed and the school did nothing to prevent the harassment. The student was often bullied because of her Croatian nationality, although at times the harassment was sexual in nature. Each incident reported to school officials was dealt with promptly. However, the bullying continued and the student became increasingly depressed and began to

(Continued on page 3)

District Not Liable in Peer Bullying Case, Cont.

speak about suicide. She began seeing the school counselor on a regular basis, and just before committing suicide her parents withdrew her from school to begin home-schooling.

The Court held that a governmental entity (i.e. the school) is not required to protect its citizens against other private parties unless either: (1) the state has custody of the person in need or there is some other heightened responsibility present; or (2) the state actor affirmatively acts to create or increase the risk of harm to its citizens.

In this case, the bullying and harassment that occurred closest to the time when the student committed suicide was during summer break and the parents withdrew the student from school prior to her committing suicide. Therefore, there was no special relationship or responsibility between the school and the child. The Court stated that "the law cannot require a school to police its students and former students outside of the school's parameters."

Further, there was no evidence that the school took action that created harm or heightened the risk of harm to the student, because the school responded when it was aware of bullying. While the parents alleged that the school had failed to act in a manner to prevent the harm to their daughter, the U.S. Supreme Court and the Sixth Circuit Court of Appeals have held that failure to act is not enough, on its own, to be held liable in this type of case.

The other issue brought up by the parents was that the district was liable for violating the equal protection clause because their daughter was being bullied because of her nationality. In order to prevail, the parents needed to prove that the school was deliberately indifferent with its response to the student on student harassment. Because the district responded to the incidents whenever they occurred, the Court could not find that the district was deliberately indifferent.

How This Affects Your District:

Bullying and harassment are pervasive in the school world. This case demonstrates that districts will not easily be held accountable for the consequences resulting from student on student harassment. However, it also shows that parents are likely to bring litigation if they feel that their child is being bullied and they think the school could have taken action to prevent the bullying.

Schools should take allegations of bullying and harassment seriously. Further, because of the Jessica Logan Act, schools have responsibilities related to peer bullying and harassment. All boards must have a policy prohibiting harassment, intimidation, and bullying. This definition must include electronic acts, and the policy must provide a strategy for protecting victims of harassment from enduring any new harassment.

In addition, students must be given instruction on the board policy regarding bullying and harassment each year. Teachers and other school staff should be trained on the policy and be aware of their responsibility to report any instances of harassment or bullying that they see or hear about occurring.

Ohio District Not Liable for Sexual Abuse of Student

***McCoy v. Board of Education of Columbus City Schools*, No. 12-3040 (6th Cir. Feb. 13, 2013).**

The Sixth Circuit declined to hold Columbus City School District liable for the actions of one of its teachers, when that teacher engaged in the sexual abuse of numerous students. The Court's decision was based on the fact that the district did not have actual notice of the teacher's misconduct.

The teacher was reported numerous times, over a six year period, to have touched students inappropriately in his classroom. However, the reported touching all seemed to be related to disciplining students for bad behavior. On one occasion the teacher kicked a female student on her behind. On other occasions, he grabbed a student's arm after the student tripped over something in the classroom and pinched students. Each time these incidents were reported to district administrators an investigation was conducted. At the conclusion of each investigation, the administrators met with the teacher and gave him written directions to refrain from touching students.

In 2005, a student reported that the teacher had touched her and another student. She reported that the teacher had called the other student up to his desk, under the guise of reviewing the student's work, and had proceeded to put his hand down the student's pants and fondle his genitals.

Based on these allegations, law enforcement began an investigation and found that the teacher had sexually assaulted not only this child, but other children. The teacher was charged with gross sexual imposition. He entered a plea and was sentenced to ten years in prison.

The parents of one of the assaulted students sued various entities, including the district, alleging that the

(Continued on page 4)

Ohio District Not Liable for Sexual Abuse of Student, Cont.

district engaged in deliberate indifference when dealing with this teacher's pattern of abuse. In order to find deliberate indifference, the Court stated that the district must have had actual notice of the sexual behavior that the teacher was engaging in. Prior to the allegations related to this last student, the school was only aware of instances of physical contact that were non-sexual. While these instances of physical contact could indicate that something else was going on, they did not give the district notice of the teacher's sexual abuse of the students. For each allegation, the district conducted an investigation, and in each case gave the teacher both verbal and written directions to discontinue his physical contact with students.

The Court noted that in hindsight the district could have done more; however, with the information it had, the district reacted reasonably.

How This Affects Your District:

This case shows that districts can only be held liable for the sexual abuse of students if they are deliberately indifferent to the abuse. Deliberate indifference is a term of art and means that the district must have actual knowledge of the abuse and that it must ignore that knowledge and continue to allow the abuse to continue in order to be liable.

When districts become aware of a teacher touching students inappropriately, a procedure should be in place for investigating these allegations and disciplining teachers who engage in these behaviors. In general, a district will not be found liable unless it can be established that an executed policy, or the toleration of a custom within the school district, leads to, causes, or results in the sexual abuse of students. Therefore, districts should have a policy to deal with these types of allegations and should ensure that they follow through with the procedures outlined in these policies.

Religious Group Sues Pennsylvania District for Discrimination

The Child Evangelism Fellowship of Dauphin County (CEF) is suing the Harrisburg School District in Pennsylvania for discrimination. CEF alleges that the district charged it a rental fee of $1,200 while other non-profit groups, like the Boy Scouts, the Boys and Girls Club, and the American Legion are provided fee waivers and not charged.

CEF claims that it has been operating in the district since 2007-2008. When it first began operating out of the district's facilities, CEF was given a fee waiver and therefore only had to pay for custodial, security, and site maintenance fees. However, the district has now started charging CEF. CEF is asking the court to order the district to designate it as a fee-exempt entity.

How This Affects Your District:

When your district creates policies and procedures regarding the use of its facilities by outside entities, it is important that a fee schedule is set up and that the fees charged are never content-based. It is permissible to set up a fee schedule that allows for differentiation of fees based on for-profit entities versus non-profit entities. However, within that classification, it is not permissible to base any fee schedule on the content of the programming that will be done or the general purpose of an entity.

A related facilities issue that sometimes arises when setting up a fee schedule is that districts should not provide for district employees to be able to use the facilities for a lesser cost than other people or groups.

Webinar Archives

Did you miss a past webinar or would you like to view a webinar again? If so, we are happy to provide that resource to you. To obtain a link to an archived presentation, send your request to Pam Leist at pleist@erflegal.com or 513-421-2540. Archived topics include:

- Education Law Legal Update - Including SB 316
- Effective IEP Teams
- Cyberlaw
- FMLA, ADA and Other Types of Leave
- Tax Incentives
- Prior Written Notice
- Advanced Topics in School Finance
- Student Residency, Custody and Homeless Students
- Ohio Budget Bill/House Bill 153
- Student Discipline
- Media and Public Relations
- Gearing Up for Negotiations

Education Law Speeches/Seminars

Administrator's Academy Dates at Great Oaks Instructional Resource Center

You can enroll in an Administrator's Academy session using the form on our website or by emailing Pam Leist at pleist@erflegal.com.

June 13th—*Special Education Legal Update*

July 11th—*Education Law Legal Updates 2012-2013*

"Filling in the Blanks" on Your Teacher Evaluation Policy

Ennis Roberts & Fischer will join with **Britton Smith Peters & Kalail** to develop a unique workshop for school administrators designed to help ease the apprehension we all feel about finalizing a comprehensive teacher evaluation policy. Our goal is to get your district to "yes" on all the important issues surrounding the new OTES system.

At the workshop, key stakeholders—including school law attorneys, labor negotiations representatives, state government representatives, and local educational leaders—will participate in a frank discussion regarding the major obstacles to completion so that educators are better able to understand the needs of all involved in the process. In addition the presenters will walk step by step through each of the required component of the evaluation policy and provide suggestions for how districts can address potential areas of contention and move forward in a positive way. In addition, workshop participants will be given a copy of a sample evaluation policy.

The workshop will be available statewide, and is free of charge. Registration is required. To register, contact Pam Leist (pleist@erflegal.com; 513-421-2540). Please specify which workshop you plan to attend and provide a valid email address at the time of registration.

Columbus	**Cincinnati**	**Cleveland**
March 19th, 2013	March 20th, 2013	April 12th, 2013
8:00 a.m. to 12:00 p.m.	8:00 a.m. to 12:00 p.m.	8:00 a.m. to 12:00 p.m.
Columbus Education & Conference Center (Hilliard)	Lakota West High School	Cleveland Marriott East

Other Upcoming Presentations

Pamela Leist
Miami University on March 14, 2013
Practical Legal Advice for Teachers

Erin Wessendorf-Wortman
OASBO Annual Workshop on April 24, 2013
Making Booster Groups Work for You

Gary Stedronsky
OASBO Annual Workshop on April 25, 2013
Medical Leave: It's Not Brain Surgery

Bill Deters
OASBO Annual Workshop on April 25, 2013
Technology in the Workplace? Disaster or Boon?

Follow Us On Twitter: @erflegal

Need to Reach Us?

William M. Deters II
wmdeters@erflegal.com
Cell: 513.200.1176

J. Michael Fischer
jmfischer@erflegal.com
Cell: 513.910.6845

Jeremy J. Neff
jneff@erflegal.com
Cell: 513.460.7579

Pamela A. Leist
pleist@erflegal.com
Cell: 513.226.0566

C. Bronston McCord III
cbmccord@erflegal.com
Cell: 513.235.4453

Gary T. Stedronsky
gstedronsky@erflegal.com
Cell: 513.674.3447

Ryan M. LaFlamme
rlaflamme@erflegal.com
Cell: 513.310.5766

Erin Wessendorf-Wortman
ewwortman@erflegal.com
Cell: 513.375.4795

ERF Practice Teams

Construction/Real Estate

Construction Contracts, Easements, Land Purchases and Sales, Liens, Mediations, and Litigation

Team Members:
Bronston McCord
Ryan LaFlamme
Gary Stedronsky

Workers' Compensation

Administrative Hearings, Court Appeals, Collaboration with TPA's, General Advice

Team Members:
Ryan LaFlamme
Pam Leist
Erin Wessendorf-Wortman

Special Education

Due Process Claims, IEP's, Change of Placement, FAPE, IDEA, Section 504, and any other topic related to Special Education

Team Members:
Bill Deters
Pam Leist
Jeremy Neff
Erin Wessendorf-Wortman
Michael Fischer

School Finance

Taxes, School Levies, Bonds, Board of Revision

Team Members:
Bill Deters
Bronston McCord
Gary Stedronsky
Jeremy Neff