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ENNIS BRITTON

School Law Review

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U.S. Supreme Court Upholds Arbitration Agreements

In an opinion that is proving to be unpopular with workers and employee advocates across the country, the U.S. Supreme Court rendered a long-awaited decision that employer–employee arbitration agreements prohibiting class action arbitrations are enforceable. At the heart of the case was whether the right for employees to bring class actions or collective/group actions against employers can be nullified through arbitration agreements that prohibit class actions or collective/group actions. The majority opinion, authored by the newest justice, Neil Gorsuch, holds that "Congress has instructed federal courts to enforce arbitration agreements according to their terms – including terms providing for individualized proceedings."

The Federal Arbitration Act (FAA) states that arbitration agreements "shall be valid, irrevocable, and enforceable" and generally requires courts to enforce these agreements. However, the FAA contains a "saving clause," which allows courts to refuse to enforce arbitration agreements that violate federal law. The National Labor Relations Act (NLRA), on the other hand, gives employees the right to engage in "concerted activities" for "mutual aid or protection." Furthermore, the NLRA specifically provides that denying employees this right "shall be an unfair labor practice."

The Supreme Court decided that arbitration agreements prohibiting class actions or collective/group actions and requiring individual arbitration proceedings are enforceable. Furthermore, it held that while the FAA requires courts to enforce arbitration agreements, the saving clause applies only to general contract defenses (e.g., fraud, duress, unconscionability). An argument targeting the arbitration itself would not constitute a sufficient challenge.

The Court also found that class actions or collective/group actions are different from the rights preserved in the NLRA for employees to organize and collectively bargain.

What This Decision Means for Your District

This opinion leaves no doubt about the Supreme Court's position that an employer's right to enforce arbitration agreements does not conflict with workers' rights under the NLRA. Therefore, if an arbitration agreement requires employees to bring individual arbitrations as opposed to class actions, it will be enforceable. However, this opinion has garnered much opposition, some even calling it an "assault against workers." Workers' rights organizations

are calling for Congress to draft laws that clearly support the right for workers to band together. Until federal laws are drafted that clearly invalidate the FAA, employer–employee arbitration agreements are considered enforceable.

– *Epic Systems Corp. v. Lewis*, 584 U.S. ___ (2018).

Ohio Attorney General Issues Opinion on Property Valuation Settlements

The Ohio attorney general recently published an opinion that addressed several questions raised by the Stark County prosecuting attorney regarding property valuation settlements when property owners and boards of education contest an auditor's value (O.A.G. No. 2018-011).

A party such as a board of education or a property owner who contests an auditor's property valuation will begin by filing a complaint with the board of revision. A party who disagrees with the requested valuation may file a counter-complaint. While the complaint is pending before the board of revision, the complaining parties may enter into a settlement agreement, either dismissing the complaint or stipulating to an agreed property valuation. Either option may be accompanied with a payment from the property owner to the board of education.

The attorney general's opinion answered questions about a hypothetical property valuation incident in which a county auditor values a property at $400,000. The local board of education files a complaint to increase the property valuation to $550,000. The property owner then files a counter-complaint to reduce the valuation to $350,000.

Dismiss the Complaint

While the complaint is pending, the board of education and the property owner may agree to dismiss the complaint. In this hypothetical scenario, the board of education dismisses the complaint in exchange for a one-time payment of $5,000.

In their simplest form, the questions arising from this scenario are as follows:

1. Is this scenario permissible?
2. If so, may a board of revision require disclosure or approval of the settlement agreement as a condition for the board of education to dismiss the complaint?

The short answer to question 1 is yes, this is permissible. The attorney general explained that a board of education may voluntarily dismiss a pending complaint. Furthermore, a board of education has the authority to enter into a settlement agreement. This includes the terms of the settlement – in this scenario, receiving a payment in exchange for dismissing the complaint.

In answering question 2, the attorney general noted that a board of revision has no authority to require a plaintiff to disclose the settlement agreement, nor to require the board of revision's approval of the settlement agreement, as a condition for the board of education to dismiss the complaint.

Stipulate the Value

A different settlement agreement that the disputing parties may choose is a stipulated value. In this scenario, the board of education and the property owner stipulate a property value of $450,000. This is halfway between the requested valuations of the board of education ($550,000) and the property owner ($350,000). Provided the board of revision agrees to the stipulated value, the property owner then, in this hypothetical scenario, pays the board of education a one-time payment of $2,500.

The questions arising from this scenario are as follows:

1. Is this scenario permissible?
2. If so, prior to the board of revision's approving the stipulated value, may a board of revision require disclosure of the payment arrangement and consider that arrangement when determining whether to approve or reject the stipulated value?

Again, the short answer to question 1 is yes. A board of education may agree to accept payment from a property owner in exchange for stipulating to a certain property value. However, only the county auditor and board of revision have the authority to determine a property's valuation. Therefore, although a board of education and a property owner may stipulate to a particular valuation, the board of revision must approve the valuation.

Question 2 is whether the board of revision may require disclosure of the payment arrangement and consider that arrangement when deciding whether to approve the stipulated property value. To determine the property value, the auditor considers not only the land and the improvements to the land, but also the present use of the land and the best probable use of the land. These factors include such things as supply and demand, financing, time and cost of development, and many others – all of which are physical and geographic characteristics. These considerations do not include any agreed payment between a board of education and a property owner. Therefore, a board of revision may neither require the disclosure of any such payment nor consider such payment in making a decision on the stipulated property valuation.

What This Means for Your District

Some county auditors have harshly criticized school districts for accepting payment directly from a property owner in exchange for dismissal of a complaint or an appeal or a stipulation of value. The Ohio Attorney General Opinion indicates that school districts may strike an agreement with property owners during pending property valuation proceedings before the board of revision or on appeal. The terms of these agreements are not required to be disclosed to a board of revision, the Board of Tax Appeals, or a court, with the exception of a stipulated property valuation. Having this understanding should make it simpler for boards of education to act in negotiating with property owners and to minimize litigation and complaints from county auditors.

Court's Decision Overturned in Gender Discrimination Case

Ohio's Tenth District Court of Appeals recently overturned a decision of the Ohio Court of Claims in a case alleging gender discrimination. The Court of Claims had rendered summary judgment in favor of the employer, the Ohio Department of Transportation (ODOT), but the Court of Appeals found that the trial court overstepped its authority in making that decision. The Court of Appeals sent the case back to the Court of Claims, presumably for either trial or settlement.

The plaintiff, a truck driver named Anne Eschborn, was the only female employee at her assigned post. She was terminated from employment and was told the reason was lack of work. However, she later received a letter stating that she had been terminated for poor performance, for using foul language, and for sexual harassment. She admitted to using foul language in a few instances at work and that these were sexual in nature.

At the outset, the appellate court noted the legal standard in discrimination cases in Ohio. The analysis, often cited as the "*McDonnell Douglas* burden shifting" analysis, goes as follows: If a plaintiff establishes a prima facie case of discrimination, the burden shifts to the employer to prove that the employer had a legitimate, nondiscriminatory reason for the adverse employment action. If the employer does so, the burden of proof shifts back to the plaintiff, who then must prove that the employer's reasons are merely a pretext for discrimination.

A plaintiff can establish a prima facie case either directly or indirectly. Directly, a plaintiff may present evidence of any nature to show that the adverse employment action taken by the employer was more likely than not motivated by discriminatory intent. Indirectly, a plaintiff may show that "(1) he or she was a member of a statutorily protected class; (2) he or she was subjected to an adverse employment action; (3) he or she was qualified for the position; and (4) he or she was replaced by, or that the removal permitted the retention of, a person not belonging to the protected class."

The Court of Claims found that Eschborn failed to present a prima facie case of discrimination. The Court of Claims determined that Eschborn could satisfy the first three elements of her prima facie case but could not satisfy the last element because the evidence was insufficient to support the conclusion that a person outside of the protected class replaced her or that other comparable, nonprotected persons were treated more favorably.

The evidence showed that ODOT assigned another employee to the post that Eschborn occupied prior to her termination. The trial court held that the evidence merely established a redistribution of work, not a replacement (with someone outside of the protected class). Therefore, the Court of Claims granted summary judgment to ODOT, denying the plaintiff of a hearing to consider the evidence.

The issue before the Court of Appeals was that no trial took place at which the judge could weigh the evidence presented to make a factual determination. Reasonable minds could differ on the meaning of the evidence about the replacement. Therefore, the two parties were in dispute of the facts, which is a genuine issue for a trial. If any genuine issues exist for the trier of fact to consider, a court cannot grant summary judgment. The Court of Appeals therefore agreed with the plaintiff, finding that the trial court had overstepped its authority in granting summary judgment. The Court of Appeals also pointed to evidence in the record that similar male employees were not disciplined for using foul language.

What This Means for Your District

While this case is certainly better for law students studying summary judgment than for school administrators, the case facts contain some practical lessons regarding employment law, discrimination, and harassment. First, without the shifting explanations for termination, the employee's claim of discrimination would likely not have been made. Employers must be clear in their communications to employees, especially communications of a disciplinary nature. Make sure that department heads and supervisors are on the same page regarding an employment matter before moving forward. Second, employers should keep in mind that discipline must be uniform among employees to prevent claims of better treatment of persons outside of a protected class. It is difficult for an employer to credibly state that foul language was a basis for termination, and not a pretext for discrimination, when other employees are not disciplined for similar behavior.

– *Eschborn v. Dept. of Transp.*, 2018-Ohio-1808.

Federal Judge Rules Transgender Discrimination Violates Title IX and Fourteenth Amendment

A federal judge in a Virginia court has ruled in the Gavin Grimm case that Title IX and the Fourteenth Amendment protect students against discrimination based on transgender status. The federal district court judge held that a gender stereotyping theory under Title IX of the Education Amendments of 1972 and the Equal Protection Clause of the Fourteenth Amendment bars transgender discrimination.

Following the Obama administration guidance that schools should accommodate transgender students, the G.G. case made its way to the U.S. Supreme Court, only to be remanded to the federal district court after the Trump

administration rescinded the previous guidance. The May 22 ruling means that Gavin Grimm may proceed to collect damages from the school district that barred him from using the boys' restrooms.

The judge said that offering students a gender-neutral restroom is insufficient, as the school district's policy itself violates Title IX if it requires students to use the restrooms that align with their biological sex instead of their gender identity. In recent years, a number of other federal district courts and appellate courts have ruled that different treatment of transgender students or employees is a form of gender stereotyping that violates Title VII of the Civil Rights Act and Title IX of the Education Amendments.

What This Decision Means for Your District

Although this federal ruling out of the Eastern District of Virginia does not serve as controlling law in Ohio, the decision nonetheless sends a message to schools across the country. Most Ohio school districts do not have transgender-specific policies related to restroom or locker room use, as other policies already in place provide appropriate and effective guidance. However, if your school district does have a policy requiring students to use a restroom or locker room according to the student's biological sex, it is recommended that you consult with legal counsel to have the policies reviewed and potentially rewritten. Such policies, if not amended, could be found in violation of Title IX and the Fourteenth Amendment and may result in payment of damages, if applicable, to the student(s) affected by the policy.

Special Education Spotlight: Considering Students with Disabilities in Emergency Response Plans

School districts have placed great focus on developing effective emergency response plans and protocols so that students and staff are prepared and able to respond to an emergency situation. As part of plan development, school districts should consider the needs of students with disabilities. For instance, students may have mobility limitations such that they are not able to transport themselves, communication limitations that prevent them from speaking for themselves, or other physical or mental limitations that prevent them from following protocols without assistance during an emergency.

Special education staff should be a part of emergency response planning to provide input on considerations for students with disabilities. Below are several ways that school districts can assist students with a disability during an emergency:

- **Discuss emergency response protocols.** During IEP and Section 504 team meetings, teams should discuss building protocols and consider whether students with disabilities may need assistance during drills or emergencies. Emergency response plans may be developed to support these needs.
- **Help students prepare for drills.** Instruct students about the purpose of drills and help them prepare in advance. Consider scheduling drills to allow time afterward to debrief and provide support so that students are not sent home immediately after a drill.
- **Know your district's responsibilities.** Although the Individuals with Disabilities Education Act does not specifically require districts to develop emergency plans for students with disabilities, other federal laws such as Section 504 and Executive Order 13347 (2004) require that public schools consider students with disabilities in their emergency plans.

Case Law Addressing Drills

In 2017, a court in Nevada found that a school district violated the IDEA when it failed to implement a safety protocol for a student with gross motor weakness. The student's IEP provided for adult supervision and support during drills, but a substitute teacher failed to implement the IEP during a fire drill. This case has two lessons: (1)

ensure that substitute teachers are familiar with a student's IEP, and (2) ensure that appropriate documentation exists to assist both staff and students during an emergency drill. – *Douglas County School District*, 70 IDELR 111, May 9, 2017.

Also in 2017, a New Mexico school was found to have violated the IDEA during an actual fire when four students' emergency plans were not carried out. One student's plan required the student to be buckled into a wheelchair and transported to safety. During the event, no wheelchair was available and no staff were trained in safe lifting techniques. An emergency kit had been prepared for another student, but the kit was stored in a separate location and could not be retrieved because interior doors automatically locked during the alarm. The lack of automatic door openers made it difficult to evacuate this student. – *Questa Independent School District*, 118 LRP 19592, December 22, 2017.

Legislation in the Works

In April, former Ohio House Speaker Cliff Rosenberger resigned because of an ongoing FBI investigation. Now, the House cannot vote on any pending legislation without a Speaker of the House, and thus far it is unable to agree on a speaker because of concerns that the favorite (Rep. Ryan Smith) could be dragged into the same FBI investigation that prompted Rosenberger's resignation. The speaker pro tem has announced a chamber vote on June 6, but until then, all legislation awaiting a House floor vote remains on hold.

Meanwhile, the Senate continues to meet and is passing legislation. Below is the current status and updates of several bills that are nearing the light at the end of the tunnel but just cannot make it any further without a House speaker.

HB 8 – Public Records Law

This bill previously passed in the House and just passed in the Senate on May 23. The bill exempts from public records law the personal information of a minor in a school vehicle traffic accident. Because the bill was amended in the Senate, it will return to the House for a final vote.

Sub. HB 21 – Community Schools

This bill also passed in the Senate on May 23. In addition to numerous changes to community schools and their sponsors, the bill eliminates the current EMIS Advisory Board and requires the Ohio Department of Education to establish a new EMIS Advisory Council for recommendations to improve the operation of EMIS. The bill also prohibits the Board of Building Standards from requiring a storm shelter to be built on any school building operated by a school prior to September 15, 2019. The bill was amended in the Senate so it now awaits approval from the House.

HB 108 – "Informed Student Document Act"

This bill passed in the House Education and Career Readiness Committee on May 23 and now awaits a House floor vote. Most of the bill relates to higher education; however, it also requires one-half unit of instruction in economics or financial literacy in high school. Financial literacy may be taught by an educator licensed to teach social studies, business education, or consumer and family sciences.

HB 428 – Ohio Student Religious Liberties Act of 2018

This bill passed in the House Education and Career Readiness Committee on May 23 and now awaits a House floor vote. The bill removes a restriction in the current law that allows schools to limit the exercise or expression of a student's religious beliefs to lunch periods or other noninstructional time periods when pupils are free to associate. It defines "religious expression"; permits students to engage in religious expression before, during, and

after school in the same manner as with secular activities; and permits religious expression in the completion of homework, artwork, or other written or oral assignments.

HB 438 – ESC Boards

The Senate passed a substitute bill on May 23. The bill permits additional appointed members to ESC boards and permits a local school district to sever its territory from one ESC and annex that territory to an adjacent ESC under specified conditions. The bill will now go back to the House for approval of the version passed by the Senate.

HB 626 – Academic Commissions

This bill establishes a moratorium on the creation of new academic distress commissions. The bill is not moving, so some legislators are trying to include this as an amendment in SB 216, which was moving through the House Committee until this amendment was proposed.

SB 216 – Education Deregulation

The Senate passed an amended substitute bill on March 21. Since then, the House Education and Career Readiness Committee has accepted several amendments. Below are highlights of the most recent Senate amendments and the House amendments. Note that this bill is sure to be amended even more in the days ahead.

- Retains current law regarding the **Kindergarten Readiness Assessment**. Adds a requirement that ODE convene an Early Childhood Comprehensive Assessment Advisory Group to make recommendations on the use and administration of the KRA and to report those findings to the General Assembly by September 1, 2019.
- Changes **educator license grade bands** to preK–5, 4–9, and 7–12. Specifies that the changes do not apply to persons licensed before the effective date of the bill. Requires the same grade bands for intervention specialists, except that mild–moderate or moderate–intensive licenses be prescribed for grades K–12.
- See the May 2018 issue of *School Law Review* for updates on the **Ohio Teacher Evaluation System**.
- Repeals a provision of current law that requires **teachers of core subject areas** to take exams to prove their knowledge of the subject when certain circumstances are triggered.
- Permits superintendents, in certain circumstances, to employ a **licensed teacher** to teach a subject area and/or grade level (within two levels of the person's license) for which the person is not licensed.
- **Removes excused absences** from being counted toward the threshold level for parental notification. Only unexcused absences would count.
- Reduces **N size for subgroups** yearly until it reaches 15 in 2019–20.

SB 246 – Suspensions and Emergency Removals

This bill passed in the Senate on May 16 and has not yet been assigned to a House committee. It prohibits out-of-school suspensions (OSS) and expulsions of K–3 students for relatively minor offenses, beginning in FY 2021. The bill requires principals to consult with a mental health professional prior to issuing an OSS for K–3 students and to assist parents with locating service providers if needed. It *requires* districts (current law *permits* districts) to permit students to complete classroom assignments missed during in-school suspensions and OSS.

Passed Legislation

HB 98 – Career Information, Power Plant Devaluation, Career Tech Teaching Licenses

This bill was signed by the governor on March 30 and becomes effective on June 29, 2018. The new law requires uniformity in access or restrictions regarding the presentation of career or recruitment information to high school students and at least two opportunities per year for this purpose. School districts whose territory includes a power plant that diminished in value by at least 50 percent from 2016 to 2017 will be entitled to an additional payment to assist with the lost funding. Beginning July 1, 2019, career tech teaching licenses will be issued as an initial two-year license and a five-year advanced license. Career tech teachers will not be required to have a bachelor's degree. Current career tech licenses may be renewed throughout the educator's career.

Section 504 Seminars Coming in October

Based on the overwhelming positive feedback we received following the 2017 Special Education Seminars, Ennis Britton has developed a Section 504 Seminar for October 2018! Our Special Education Team will travel throughout Ohio to present this professional development opportunity in five different locations. Each seminar will consist of two general sessions and two breakout sessions with our Special Education Team. The general sessions will cover the basics of Section 504 and compliance officer training. Additionally, participants will choose from breakout session topics including accommodations, trauma and mental health, service animals, and extracurriculars.

Our Special Education Team has developed materials and practical tips that are designed to help your special education team members confidently and knowledgeably tackle difficult compliance issues. This full-day seminar will be held at five locations across Ohio:

- October 15: **Cincinnati**
- October 16: **Columbus**
- October 17: **Northwest Ohio/Toledo**
- October 18: **Cleveland**
- October 19: **Mahoning Valley**

The cost of the seminar is $150 per attendee. The cost includes materials to be added to the custom Ennis Britton binders from the October 2017 seminars. Participants who do not have the Ennis Britton binder with the Ohio Operating Standards may purchase one for $50. Lunch and complimentary beverage service will be provided at all locations. This seminar is open to all special education directors and staff in Ohio, but space is limited. An announcement will be sent when registration for the seminars opens.

Upcoming Deadlines

As your school district prepares for the next couple of months, please keep in mind the following upcoming deadlines. For questions about these requirements, please contact an Ennis Britton attorney.

- **June 1**: Deadline to take action on and give written notice of intent not to reemploy nonteaching employees (RC 4141.29(I)(1)(f)); Deadline to take action on and give written notice of intent not to reemploy teachers (RC 3319.11(D)); Deadline to take action to nonrenew contracts of administrators other than superintendent and treasurer (RC 3319.02)
- **June 30**: End of 2017–2018 school year (RC 3313.62); End of third ADM reporting period (RC 3317.03(A))
- **July 1**: Beginning of 2018–2019 school year (RC 3313.62); Deadline for board to notify teaching and nonteaching employees of succeeding year salaries (RC 3319.12, 3319.082); Board may begin to adopt appropriation measure, which may be temporary (RC 5705.38(B)); Treasurer must certify available revenue in funds to county auditor (RC 5705.36(A)(1))

Upcoming Presentations

ADMINISTRATOR'S ACADEMY SEMINAR SERIES

September 28, 2017: Low-Stress Solutions to High-Tech Troubles – Archive available
January 25, 2018: Take Hold on Public Relations – Archive available
April 5, 2018: Special Education Legal Update – Archive available

July 12, 2018: Education Law Year in Review
Live video webinar

The final Administrator's Academy of the school year will be provided via a live video webinar professionally produced by the Ohio State Bar Association. As always, an archive will be available for all presentations.

Participants must be registered to attend each event. You may register on our website or contact Nancy via email or phone at 513-674-3451.

OTHER UPCOMING PRESENTATIONS

June 12: Ohio Association of Career-Technical Superintendents Summer Conference
– Pamela Leist

June 15: Ohio School Boards Association – Sports Law and Title IX Compliance
– Erin Wessendorf-Wortman

June 22: Mercer County ESC – Legal Update
– Jeremy Neff

June 26: Ohio School Resource Officers Association – Annual Conference
– Bill Deters

August 2: Northwest Ohio ESC
– Bill Deters, Bronston McCord, Gary Stedronsky

August 9 & 10: Trumbull County ESC Summer Conference
– Pamela Leist, Giselle Spencer, Megan Bair Zidian

August 23: Ohio School Boards Association Collaborative Conversations – Finance: Managing and Monitoring Educator Certifications
– Pamela Leist

August 31: Hamilton County ESC
– Jeremy Neff

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, contact Nancy via email or phone at 513-674-3541. Archived topics include the following:

- What You Should Know about Guns in Schools
- Three Hot Topics in Special Education
- School Employee Nonrenewal
- New Truancy and Discipline Laws
- Supreme Court Special Education Decisions
- Employee Licensure
- Transgender and Gender-Nonconforming Students
- Contract Nonrenewal
- Ohio Sunshine Laws
- School Employee Leave and Benefits
- Managing Workplace Injuries and Leaves of Absence
- Special Education: Challenging Students, Challenging Parents
- Fostering Effective Working Relationships with Boosters
- Low-Stress Solutions to High-Tech Troubles
- Requirements for Medicaid Claims
- Effective IEP Teams
- Discrimination: What Administrators Need to Know
- Levies and Bonds
- OTES & OPES Trends and Hot Topics
- Tax Incentives
- Prior Written Notice
- Advanced Topics in School Finance
- Student Residency, Custody, and Homeless Students
- Student Discipline
- Crisis, Media, and Public Relations
- Gearing Up for Negotiations

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Want to stay up-to-date about important topics in school law?
Check out Ennis Britton's Education Law Blog.

Ennis Britton Practice Teams

At Ennis Britton, we have assembled a team of attorneys whose collective expertise enables us to handle the wide variety of issues that currently challenge school districts and local municipalities. From sensitive labor negotiations to complex real estate transactions, our attorneys can provide sound legal guidance that will keep your organization in a secure position.

When you have questions in general areas of education law, our team of attorneys help you make competent decisions quickly and efficiently. These areas include:

Labor & Employment Law

Student Education & Discipline

Board Policy & Representation

There are times when you have a question in a more specialized area of education or public law. In order to help you obtain legal support quickly in one of these areas of law, we have created topic-specific practice teams. These teams comprise attorneys who already have experience in and currently practice in these specialized areas.

Construction & Real Estate
Construction Contracts • Easements • Land Purchases & Sales • Liens • Mediations • Litigation

Team Members:
Ryan LaFlamme
Bronston McCord
Giselle Spencer
Gary Stedronsky

Workers' Compensation
Administrative Hearings • Court Appeals • Collaboration with TPAs • General Advice

Team Members:
Ryan LaFlamme
Pam Leist
Giselle Spencer
Erin Wessendorf-Wortman

Special Education
Due Process Claims • IEPs • Change of Placement • FAPE • IDEA • Section 504 • any other topic related to Special Education

Team Members:
John Britton
Bill Deters
Michael Fischer
Pam Leist
Jeremy Neff
Hollie Reedy
Giselle Spencer
Erin Wessendorf-Wortman
Megan Bair Zidian

School Finance
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