



Ennis Roberts Fischer SCHOOL LAW REVIEW



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Ohio Court Rules on Private School Transportation Case

State ex rel. Luchette v. Pasquerilla,
2009 Ohio—2084

The 11th District Court of Appeals recently considered the question of whether a local school district board of education can be compelled by a court to provide transportation to a student attending private school. The school district had continued to offer payment in lieu of transportation despite the fact that the State Board of Education determined that transportation of the private school student was not impractical under Ohio Revised Code sections 3327.01 and 3327.02. The court determined that a court can compel a school district to provide transportation where the school district's continued offer of payment in lieu of transportation is in violation of an order of the State Board of Education.

In this case, the mother of a student who attended a private school claimed the local school district was required to provide transportation for her child. The school district in this case passed a resolution pursuant to ORC 3327.02(A) and (B)(1), finding that transportation of the child was "impractical." The County Educational Service Center agreed with the decision and permitted the school district to offer payment in lieu of transportation. The parents rejected the offer and requested mediation from the Ohio Department of Education. The Ohio State Board of

Education ("state board") conducted a Chapter 119 hearing when mediation failed to settle the dispute, and the state board declined to confirm the school district's determination that transportation to the private school would be impractical. Despite this rule, the district continued to deny transportation, which caused the mother to file a complaint seeking the court to compel the district to provide transportation for her child.

The school district claimed that the state board's resolution did not actually order the school district to perform any action. It also argued that Ohio law provided an adequate remedy for the situation under ORC sections 3327.02 (F) and (G), which discuss payment when the school district fails to provide transportation. The district alleged that ORC 3327.02 does not contain a remedy of actual transportation. The mother of the student argued that ORC 3327.02(F) and (G) are temporary remedies for use pending the state board's decision.

The mandamus action was dismissed by the trial court, and the mother appealed the decision. The 11th District Court of Appeals thoroughly reviewed the statutory procedures set forth in ORC 3327. It noted that the statute offers that if the school district fails to provide transportation following the state board's decision, the state board shall order the school district to pay the pupil's parent the maximum amount on a schedule

ordered by the state board. If the school district fails to comply with this order, the statute provides that the state board shall deduct payments it makes to the school district, in the amount that the school district was required to pay under the previous order, and pay the nonpublic school where the pupil attends. The nonpublic school may then pay the full amount to the parent or use the full amount to provide transportation to the student.

Based on the statutory language, the school district asserted that it has no obligation to provide transportation where it determines it impractical, and that it was only required to provide a source of funding for transportation. The mother argued that the payment in lieu of transportation option only applied until the state board determined that the district should provide transportation, however, the statute clearly provided a remedy if the district continued to deny transportation by forcing payment or diverting funds to the private school. Therefore, the court had to determine whether this was the only remedy available.

The court found that when the state board orders the district to provide transportation, the statutory guarantee of payment does not give the pupil the ordered remedy; rather it is merely an effort to compensate the parent until the school district complies

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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

Ohio Court Rules on Private School Transportation Case

voluntarily or the court compels it to comply. As a result, the guarantee of payment does not eliminate the right to transportation. With respect to the district's argument that the state board did not actually order it to do anything, it is clear that the state board had two options under the statute: (1) find that providing transportation was impractical, or (2) find the district must provide transportation. Here it was determined that providing transportation was not

impractical, thus the school board was required to provide the student with transportation.

How this impacts your district:

The 11th district's decision is not binding on all Ohio courts, but its reasoning may be persuasive to future courts confronted with this issue. Your district should recognize that payment in lieu of transportation is appropriate

when it is determined that transportation is impractical. If the state board, however, finds that transportation is not impractical, the 11th district's analysis supports the conclusion that the district must provide transportation. Please do not hesitate to contact Ennis, Roberts, & Fischer if your district is confronted with any issues pertaining to transportation of students to private schools.

District Court Determines Executive Session Discussions Are Discoverable

McComas v. Rock Hill Local School District

Recently, the United States District Court for the Southern District of Ohio Western Division issued an order regarding discussions that occur in executive sessions. In short, the court determined that information discussed in an executive session is subject to discovery. In the case at issue, the information was not protected by state or federal law so as to warrant precluding it in discovery.

This case stemmed from litigation involving a parent suing a school district on behalf of her child. Prior to trial, the plaintiff sought to compel the defendant board members to testify as to communications that took place during a closed executive session. The defendants objected to the request and claimed that the discussions were confidential.

The defendants based their claim of confidentiality on three grounds: (1) the Family Education and Privacy Rights Act (FERPA) prevented disclosure of the information sought by the plaintiff; (2) Ohio's Sunshine Law (Ohio Revised Code section 121.22) allows the board members to meet in an executive session, closed to the public, under certain circumstances; and, (3) the defendants were precluded from disclosing the information due to criminal penalties under Ohio Revised Code section 102.03(B), which prohibits a public official or employee from disclosing information acquired in the course of the public official's official duties, that is designated as confidential, without appropriate authorization.

The court began its analysis by noting that the scope of discovery under

the Federal Rules of Civil Procedure is generally very broad. The test to determine whether information is discoverable is whether the line of interrogation is reasonably calculated to lead to the discovery of admissible evidence. The court's broad discretion to permit discovery is tempered by evidentiary privileges such as the attorney-client privilege and the work-product doctrine. The court recognized that the information sought by the plaintiff was clearly relevant to her claim and it did not fall within one of the traditional privileged exceptions.

The court failed to find any basis on which information protected by FERPA may also be precluded from the federal discovery rules. The court noted that FERPA does not contain statutory language expressly prohibiting the disclosure of student records; rather it imposes funding requirements to discourage the disclosure of such records. FERPA actually allows for disclosure of personally identifiable information from a student record pursuant to court order so long as certain parental notification requirements are met.

With respect to the defendant's claim regarding Ohio's Sunshine Law, the court noted that there was no dispute that the information was confidential and fell within an exception to the open meetings requirement that permitted the discussions to take place in a closed executive session. The court, however, found that there were no specific statutory rules granting an evidentiary privilege for these discussions and that there was little case law applying Ohio's Sunshine Law to discovery rules. Because there was no statutory language or judicial interpretation creating an evidentiary privilege the court

declined to find that such a privilege existed in Ohio's Sunshine Law.

Finally the court addressed whether the defendants would be subject to criminal penalty under ORC section 102.03(B) if they disclosed this information. The Court determined that the statute should not act to bar discovery in this case as it merely precludes public officials or employees from disclosing confidential information without appropriate authorization. A court order meets the definition of appropriate authorization, and as a result, the information discussed in the executive session was subject to discovery.

How this impacts your district:

While this order originated in a federal court, the analysis was based on the statutory language found in FERPA and on an interpretation of Ohio law. Though this order is not binding on state courts, the analysis may be influential on future decisions affecting Ohio school districts. With this in mind, board members should note that although Ohio's Sunshine laws allow them to discuss certain matters in a confidential executive session, these discussions may still be subject to discovery in a civil court proceeding. If you have any questions regarding this case or the law behind executive sessions, please do not hesitate to contact Ennis, Roberts, and Fischer.

Two Ethics Opinions Issued Concerning Public Officials

The Ohio Ethics Commission (OEC) has issued two opinions this year relating to public officials and employees. The first opinion, Advisory Opinion No. 2009-01, addresses the following question: Can a public official accept a gift from his or her spouse if: (1) the spouse received the gift from his or her employer; and (2) the spouse's employer is doing or seeking to do business with, regulated by, or interested in matters before the public agency the official serves?

The advisory opinion indicates that a public official may accept the gift subject to a number of limitations. For instance, the employer must not be giving the gift to the official's spouse in order to give it to the official. Several factors will be examined if this situation arises in order to determine whether the employer's true intention is to give the gift to the official. These factors include: (1) whether the item is given to the employee at a time when a specific matter is before the official; (2) whether the employer routinely provides gifts or rewards to its employees; (3) whether the value and nature of the item is consistent with those the employer has provided to other employees in similar situations; and (4) whether the employee has met the requirements ordinarily considered by the employer when giving gifts.

OEC's opinion derives from several provisions of the Ohio Revised code regulating the conduct of public officials. ORC 102.03 prohibits public officials from accepting, and prohibits any person from promising or giving a public official or employee, anything of value that will have an improper influence on the public official or employee. ORC sections 102.03(E) and (F) clarify that the public official may accept or share in a gift given to the spouse so long as the purpose was not to give the gift to the public official. ORC section 102.02(A) further states that a public official who files a financial disclosure statement is not required to disclose her spouse as the source of a gift, unless the gift was given to the spouse on the condition that she will provide it to the official or employee.

This opinion contemplates the situation that often arises when employers compensate or reward their employees with gifts or incentives such as

cash, gift cards, tickets, trips, etc. Again, the employee may share these gifts with his or her spouse who is a public official, so long as the employer's intention was not to give the gift to the public official.

The second opinion, Advisory Opinion No. 2009-02, addresses two questions: (1) Can a public official participate in the authorization of a contract if his or her family member's employer has an interest in the contract?; and (2) Can a public official participate in regulatory matters that affect a family member's employer?

OEC answered these questions in the negative, finding that a public official cannot participate in a contractual or regulatory matter before her public agency if her family member has an interest in the contract or will receive a definite and direct benefit from the matter. The opinion clarifies that a public official is not prohibited from participating in matters merely affecting a relative's employer, so long as the relative does not have an interest and will not receive a benefit from the matter. Therefore, it is important to determine whether an employee has an interest in her employer's contracts or whether an employee will receive a definite and direct benefit from a regulatory matter affecting her employer.

OEC found that section 2921.42(A) (1), prohibits a public official from authorizing a public contract to the employer of a family member if the family member has a definite and direct interest in the contract. Authorizing the contract includes any activity such as voting on, deliberating on, recommending, or any other official action on the contract. The prohibited interested can be either financial or fiduciary in nature. The determination of whether an employee has an interest in her employer's contract depends on the facts and circumstances of each case. OEC offered several examples of when an employee has an interest in her employer's contracts. This list includes circumstances where the employee is a director, trustee, or officer of the company or agency, takes part in the negotiation of the contract, receives a share of the contract's proceeds in a commission or fee, has employment responsibilities that include participation in or oversight of the administration or execution of the contract, or is employed

in a position that is dependent on the contract.

Furthermore, ORC sections 102.03 (D) and (E) prohibit a public official or employee from participating in any matter before the public agency that affects the interests of the employer of a family member if the family member will receive anything of value as a result of the agency's decision on the matter. If a matter before a public agency affects the employer of a public official's or employee's family member, and the family member would receive a definite and direct benefit or detriment from the agency's decision on the matter, these statutes prohibit the official or employee from participating in the agency's decision-making on the matter. If, on the other hand, the official's family member will not receive a definite and direct benefit from, or suffer a definite and direct detriment from, a matter affecting her employer then the statutes do not prohibit the official from participating in the matter.

Finally, neither ORC sections 2921.42(A)(1) nor 102.03(D) and (E) prohibit a public official or employee from participating in any matter before her public agency that affects an employer of a family member if the family members is an "ordinary employee" and does not have a personal interest in or receive anything of value from the regulatory matter.

How this impacts your district:

Individuals employed by a local school district are public employees and should be aware of the issues raised in these ethics opinions. It must be noted that teachers, instructors, and other educators are excluded from the prohibitions set forth in ORC 102.03 if they do not perform or have the authority to perform supervisory or administrative functions. As a result these ethics issues are most likely to confront board members and other supervisory positions employed by the district. These individuals must be cautious to avoid any conflicts of interest that may arise when a family member is employed by a company that does business with the district. Please contact Ennis, Roberts, & Fischer if your district has any questions relating to ethics issues.

Licensure Requirements and Contract Terminations

Hamilton v. Governing Bd. Madison-Champaign Educational Serv., 2009 Ohio-1771.

The 2nd Appellate District for the Court of Appeals of Ohio recently decided to uphold a trial court's decision in favor of an educational service governing board that had terminated a teacher after she failed to obtain the appropriate license for her position. The issue in this case stemmed from the Governing Board's duty to staff the position of multi-disabled/intervention specialist (MD) in the local school district.

Teaching a MD class requires special licensure and skills beyond that of a regular classroom teacher. In this case the Governing Board was forced to fill the vacant position on short notice as the school year had already begun without a MD teacher. The individual chosen to fill the position had experience working with students with disabilities, however, all of her teaching certificates had expired.

Initially the teacher was granted a one-year substitute license. Following the first year of employment, the teacher was able to secure a professional license in the area of health education which allowed the Governing Board to seek special consideration for a temporary license to allow the teacher to continue in her capacity as MD. A one-year temporary license was granted, which stated that future renewal of the license was dependent on the teacher completing six semester hours in an approved program. The teacher was employed under this license for the second school year, but failed to complete the course work during the following summer in order to be eligible for the permanent license required by the MD position. As a result, the Governing Board initiated proceedings to terminate the teacher's contract of employment with the Board prior to what would have been her third year of employment in the MD position.

After the teacher was informed of the termination she requested an evidentiary hearing before a referee. The referee determined that there were no prerequisites or conditions to be met for the teacher to receive a contract for that school year and that the teacher

was confused and misunderstood exactly what was expected of her with regard to continuing education requirements. The referee also concluded that there was no evidence presented that justified the termination of the teacher's contract with the Board. The referee subsequently recommended that she continue employment with the Board, however, the Board rejected the recommendation and unanimously voted to terminate the contract. The teacher subsequently filed a complaint alleging that she had been wrongfully terminated.

The trial court determined that the Board had properly fired the teacher for good and just cause. On appeal, the teacher suggested that she was initially hired without qualification for the specific role she had performed in two prior years and that she was replaced by an unqualified teacher at a substantial savings to the Board. She argued that the same procedure to qualify her replacement could have been offered to her. The Board argued that it had "good and just cause" to terminate the teacher because she failed to maintain or obtain the appropriate licensure required for the position.

In reviewing the lower court's decision, the appellate court examined Ohio Revised Code section 3319.16 which sets forth the circumstances in which a teacher may be terminated. The court noted that the decision to terminate a teacher's contract is comprised of two parts: (1) the factual basis for the allegations giving rise to the termination; and (2) the decision as to whether the facts constitute gross inefficiency, immorality, or good cause pursuant to ORC 3319.16. The court stated that the primary duty of the referee is to ascertain the facts under the first part of the decision, and the primary duty of the board is to interpret the significance of the facts under the second part of the decision. The board must accept the referee's findings of fact unless they are clearly improper, but the board also has discretion to accept or reject the recommendation of the referee so long as the decision is consistent with the law.

The law provides that a trial court may only reverse a board's order of termination where the decision is not supported by, or is against the weight

of the evidence.

The appellate court determined that the case law in Ohio supports the position that a teacher's contract may be terminated if the teacher is not properly certified to teach the students she would be teaching that school year. The superintendent has discretion to continue employing the teacher for up to two years if she continues to work towards obtaining the appropriate licensure. The teacher in this case, however, acknowledged that she was informed that it was her duty to obtain the appropriate licensure before the upcoming school year.

The court found that under the provisions of ORC 3319, the superintendent was not required to continue employing the teacher when she demonstrated no progress toward completing the coursework required. As a result, the appellate court could not find that the trial court abused its discretion in finding that the Board had terminated the teacher for good cause. Therefore, the Board's decision to terminate the contract was upheld.

How this impacts your district:

This case should remind administrators that there are several options to pursue when employing teachers. First, it must be determined if the position to be filled requires licensure, and if so, whether the applicant has obtained the necessary licenses. If the teacher does not have the appropriate licenses, Ohio law allows temporary licenses to be issued if certain conditions are satisfied and it provides schools with the option to employ teachers who are working towards completing the work necessary to receive the required license. This decision should make clear, however, that a school may terminate a teacher for good and just cause when she fails to obtain the appropriate licensure or is not working towards obtaining the license under the alternative hiring options. If your district has any questions pertaining to teacher licensure requirements and employment contracts, please contact Ennis, Roberts, & Fischer for consultation.

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

June 26, Jeremy Neff at the 2009 OSBA Sports Law Workshop in Columbus, Ohio
Ins and Outs of Coaching Contracts

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