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School Law Review

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Ohio Supreme Court Upheld Public Body's Public Records Request Denial

***The State ex rel. Zidonis v. Columbus State Community College*, Slip Opinion No. 2012-Ohio-4228 (Aug. 21, 2012).**

The Supreme Court of Ohio recently upheld the denial of a public records request submitted by a former employee to Columbus State Community College ("CSCC").

Zidonis, a former employee of CSCC, made multiple public records requests after her termination. The first of her requests was promptly fulfilled by CSCC. However, two requests in particular were denied for being overly broad. One was a request for copies of emails sent between Zidonis and her former supervisor. The other was a request for all documents that were "complaint files" or "litigation files." The categories in this second request were chosen because Zidonis's attorney was provided with a copy of the records retention policy and noted that these were two categories of records within the policy.

In her response to Zidonis, the CSCC general counsel noted that Zidonis should revise the request so that the appropriate documents could be identified, as both requests were overly broad because they did not specify particular content or time periods. CSCC's attorney went further to tell Zidonis, and her counsel, to contact her if Zidonis needed any help with identifying the records sought or with revising or clarifying the request.

Rather than adjusting the request, Zidonis's attorney sent letters to high ranking officials of CSCC asking for a description of the method of storage for emails. At a later date, after a revised request had still not been submitted, Zidonis's attorney met with CSCC's general counsel. At that time the general counsel informed Zidonis's attorney of the method by which the college organized its emails: by content and year. Still, Zidonis's attorney did not revise his request. Zidonis's attorney sent various requests asking when he would be able to come to the college to review the requested complaint and litigation files from his other request. In all of his requests for complaint and litigation files, Zidonis's attorney noted that the retention period for those documents should be six years after the complaint of litigation was last active.

After many months of back and forth, Zidonis filed a mandamus action in court to compel CSCC to provide her with access to the complaint files, litigation files, and email records.

The Court found that the request for complaint and litigation files was overly broad because of the lack of content limitations in the request and the lengthy period of time. While Zidonis never specified a time period, her attorney's constant reminder of the six year requirement in the policy led CSCC and the Court to believe that the request was for a six year time period. The Court felt that this was too long. Further, the Court noted that while Zidonis did request particular categories, those categories were too voluminous to be actual requests for particular content. Specifically, the Court stated that each request must be analyzed under the totality of the facts and circumstances and in this case, those circumstances pointed to an overly broad request.

The email request was also overly broad. Zidonis argued that R.C. 149.43 requires public bodies to maintain their email records so that they can be retrieved based on sender and recipient status. However, the Court stated that 149.43 only requires that public records be kept in a manner that they are readily available for copying and inspection. There is no specific manner by which the records must be organized, so long as they are organized by some method.

Zidonis was given nu-

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Ohio Supreme Court Upheld Public Body's Public Records Request Denial, Cont.

merous opportunities to revise her requests, and revisions were never completed. Therefore, CSCC acted properly in denying the requests, because all were overly broad.

How This Affects Your District:

All public records requests should be analyzed based on all of the facts and circumstances of the requests. Requesters are required to be specific in the records they ask for. Specificity applies to the content of the materials asked for, not the medium. Therefore, it is likely that when a person requests "all emails" between two particular people, that request will be overly broad. However, if a request is denied for being overly broad, the requester must be allowed to adjust his or her request in order to allow the public entity to better identify the records requested.

One important take-away from this case is that there is no specific manner by which public records must be organized. The law states that records must be organized in a manner that makes it possible for a school district to keep records available for inspection and copying. Thus, if a requester makes a request for records and those records cannot be identified partially because of the method by which the records are kept, it is not the responsibility of the district to change the method. It is the responsibility of the district to inform the requester of the method of organization, so that the requester may make a more precise request going forward.

As a result of increased scrutiny of school districts on the part of the media, public records requests from the media and other sources are becoming more frequent. We will be having a complimentary one-hour Public Records webinar on October 18th from 11:00 a.m. to 12:00 p.m. To register, contact Pam Leist and provide her with your name and email address.

Teacher's Suspension for Sharing Lewd Photographs Upheld

Robinson v. Ohio Dept. of Edn. (Ohio App. 2 Dist.), 2012-Ohio-1982

The Montgomery County Court of Appeals affirmed the one-year suspension of a teacher's license on the basis that accessing and viewing inappropriate images using school equipment during school hours constitutes conduct unbecoming an educator in violation of Ohio law.

The teacher was suspended following his receipt, via email, of four photos, three of which showed a woman in a bikini and one of which showed the woman nude. He viewed these photos in his own classroom and then showed them to another teacher with students in the room. The other teacher reported the incident to an administrator and an educator misconduct reporting form was filed with the Ohio Department of Education ("ODE"). ODE issued a resolution that the teacher's license be suspended for one year, with all but 60 days suspended, to be served in the summer months. The teacher appealed the resolution, which was affirmed by the trial court. He then appealed the judgment to the Court of Appeals.

The teacher disagreed with the resolution that his conduct was "unbecoming of an educator" in violation of R.C. 3319.31(B)(1). The Ohio Administrative Code ("OAC") defines this conduct to include "crimes or misconduct involving the school community, school funds, or school equipment/property" and "any other crimes or misconduct that negatively reflect upon the teaching profession." The Licensure Code of Professional Conduct for Ohio Educators ("the Code") further states that this type of conduct has occurred when a teacher "us[es] technology to intentionally host or post improper or inappropriate material that could reasonably be accessed by the school community." While the teacher argued that he did not host or post the four photos, the Court held that the intent of the Code appears to be that "educators should not use technology to display improper or inappropriate material where they could be reasonably accessed by the school community." Because the teacher accessed and viewed the photos in a classroom during school hours and with students in the room, the Court held that his conduct was correctly considered "unbecoming of an educator."

The teacher also alleged that ODE's resolution to suspend him was not supported by enough evidence. In part, he argued that the hearing officer's assertion that one of the photographs was pornographic distorted the evidence. The Court stated that his actions were unbecoming of an educator regardless of whether the photos were pornographic or not. The fact that photos were considered lewd and that one contained nudity was sufficient. The teacher also argued that it was wrong for the hearing officer to consider whether the teacher believed his conduct was inappropriate. The Court held that even though the teacher acknowledged his behavior was inappropriate, the fact that he still believed the photos were a joke supported his lack of awareness of the gravity of his actions.

Lastly, the teacher stated that the suspension was contrary to law because his actions did not constitute conduct unbecoming an educator. He argued that since there was no nexus between the alleged misconduct and his performance as a teacher, no public purpose would be served and that the suspension was unconstitutional. The Court rejected the teacher's claim that sharing of a joke with another teacher was constitutionally protected speech, reasoning that he was not punished because of the joke but because he showed inappropriate photos to another teacher using school equipment, during school hours, and while students were present in the classroom.

Teacher's Suspension for Sharing Lewd Photographs Upheld

How This Affects Your District

This case gives a clear example of behavior that will be construed as "unbecoming of an educator." This teacher believed that what he was showing was a joke. However, what may be a joke at home or amongst friends, may be found to violate the Code of Professional Conduct. Administrators should be clear with teachers that use of school property should be for school purposes. Otherwise, teachers may inadvertently find themselves in trouble for something they believe to be simply a prank or a joke. While teachers do have constitutionally protected free speech, the use of public property for that free speech brings it under the purview of ODE and the Code.

Ohio Supreme Court Upheld Denial of Levy Repeal

***State ex rel. Taxpayers for Westerville Schools v. Franklin Cty. Bd. of Elections*, Slip Opinion No. 2012-Ohio-4267**

Recently the Supreme Court of Ohio upheld the Franklin County Board of Elections denial of a citizen group's attempt to repeal a school levy. The issue arose after the Westerville School District proposed a replacement levy.

In 1972 and 1979, the Westerville School District approved a 1.6-mill levy and a 9.8-mill levy, respectively. Combined these levies were for 11.4-mills. In 2009, the school board presented to the electors in the district a same-rate replacement levy, under R.C. 5705.192. The voters of the district subsequently approved the levy. However, in August 2012, a group called "Taxpayers for Westerville Schools" submitted a petition to the Board of Elections for a "decrease of [the] increased rate of levy."

The group based its request on the idea that R.C. 319.301 had reduced the effective millage of the 1972 and 1979 levies to 3.43-mills. According to R.C. 5705.261, district residents may propose a decrease of a levy when an "increased rate of levy" has occurred. The Court noted that the tax-reduction factors in R.C. 319.301 did not reduce the rate of voter-approved levies, but only decreased the effective millage of the approved levies. In fact, R.C. 319.301(F) specifically states that "No reduction shall be made under this section in the rate at which any tax is levied."

The Court held that since there was no increase in the voter-approved rate of the tax levy, the Taxpayer group had no statutory right, under R.C. 5705.261, to request a decrease in the levy. The effective rate of the levy was not what mattered to the Court. Rather, what was approved by the voters of the district was the pertinent fact.

How This Affects Your District:

If this case had been decided differently, it likely would have caused many issues for districts. School districts would have faced the risk of having these types of replacement levies repealed and that would have wreaked havoc on financial planning. According to R.C. 5705.192, districts have the ability to replace old levies with new levies that either increase, decrease, or maintain the current rate. If an increase in the voter-approved rate is passed, then districts may open themselves up to R.C. 5705.261 levy repeals. However, if the district is only seeking to match the voter-approved rate of two or more levies, this decision makes clear that a R.C. 5705.192 reduction will not be allowed, regardless of the effective rate of any of the levies, past or present.

Change to Application Process for Licensure and Public Employment

Until recently, applicants for licensure or public employment were required to complete a Declaration of Material Assistance/Non-assistance ("DMA") form. These forms were required for some applicants in order certify that they had not provided "material assistance" to any terrorist organization. However, HB 487 repealed the provisions that required the completion of these forms. Consequently, districts no longer need to require applicants to complete this form. The forms should be removed from any application packets or materials that are distributed to applicants or new hires.

Requirements Related to Continuing Contracts

As you are looking at your evaluation process and making decisions regarding those evaluations, it is important to keep in mind which teachers are eligible for a continuing contract. HB 153 made some changes to the laws regarding continuing contracts, and we wanted to take this opportunity to lay out the requirements. R.C. 3319.08 describes three categories of teachers who are eligible for continuing contracts.

1) Any teacher holding a professional, permanent, or life teacher's certificate;

2) Any teacher meeting the following conditions:

- The teacher was initially issued a teacher's certificate or educator license before January 1, 2011;
- The teacher holds a professional educator license, senior professional educator license, or lead professional educator license;
- The teacher has completed one of the following:

Requirements Related to Continuing Contracts, Cont.

1. If the teacher did not hold a master's degree at the time of initially receiving a teacher's certificate under former law or an educator license: thirty semester hours of coursework in the area of licensure or in an area related to the teaching field since the initial issuance of such certificate or license, as specified in rules which the State Board of Education shall adopt;

2. If the teacher held a master's degree at the time of initially receiving a teacher's certificate under former law or an educator License: six semester hours of graduate coursework in the area of licensure or in an area related to the teaching field since the initial issuance of such certificate or license, as specified in rules which the State Board shall adopt.

3) Any teacher who meets the following conditions:

- The teacher never held a teacher's certificate and was initially issued an educator license on or after January 1, 2011;
- The teacher holds a professional educator license, senior professional educator license, or lead professional educator license;
- The teacher has held an educator license for at least seven (7) years;
- The teacher has completed the following:

1. If the teacher did not hold a master's degree at the time of initially receiving an educator license: thirty semester house of coursework in the area of licensure or in an area related to the teaching field since the initial issuance of that license, as specified in rules which the state board shall adopt.

2. If the teacher held a master's degree at the time of initially receiving an educator license: six semester hours of graduate coursework in the area of licensure or in an area related to the teaching field since the initial issuance of that license, as specified in rules which the state board shall

Reliance on Retrospective Testimony in Due Process Not Allowed

***R.E. v. New York City Dept. of Educ.*, Nos. 11-1266/11-1474/11-655 (2d Cir. Sept. 20, 2012).**

Three cases involving special education matters were consolidated and ruled on by the 2nd Circuit Court of Appeals last month. These cases all involved students with autism and were brought when the students' parents chose to enroll the students in private schools because they believed the New York public school placement offers for their children were not adequate.

The due process appeal decision favored the districts based in part on testimony from the New York Department of Education regarding the educational programming the students would have received if they would have attended public school. On appeal to the 2nd Circuit, the parents argued that relying on testimony regarding the programs the students would have participated in if they would have attended public school (i.e. retrospective testimony) was inappropriate.

The Court of Appeals concluded that this use of retrospective testimony was only appropriate when describing the services that were described in the student's IEP. If, however, the retrospective testimony was used to overcome deficiencies in the IEP, then the testimony could not be relied upon. On the other hand, the Court also did not adopt the method asked for by the parents, which was a "four corner" rule that would prohibit any testimony about services beyond what was in the written IEP.

Specifically, the Court stated, "testimony may not support a modification that is materially different from the IEP, and thus a deficient IEP may not be effectively rehabilitated or amended after the fact through testimony regarding services that do not appear in the IEP." The Court qualified that statement by noting that testimony can be given that explains or justifies services that are listed in the IEP.

The Court also answered the question of whether a district must specify the exact school name where a student will be placed. This issue was raised because of the requirement that an IEP specify a location for services. The Court stated that it is not required for a district to give an exact school site and districts may select a specific school, without the input of parents, as long as the school will provide the appropriate program outlined in the IEP.

How This Affects Your District:

While this decision is not binding on any court in Ohio, it serves as a reminder of two main points.

First, districts should be careful to document on each student's IEP all of the services that will be provided. If a complaint is filed, IHOs and SROs are under no obligation to hear testimony related to services not specifically stated in the IEP.

Second, when making placement decisions, it is generally better to be less specific regarding the exact location of the student's program. This Court noted that districts do not have to name a particular school. If you do choose to name a particular school, and that school discontinues its ability to provide the programs required for the student's education, problems could arise. For example, a parent could file a complaint if you try to move the student to another school that does offer the programming, because in the IEP you were specific about the location. Therefore, in the interest of creating a more workable IEP, it is better to be less specific about location, so long as the location the student ends up at does have the appropriate program.

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.

December 6th, 2012—*Navigating Workers' Compensation and Unemployment Law Issues*

March 7th, 2013—*Advanced Topics in School Finance Law*

June 13th—*Special Education Legal Update*

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

Other Upcoming Presentations

Jeremy Neff
Butler County ESC on October 12, 2012
Guidance Counselors Roundtable

Erin Wessendorf-Wortman
Webinar on October 18, 2012
Public Records

Jeremy Neff
Educational Leadership Association on October 19, 2012
Legal Update

Erin Wessendorf-Wortman
Brown County ESC on October 29, 2012
Cyberlaw

Bill Deters
OSBA Capital Conference School Law Workshop on November 13, 2012
30 Tips in 60 Minutes

Bronston McCord
OSBA Capital Conference School Law Workshop on November 14, 2012
Deception and Piracy—Student Cybertroubles

Jeremy Neff
National Business Institute Seminar on November 15, 2012
Special Education Legal Update

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
- Student Residency, Custody and Homeless Students
- Ohio Budget Bill/House Bill 153
- Student Discipline
- Media and Public Relations
- Gearing Up for Negotiations

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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:
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School Finance

Taxes, School Levies, Bonds, Board of Revision

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