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Mentor Teachers Cannot Be Paid By Universities For Services

The Ohio Ethics Commission recently issued an opinion stating that mentor teachers to student teachers cannot be paid by a university for performing this duty. There is no prohibition on universities compensating districts for allowing its students to come on campus to student teach and do field studies. Districts may take this compensation and use it at their discretion.

The opinion is based on O.R.C. § 2921.43(A)(1) which provides that no public servant shall accept and no person shall give a public servant any compensation to perform the public servant's official duties, to perform any other act or service in the public servant's public capacity, or as a supplement to the public servant's public compensation. Regardless of job duties, any school district official or employee is considered a public servant. Further, for the purpose of interpreting "person", the meaning would include universities (public and private).

The precedent used by the Ethics Commission is Advisory Opinion No. 2008-01, which discussed the legality of school booster groups giving coaches supplemental compensation for coaching duties. In this opinion the Commission stated: "For the performance of their public duties, school district employees can receive only the compensation that is provided by the district pursuant to the terms of the employment relationship, and any lawful supplemental contract." Therefore, the district is the only lawful source of compensation for supplemental duties and a school district employee cannot receive compensation from any source other than the district "for services he or she performs" in connection with school activities.

While mentoring is not a part of a teacher's usual duties as a district employee, there is an employment link between the employee and the district while he or she is engaged in mentoring activities. This would indicate that the employee is functioning within the scope of his or her employment with the district. The employment link includes that the employee provides mentoring services under a partnership between the district and the university, the university relies on district personnel to identify teachers who may be best suited for mentoring, and the mentoring activities occur during the school day while using school facilities and resources. Therefore, even though mentoring is not a part of a district employee's regular duties, the services provided (as with coaching) are connected with a school supported program and the employee is acting within his or her official capacity as a district employee. Since that is true, O.R.C. § 2921.43(A)(1) applies and the teachers should not accept compensation from any university in concert with mentoring responsibilities.

However, O.R.C. § 2921.43(A)(1) does not prohibit a college or university from providing payments, fee waivers, or other benefits to the district in return for allowing students to student teach or perform field experiences in district schools. Therefore, if colleges and universities want to compensate someone for allowing their students to come on campus, it would be appropriate to compensate the districts. Then, each district may take any action it deems appropriate with regards to compensating mentor teachers from the compensation received by the university.

Also, the Commission states that since this issue had not been previously considered, it recommends that this opinion should not apply to any district official or employee for actions that occurred before the opinion was approved. Therefore, it is not retroactive and employees would only be liable for issues that arise from this type of compensation from this point forward.

How This Affects Your District:

If your district has been allowing university students to come on campus for field experiences and to student teach and the teachers have

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been receiving direct compensation from the university, then you should be prepared to begin receiving payment or other compensation from the university in lieu of it being sent directly to the teachers.

It is imperative that your district develop a policy for the method in which you plan to distribute the funds. You may wish to set up a policy that enables the district to make one payment at the end of each school year to all of the mentor teachers as a stipend. If you have any questions about developing a policy in accordance with the Ethics Commission Opinion please contact one of us.

Court Gives Deference To Disciplinary Decision Over Student's Violent Essay

***Cox v. Warwick Valley Central School District*, No. 10-3633-cv (2nd Cir. August 17, 2011).**

The 2nd Circuit Court of Appeals upheld a New York District Court decision allowing a school to place a student in in-school suspension (ISS) for the remainder of the school day in order to assess any imminent danger the student posed to himself or others. Further, the Court held that the principal's decision to report possible parental neglect was appropriate in the situation.

A middle school student in the Warwick Valley Central School District was asked to write an essay describing what he would do if he only had 24 hours to live. The student proceeded to describe himself getting drunk, smoking, doing drugs, and breaking the law. The essay ended with a description of the student committing suicide in front of his classmates. Prior to writing this essay the student had been in and out of trouble throughout his time at the school. The incidents he was involved in included throwing objects at classmates, fighting with other students, and bringing fireworks, lighters and alcohol to school. The incidents had become so frequent that the principal met with the student's parents in order to set up a "behavioral contract." Even after that contract was signed the student made comments about flying a plane into the school building and blowing objects up and participated in vandalizing school property.

After reading his essay the student's teacher was concerned about how the student was casually describing being involved in illegal activity, violence and suicide. Therefore, the teacher took the essay to the principal and the principal immediately removed the student from class to discuss the writing. The student was sequestered in the ISS room for the rest of the day in order for the principal to consider whether the student posed any imminent threat to himself or others. The principal subsequently concluded that there was no immediate threat and that further discipline was not appropriate. However, the principal did meet with the school psychologist and guidance counselor in order to discuss the perception that the student's parents were insufficiently concerned about the student's emotional well-being. After being advised by the superintendent of his legal obligation to report suspected abuse or neglect to the state department of Child and Family Services (CFS) the principal did report his concerns to CFS.

The parents argued that the school infringed on their child's free speech rights and took adverse action against him by disciplining him for writing the essay and by reporting the parents to CFS. The Court stated that school administrators have two main roles: disciplinarian and protector. In the first role, schools have the right to distinguish between empty boasts and serious threats. In order to distinguish between the two an investigation must take place and an investigation is not disciplinary. Accordingly, the principal placed the student in ISS for the remainder of the day as a precaution in order to make an informed decision about disciplinary action. The Court held that this action was appropriate and not adverse.

The second alleged adverse action was when the principal reported the parents to CFS. The Court stated that this report was not disciplinary, but rather a protective act. In New York, school officials are required by law to report any suspected neglect. Therefore, school officials cannot be sued for reporting unless the report was an obvious retaliatory action. If school officials could be sued under §1983 for this type of action, it would put the officials into an impossible lose-lose situation. Thus, the court held that a report of neglect to CFS was not an adverse action and the principal acted appropriately in investigating the situation and reporting possible neglect to CFS.

How This Affects Your District:

The main point to glean from this case is that actions that are investigatory rather than disciplinary do not infringe on a student's free speech rights. Schools do have the right to reasonably distinguish between fiction and true threats. This case may have turned out differently had the principal subsequently suspended the student for his writings, but because the principal was only trying to decipher whether there was an imminent threat of danger the Court found that his actions were not adverse.

There is one other main point that should be addressed here. In Ohio, as in New York, there is a law that requires school officials to report any suspected child neglect to the police or child services agency. This is found in O.R.C. §2151.421. Part of that law states that any person who is required to make this type of report cannot be held liable , civilly or criminally, for any loss that a person may have incurred because of the report being made. Therefore, if school officials are making a good faith report in accordance with the O.R.C. requirements, they cannot be sued even if the allegations end up being untrue. So, when dealing with these situations, it is always better to report than to leave it alone and risk being liable under O.R.C. §2151.421.

Reminder About Restrictions On Nepotism

Early in the school year is a good time to review the ethics laws concerning the hiring of family members. Generally, the ethics laws in Ohio prohibit all public officials and employees from (1) hiring family members for public jobs; (2) using their public positions to get public jobs (or other contracts) for family members; and (3) using their public positions to get promotions, selective raises, or other job-related benefits for family members. This means that a public official or employee is not only prohibited from directly hiring a family member, but he or she also may not ask someone else within his or her agency to hire his or her family member.

To be clear, a public official is any person who is elected or appointed to or employed by a public agency. Schools are public agencies and thus any person affiliated with a school district in an elected, appointed, or employed capacity would qualify as a public official. A non-exhaustive list of family members includes, but is not limited to, a husband or wife, child or grandchild, parent or grandparent, brother or sister, and step-child or step-parent. Also included in the definition of family members is any other person who is related to the official by blood or marriage and lives in the same household with the official. Therefore, if a public official's cousin lives in the same household as the public official, the cousin would be counted as a family member under this law.

So, what should a public official do when a family member decides to apply for a position within the official's agency? The answer is simple. The public official should recuse himself from any hiring decisions regarding the position the family member is seeking. There is no law against family members working within the same agency. The only standard that must be followed is that the official must not hire, recommend hiring, or otherwise be involved in the hiring of the family member. Therefore, when a family member applies for a position, the public official should not be involved in any of the interviews, because by doing so the official could be eliminating other applicants, which would be construed as using the public position to secure the job for a family member.

Hiring a family member directly can be a felony offense. If an official can be proven to have had an interest in a family member's employment it can be a misdemeanor offense. Further, if a person is hired in violation of the ethics law, the employment contract is void and unenforceable.

In order to avoid these penalties, public officials should be cognizant of any conflicts of interest involving family members and remove themselves from any hiring decisions regarding these family members. Again, there is no rule against family members working within the same agency or district, but the hiring decisions need to be made by non-family members in all cases. If you have any concerns regarding the hiring of family members please do not hesitate to call one of us.

Can Teachers Talk About the SB 5 Referendum on District Property?

A key topic this Fall for some educators in Ohio will be the SB 5 referendum. Teachers, like students, do not completely lose their free speech rights when they enter the schoolhouse gates. However, there are some circumstances where a teacher's free speech rights can be restricted. When making decisions about this issue it is important to balance the interests and rights of the teachers against the tendency of their speech to interfere with the educational process.

If the speech materially and substantially interferes with the operation of the school, it is not protected. This is the same analysis that administrators must do when deciding whether a particular type of student speech is inappropriate. So, for example, if a teacher interrupts the school day by getting on the intercom to make an announcement about the referendum, that speech would substantially disrupt the day. If however, the teacher is having a discussion in the teacher's lounge with other teachers the speech would be protected.

The next piece that administrators must look at is the location of the speech. If the speech is occurring in the classroom while the teacher should be performing his or her job duties, it is not protected. In general, teachers do not have academic freedom to teach topics that are irrelevant to the subject being taught. For example, a math teacher does not have the academic freedom to begin talking or teaching about the referendum process of SB 5. However, a government teacher who has an approved lesson plan may have the right to teach about the process of referendums and SB 5.

In general, courts have held that teachers have the most ultimate protected speech when students are not within earshot or when they are teaching a particular topic within their course of study. Teachers can talk in break rooms and in the parking lot where students are not present. Additionally, while there are varying court opinions on this topic, it is generally held that teachers may answer a student's question about a referendum during class so long as it does not become overly long and the teacher did not initiate the conversation.

Teachers should not be using their classrooms or the hallways as soapboxes to discuss the referendum or SB 5 nor should they be handing out any information to students during class time. The main point is that administrators need to protect students from any major disruptions in their class time or in the efficient running of the school.

It should be noted that, unless the teacher dress code bans buttons or armbands altogether, teachers are allowed (as part of their free speech rights) to wear buttons and armbands that represent their feelings about SB 5 and the referendum so long as there are no obscene messages displayed on those buttons or armbands.

District Disclosure of Signed Student Statement to Police is Not FERPA Violation

After an altercation in school, a school principal asked the two students involved to write a statement explaining what happened and sign it. Once the two students completed this statement the school resource officer (SRO) collected the statements and turned them over to the police department. When collecting the statements from the students the SRO informed both that the written statement was a police report and each student would be charged with disorderly conduct. The parents of one of the students alleged that a FERPA violation had been committed when the SRO disclosed the statements to the police department .

FERPA requires any educational agency receiving funds from the federal government to have a policy or practice that allows parents and students to inspect and review education records, seek amendments to records, and consent to the disclosure of personally identifiable information from education records, except as otherwise specified by law. All allegations of FERPA violations go through the Family Policy Compliance Office (FPCO).

While the FPCO found the parents' complaint to be untimely, it still gave insight as to the decision it may have come to. First, "education records" are those records that are directly related to a student and which are maintained by an educational agency or institution. FERPA does allow a record that is characterized as a law enforcement unit record to be disclosed to third parties, including the police, without parental consent. In order to qualify as a law enforcement unit record, the record must be created for a law enforcement purpose and must be maintained by the law enforcement unit.

The FPCO explained that the SRO could be classified in two different capacities. The SRO could be classified as both a school official and a law enforcement officer simultaneously. Once the SRO collected the statements the statements became an education record subject to FERPA. However, because the SRO is also a law enforcement officer the statement would also be a law enforcement unit record and the SRO would then be permitted to non-consensually disclose to the local police.

Conversely, if the SRO was only a law enforcement officer, then the student's statement was never maintained by the District and was never an education record protected by FERPA in the first place. The remedy that FPCO recommended was for the parents to discuss the procedures for obtaining statements from students who were involved in altercations with the local school board.

How This Affects Your District:

While the opinion given by the FPCO is not binding, it does give insight into how it may make decisions regarding statements taken by SRO's. The opinion given states that SRO's are either acting in a dual position of both a school official and a law enforcement unit or they are just law enforcement units. Thus, when an SRO takes statements from students engaging in altercations, the SRO has the right to turn those statements over to the law enforcement agency without violating FERPA. In order for these statements to be law enforcement unit records rather than educational records, the records must be created and maintained by the school's law enforcement unit for a law enforcement purpose. Since an SRO is the school law enforcement unit, schools should not be wary of FERPA violations when allowing these officers to turn over student statements to the police.

Ohio Teacher Evaluation System Developed and Ready For State Board Approval

As required by HB 153, ODE has developed a State Teacher Evaluation System that, later this month, will be presented to and voted on by the State Board of Education. The evaluation system breaks teachers into three categories or options.

Option A is a beginning teacher. The formative assessment for these teachers will first include a self-assessment and student data analysis. Then these teachers will undergo two formal observations. The summative evaluation will consist of their cumulative effectiveness rating plus the student growth/performance data and an assessment of their communication and professionalism. The summative evaluation consists of the same components for all three options.

Option B is for career teachers who are not in the final year of their individual contract and these teachers will also need self-assessment and student data analysis. However, there will be no formal observations. Those are replaced by a goal-setting process and a professional project.

Option C is for teachers who are in their final year of their individual contract. These teachers, as in the two prior options, will do a self assessment and have student data analysis. However, the evaluation system combines Options A and B, and these teachers will have two formal observations and will need to undergo a goal-setting process.

In the interim period before the details of the student growth and performance data system are defined, teachers will not be evaluated based on student growth data. For each category of teacher, 10% of the evaluation will come from a measure of each teacher's professionalism and communication skills. For that time period, the formal observation process will account for 90% of the Option A teachers' evaluation. For Option B teachers, the evaluation will be based 40% on the goal-setting process and 50% on the professional project. For Option C, 50% will be based on the formal observations and 40% on the goal-setting process. After the details of a student growth and performance data system are defined the ODE plans to count this as no more than 50% of the entire evaluation system. For Option A teachers it may be a bit less depending on future legislation.

We will let you know about any new details as more information is learned about this evaluation system.

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
Employee Misconduct

Erin Wessendorf-Wortman
Brown County on September 12, 2011
Legal Update

Jeremy Neff
National Business Institute Seminar on October 13, 2011
Ohio Special Education Law

Jeremy Neff
OSBA/OASBO School Law for Treasurers Workshop on October 14, 2011
Human Resources Legal Update

Bill Deters
OSBA Employment Law Workshop on October 21, 2011
Hiring Hypotheticals: You're Hired...or are you?

Bill Deters
OSBA Capital Conference School Law Workshop on November 15, 2011
Strategies for Managing eNightmares

Gary Stedronsky
OSBA Capital Conference School Law Workshop on November 16, 2011
You're A New Superintendent — Now What?

Administrator's Academy Dates at Great Oaks Instructional Resource Center

December 8, 2011 — *FMLA*

March 22, 2012 — *New Teacher Evaluation Procedures*

June 14, 2012 — *Special Education Update*

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