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School Law Review

U.S. Supreme Court Deadlocked on Fair Share Fees Case

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The U.S. Supreme Court announced on March 29th, 2016 that it was deadlocked with a 4-4 decision on a case brought before it to challenge the practice of public employer unions collecting fair share fees.

Initially filed in California by a group of teachers who decided not to join the union, the case served as a direct challenge to a well-recognized U.S. Supreme Court decision from 1977, *Abood v. Detroit Board of Edn.*, which declared fair share fees legal.

Many interpreted the Supreme Court's decision to hear the case as an indication that Abood may be overruled given the Court's more conservative composition. However, the death of Antonin Scalia, who presumably would have provided the swing vote to overturn *Abood*, passed away before the decision was rendered.

A split decision in this case means that, at least for now, *Abood* remains good law and the practice of fair share fees will continue. This is a decisive victory for unions across the nation, although representatives from both sides have indicated that they may request a rehearing on the matter. (*Friedrichs v. California Teachers Association* (2016) 578 U.S. ___)

How this Decision Impacts Your District:

Many unions in school districts across Ohio collect fair share fees as a way to financially support the organizations. The Supreme Court decision, or lack thereof, means fair share fees remain legal. For many unions, a decision to the contrary would have effectively challenged the continued existence of these unions.

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Important Special Education Ruling Finds Bullying May Be Denial of FAPE

The federal Second Circuit Court of Appeals issued a decision on January 20, 2016, that found a school district's repeated refusal to discuss bullying of a learning-disabled student during the IEP process was a procedural violation of IDEA, denying her parents meaningful participation in developing the child's IEP. The court ordered that the parents be reimbursed for the cost of the private placement, to which she was moved after the parents rejected the proposed IEP.

At two separate IEP meetings, parents sought to discuss with school officials alleged bullying of their daughter. On both occasions, the district refused to engage in the discussion. Because the bullying was severe enough to restrict the student's educational opportunities, the action of the district to prevent a discussion on the matter impeded the parent's ability to evaluate the sufficiency of the IEP, constituting a procedural violation and denying the child a FAPE.

The court rejected the New York Department of Education's (NYDE) arguments that no harm was done, because the child's IEP had goals for improving the child's behavior that might reduce future bullying. The court also disregarded NYDE's argument that anti-bullying strategies were better addressed outside the IEP process.

The court of appeals detailed the severe bullying of the child while in the classroom. The classroom was a blended special education and regular education classroom with a regular and a special education teacher, plus several special education itinerant teachers ("SEITs") who assisted one on one with students. The SEITs testified that the bullying of the student was ignored by the teachers, that it was severe and persistent and included physical bullying like pinching and tripping, and also social bullying such as teasing, shaming, exclusion and name calling. This impeded the child's ability to concentrate, participate in class, and stay on task while at school and with activities and homework, as testified by a child psychologist and the school SEITs.

One interesting factor to the case was that the NYDE conceded that bullying a student with a disability could substantially restrict her learning opportunities. The court assumed this without specifically deciding it; however, the court noted that the concession of the department essentially acknowledged the position of the Untied States as amicus curiae in the case and also the position of the Office of Civil Rights (OCR) in its August 20, 2013 Dear Colleague letter on bullying of students with disabilities. However, the court declined to decide the level of deference owed to those entities and their guidance because the Department had conceded the issue.

The court also noted it would not decide if the bullying was so severe it became a substantive denial of FAPE, since it had already decided there was a procedural violation. The court also did not adopt the four part test that the district court wrote in a decision about the case for the same reason; i.e. that the procedural violation finding made it unnecessary.

How this Decision Impacts Your District:

While this case arose in the federal Second Circuit and not our own federal Sixth Circuit, the decision may be the first to address the issue of bullying as a procedural violation that may result in the denial of FAPE under IDEA. The decision also refers to the OCR Dear Colleague letter from 2013 and its position that bullying of a disabled student may interfere with the student's ability to receive a FAPE. This ruling is an important call to ensure that bullying of disabled students must continue to receive diligent attention by schools, and certainly that severe bullying that impacts a student's ability to receive a FAPE must now be considered as a risk for procedural violation of the IDEA. Compensatory damages and tuition reimbursement are only some of the available remedies when violations are found.

T.K. and S.K. individually and on behalf of L.K. v. New York City Department of Education, (C.A. 2, 2016) 810 F.3d 869

Use of Attendance for Teacher Evaluation Goes to Court of Appeals

Ennis Britton, Co., LPA recently submitted an amicus curiae brief on behalf of the Ohio School Boards Association, the Ohio Association of School Business Officials, and the Buckeye Association of School Administrators in the case of *Tolles Career and Technical School Bd. Of Edn. v.Tolles Education Association*.

The case is important for Ohio school districts because it represents a potential challenge to school management's ability to determine what data may be used in teacher evaluations. The case arose after the union filed a grievance to challenge an evaluator's inclusion of teacher attendance data under standard seven on several teacher evaluations. The grievance was denied by school administration, and the union submitted the matter to arbitration. In response, the Tolles Board of Education filed a complaint for declaratory relief in Madison County to obtain a declaration from the court that the matter could not be submitted to arbitration. The trial court denied the Board's complaint and instead ordered the parties to arbitrate the issue in full.

The Board has argued throughout the process of grievances, arbitrations and court filings that the use of attendance data to evaluate employees is an exclusive management right that has not been otherwise restricted through the bargaining process. Although the CBA contains a due process clause that permits a teacher to challenge a violation of evaluation procedure or law through arbitration, the Board maintains that use of the data involves content, rather than procedure or law, and therefore the due process provision does not apply.

The Board further maintains that it does not have to bargain what data or metrics it uses to evaluate teachers under the OTES evaluation framework. Regular and punctual attendance of a public employee in particular is a basic tenet of the employer employee relationship, and it should go without saying that an employer has the authority to evaluate an employee's performance based on attendance.

How this Decision Impacts Your District:

A significant part of the decision in this case will hinge on interpretation of the specific language contained in the collective bargaining agreement between the parties. However, a decision that upholds the trial court's order to submit the use of attendance data in evaluations to arbitration may have a

negative impact on school districts by restricting management's discretion to select assessment data for teacher performance evaluations.

A ruling from the Twelfth District is expected within the next few months, and we will update you on the litigation once a decision is issued.

Tolles Career & Technical School Bd. of Edn. v. Tolles Education Association**,** Case No. CVH 20150102 (Madison C.P., December 9, 2015)

Proposed Legislation to Address Student Threats of Violence

Senate Senator Jim Hughes proposed Bill 297 on March 21, 2016. This bill seeks to amend Ohio's student discipline statutes to address threats of violence made by students.

The proposed bill would allow a board of education to adopt a resolution to permit a superintendent to expel a student for up to 60 days for "communicating a threat to kill or do physical harm to persons or property" if all of the following conditions are met:

- The threat is communicated verbally or in writing, in person or via telephone, computer, or with another electronic communication device; and
- The threat is made against persons or property at a school, on a bus, at an athletic competition, extracurricular event, other program or activity sponsored by the school district or in which the district participates, or at any other property controlled by the board of education; and
- The student engaged in "conduct that constitutes a substantial step in a course intended to culminate in the commission of the threatened act, as determined by the superintendent in consultation" with law enforcement.

As a condition to reinstatement from expulsion, the board of education may require the student to undergo an assessment to determine whether the student poses a danger to himself/herself or to others. The superintendent may extend the expulsion for not more than one calendar year if the student fails to undergo the assessment.

A student expelled under this bill can only be reinstated if the superintendent determines that the student has shown sufficient rehabilitation.

Another provision in this bill allows a board of education or law enforcement agency to file a civil action seeking recovery for restitution from the parent, guardian, or custodian of a student who is expelled. Restitution sought is for the costs of the school district or law enforcement agency incurred as a result of the student's conduct that gave rise to the expulsion.

This bill was just recently introduced and must make its way through the legislative process before it becomes law. We will continue to keep our clients updated on its status.

College Credit Plus Weighted Grades Bill

Parents and students around Ohio have complained about what they see as an inequity involving college credit plus (CCP) courses. In February, a group of high school students testified in front of the General Assembly against the CCP rule that requires districts to treat all college courses as being comparable to AP courses for grade weighting. The students believe the rule has unfair consequences, because it can lead to relatively easy college courses being weighted the same as more rigorous AP, International Baccalaureate (IB) or honors classes for GPA purposes. For instance, a student could take an entry-level CCP science course and receive the same weighted GPA as a high school AP Physics class.

Recently, ODE held a webinar reminding districts that they must follow the law as described above; i.e. that all college courses must be comparable to AP courses- and not penalize a student for taking CCP courses. ODE claimed that CCP parents and students feel "discriminated against" because they are potentially losing out on scholarships if the classes they take are not weighted the same as AP, IB, or honors courses.

Representatives Mike Dovilla and Marlene Anielski recently sponsored House Bill 445, which proposes to correct the perceived inequities. The bill would require school districts to award weighted credit for CCP courses that the district determines are comparable to AP, IB or honors classes. This would help eliminate concerns that students are "padding" their GPA by taking entry-level CCP courses.

The bill also addresses a concern about the difference between the number of hours spent in a college course as opposed to a high school course. For instance, a student taking a college course spends about 45 hours in the classroom compared to 120 hours in an AP high school class. The bill clarifies that one high school credit is equal to four credit hours of a college course, or the equivalent if the college operates on a quarter schedule. Under the bill, students attending public, non-public, community, STEM, and home instruction also would be permitted to participate in extracurricular activities while participating in CCP.

Finally, the bill prohibits students from taking a course on a college campus if a comparable class is being delivered through the CCP program in the school district. It also clarifies that textbooks and materials purchased for CCP belong to the entity that paid for them. The bill currently is in the House Education Committee and has had its first hearing before the committee. We will continue to update clients as it moves through the legislative process. A link to the bill is available here: HB 445

Legislation in the Works

SB 3, known as the "education deregulation" bill, passed the Senate in March of 2015 and has been in the House Education Committee since April of 2015. Five hearings have been schedule, two of them in 2016, and the last of which was cancelled. Expect amendments in the House, but the scope and content hasn't yet been revealed.

HB 410, the "truancy bill" was heard in the House Education Committee with multiple people testifying as proponents and also as interested parties. According to the bill's co-sponsor, Rep. Hayes (T-Harrison Township) it "…seeks to create more holistic processes for addressing student absenteeism by encouraging schools to intervene sooner and build a team to crate a plan to get truant students back on track." Representative Hayes is a former school board member in Reynoldsburg and Southwest Licking Schools.

How would HB 410 affect your district?

The bill would prohibit suspensions or expulsions solely due to unexcused absences under a zero tolerance policy. It requires a series of progressive interventions by the school district and juvenile courts, including "absence intervention teams" for habitually truant students and "absence intervention plans" to be developed by the school district. One required member of the team is a school district attendance officer, which of course not all districts have, or share with other districts. Even for districts that have such attendance officers, the caseload in a large district can be challenging. A teacher and an administrator also would have to be on the team. The bill is currently proposed to be effective in the 2017-18 school year. There would be new EMIS reporting requirements. The Juvenile Judges Association has proposed language that would allow diversion and intervention to occur either before or after a filing in juvenile court. The bill currently provides for these diversion programs only after a juvenile complaint is filed, and many school districts and juvenile courts already have operational educational neglect and truancy programs.

Sunshine Law Week: "Sunshine Audit" Report Released by State Auditor

Ohio State Auditor Dave Yost began a process called the Ohio Sunshine Law Audit in 2015. The rationale announced by the office was to permit citizens to appeal to an entity other than a court about complaints to obtain public records from public entities as an alternative to filing a mandamus action.

The person or entity requesting the audit must first attempt to participate in the Ohio Attorney General's (OAG) public records mediation program. Participation in the OAG's mediation program is an optional process and a public entity, such as a school district, could decline to participate in the mediation program without penalty. A subsequent referral to the Auditor's Sunshine Law audit results in the auditor investigating and making a determination about whether the public office was "compliant" or "noncompliant" in providing the requested public records. The result of a "noncompliance" finding in a sunshine law audit would be a notation of noncompliance on the district's audit report.

The move to create the sunshine law audit by the office of Dave Yost was challenged by some state legislators, who proposed a bill to limit these audits, as it was felt this action was beyond the authority of the Auditor; but the bill was dropped without action. Therefore, the program has continued to operate on a small scale. A report released the week of March 14, 2016 indicates that a small number of public entities have been the subject of complaints to the auditor's office for Sunshine Law Audits.

Sixteen public entities were subjected to sunshine law audits, and eight were found compliant, five were found "initially noncompliant" and three were found noncompliant. Only one school district was the subject of an audit, in an issue that involved a public records request for enrollment and class sizes. The school district provided the records to the requestor and then was found compliant.

Be aware that this program is operating. There is a protocol for the audits and form letter to notify districts they are the subject of a referral to the Auditor's office for a sunshine law audit. To learn more or if your district receives such a communication, contact your counsel.

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.

- **April 15**-- Deadline for financial disclosure forms to be filed with the Ohio Ethics Commission
- **April 25**-- Deadline for certification to Department of Taxation for income tax levy for August election
- **April 29**-- Deadline to submit to county auditor for emergency and operating levies for August election
- **May 4** – Deadline to submit to board of elections for emergency, phased-in, current operating expenses, permanent improvement, operating, or continuing replacement levy for August election. Deadline for certification of resolution for income tax levy to board of elections. Deadline for district resolution of necessity, resolution to proceed and auditor certification for bond levy with board of elections for August election (also deadline for county auditor to certify school district bond issue terms for August election).
- **June 1**- Deadline to act on and deliver written notice of nonrenewal to administrators, (except superintendent and treasurer) teachers and non-teaching employees.
- **June 30**- School fiscal year ends.
- **July 1**- Deadline for board to adopt appropriation/temporary appropriation measure. Deadline for salary notices for teachers and nonteachers
- **July 10**- Deadline for teachers to notify district of termination of contract without board consent

Upcoming Presentations

SAVE THE DATE! 2015-2016 Administrator's Academy Seminar Series

April 7, 2016 – Special Education Legal Update

Great Oaks Instructional Resource Center, Cincinnati, Ohio

July 14, 2016 – 2015-2016 Education Law Year in Review

Webinar or Archive ONLY!

Participants must be registered to attend each event. Each seminar will be accompanied by a live online webinar. The webinar will be archived for those who wish to access the event at a later time. You can register on our website at www.ennisbritton.com/client-resources/erf-administrators-academy/, contact Hannah Reichle at 614.705-1333, or send an email tohreichle@ennisbritton.com

Other Upcoming Presentations:

April 14, 2016- Bronston McCord, Rob Giuffre on Strategic Compensation

OASBO annual conference, Greater Columbus Convention Center (Columbus)

April 14, 2016- Pam Leist, Hollie Reedy on Booster Group Management and the Law

OASBO annual conference, Greater Columbus Convention Center (Columbus)

April 22, 2016 – Pam Leist, Jeremy Neff on Special Education Laws Made Simple

NBI Live Seminar, Holiday Inn & Suites Conference Center, Mansfield, OH 44902

Twitter: @EnnisBritton

Want to stay up-to-date about important topics in school law? Check out Ennis Britton's Education Law Blog at www.ennisbritton.com/education-law-blog.

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 Hannah Reichle at hreichle@ennisbritton.com or 614-705-1333. Archived topics include:

- Managing Workplace Injuries & Leaves of Absence
- Special Education: Challenging
- Levies & Bonds
- OTES & OPES Trends & Hot Topics
- Tax Incentives

Students, Challenging Parents
- Fostering Effective Working Relationships with Boosters
- Effective IEP Teams
- Cyberlaw
- FMLA, ADA and Other Types of Leave
- Prior Written Notice
- Advanced Topics in School Finance
- Student Residency, Custody and Homeless Students
- Student Discipline
- Media and Public Relations
- Gearing Up for Negotiations

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 helps 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 are comprised of attorneys who already have experience in and currently practice in these specialized areas.

Construction/Real Estate
Construction Contracts, Easements, Land Purchases and Sales, Liens, Mediations, and Litigation

Team Members
Bronston McCord
Ryan LaFlamme
Gary Stedronsky

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

Team Members
Ryan LaFlamme
Pam Leist
Giselle Spencer
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

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Bill Deters
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Megan Bair Zidian

School Finance
Taxes, School Levies, Bonds, Board of Revision

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