

Ennis, Roberts & Fischer

School Law Review

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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 issues raised to your situation, please contact an attorney at Ennis, Roberts & Fischer for consultation.

Handcuffing Nine-year-old Held Unreasonable

Gray v. Bostic—August 2006

A recent Eleventh Circuit case addressed the scope of a resource officer's authority to detain students after a verbal altercation between a student and teacher.

In *Gray v. Bostic*, a nine-year old female student was detained and handcuffed by the school resource officer (SRO) after making a threatening comment to her physical education teacher. The SRO witnessed the confrontation between the teacher and student and intervened only after the situation had resolved itself. At that point, the SRO took the student out of the gymnasium and proceeded to put her in handcuffs to teach her a lesson about how it "feels to be in jail."

To determine whether the SRO's actions violated the law, the Eleventh Circuit looked to whether 1) the SRO's actions were within his discretionary authority, and 2) handcuffing the student was reasonably related in scope to the circumstances that justified his initial intervention.

Because the SRO's duties included investigation of criminal activity on school grounds, and because the officer believed that the student had committed a misdemeanor, the court held the SRO acted with proper authority to detain the student for questioning regarding her threat to the teacher.

However, although an officer is allowed to handcuff a detainee that he believes is a potential threat to school

safety, the court held that handcuffing the student in this case was a violation of her Fourth Amendment rights because the student no longer posed a threat to the school's safety at the time the SRO intervened. By the time the SRO took action, the situation had resolved itself and the student was properly following the directions of her teacher.

How the decision affects your district: This case illustrates that an SRO may use only reasonable means and force to investigate wrongdoing and maintain school safety. While a resource officer may have authority to detain and handcuff students who pose potential threats to the safety of others, SROs may not use such force after the threat has subsided.

The Challenges of Last Chance Agreements

Fouty v. Ohio Department of Youth Services—June 2006

An Ohio appeals court recently expanded potential liability against employers that fail to meet obligations created by agreements such as a "last chance" agreement.

Fouty, an at-will employee who worked at the Ohio Department of Youth Services ("ODYS"), failed twice to

meet requirements for department drug testing because the urine he submitted was either too hot or too cold. After Fouty refused a third testing attempt, ODYS documented his refusal as a positive test result and set up a pre-disciplinary hearing to address the policy violation.

Fouty contested the designation, and eventually both parties agreed to enter into a

last chance agreement. The agreement required Fouty to participate in an Employee Assistance Program ("EAP"). As part of the program, Fouty met with a psychologist for an initial assessment. The psychologist determined that while Fouty did not use drugs, he did exhibit signs of alcohol abuse. The EAP supervisor then referred Fouty to an
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The Challenges of Last Chance Agreements, Cont.

alcohol treatment center, and ODYS placed Fouty on leave. When the center determined that Fouty had neither a drug nor an alcohol problem, they transferred his case back to the EAP center for further action.

Both EAP and ODYS decided that Fouty would need to meet with the original psychologist for a second assessment. However, instead of contacting Fouty directly, EAP sent a series of certified letters that Fouty never received. As a result, Fouty did not meet with the psychologist before the designated deadline, and

he was ultimately terminated.

Fouty brought a claim to challenge his termination. The appeals court, in upholding a lower court's ruling, held ODYS and EAP liable for both breach of contract and negligence tort claims. The court declared that ODYS and EAP failed to perform obligations created by the last chance agreement, including development of a detailed outline of the treatment plan. Additionally, EAP committed negligence when it failed to contact Fouty through telephone or other alternative means, as EAP's internal policies

required. Finally, ODYS was held liable for negligently performing its duties because the department unquestioningly accepted EAP's determination that Fouty failed to complete the program without conducting its own assessment. Therefore, Fouty's termination was unwarranted, and both agencies were liable for back pay and damages. **How the decision effects your district:** the Fouty decision highlights the significant potential liability district employers face for either drafting unrealistic obligations in an agreement, or for failing to adhere to obligations of the agreement.

“Therefore, Fouty’s termination was unwarranted, and both agencies were liable for back pay and damages.”

Pennsylvania Principal Properly Terminated for Failure to Respond to Gun Incident

Flickinger v. Lebanon School District—May 2006

A Pennsylvania lower court upheld a school district's termination of a principal who failed to respond to a gun incident at his school.

Principal Flickinger received a report from an assistant principal that a student brought a gun to school. Flickinger waited more than thirty minutes to respond. During the delay, the assistant principal and another administrator were forced to investigate the report themselves, and discovered that the student in question had both a gun and a knife in her pockets.

The principal became involved in the situation only after the assistant

principal issued a building code red. Further, the principal took several additional minutes after the alarm sounded to appear on the scene.

The Board initially terminated the principal for his delayed response, but reinstated him and placed him on leave during an investigation after he claimed due process violations. At the conclusion of the investigation, the Board terminated the principal for breach of his duties in relation to the incident.

When Flickinger brought a claim in court, the court upheld the Board's termination. The

court specifically held that reinstatement during investigation adequately remedied due process violations against Flickinger. The court further ruled that the Board reasonably found breach of duties and serious violations of the district's safety policies.

How the decision effects your district: First, under the holding, districts may adequately remedy due process violations by reinstating employees and conducting an investigation. Second, especially in light of recent school shooting incidents, districts must train administrators to quickly respond to weapons threats in order to avoid additional claims of liability.

“The court specifically held that reinstatement during investigation adequately remedied due process violations against Flickinger.”

Three Special Circumstances for Schools to Take Disciplinary Action Under IDEA

Under IDEA, there are three special circumstances that permit schools to take disciplinary action against special education students regardless of whether behavior is a manifestation of a disability. The circumstances arise when:

1. *A student carries a weapon onto school premises or to a school function.*
2. *A student uses, sells, or possesses an illegal drug on school premises or at a school function.*
3. *A student has inflicted serious*

bodily injury on another person while at school or at a school function.

The last circumstance is reflected in the most recent changes to the 2004 version of IDEA.

In all three situations, IDEA permits a school to remove a student regardless of whether the behavior is a result of the student's disability. The school may remove the student for up to **45 school days** for a total of

nine school weeks (the 1997 version of IDEA permitted removal only for 45 calendar days, which equals six and a half weeks of school).

However, a school must still adhere to the manifestation process for a student whose behavior falls under one of the three circumstances. If the school determines that the behavior is a manifestation of the disability, the IEP team must still conduct an FBA and develop a BIP to address the behavior.

School Policies that Ban Same Sex Dates at School Functions

As homecoming season comes to a close, many schools continue to grapple with an increasingly controversial school policy issue:

whether or not schools may ban same sex dates at school dances and other functions. While schools cite concerns over student safety and security to justify the policy decision to ban same sex dates, districts have little legal justification for adopting this type of policy. In fact, districts that attempt to ban same-sex dating at school functions increasingly find themselves involved in heated community debates and even lawsuits (under U.S. Constitution or Title IX sex discrimination claims). As a result, school districts should not attempt to ban same-sex dating at school functions.

Current case law provides some insight into the issue. The case of *Fricke v. Lynch* involved a school ban on attendance of students that brought

same-sex dates to school dances. In the case, a homosexual student, Aaron Fricke, wanted to attend a senior reception with a male companion. The principal denied Fricke's request to bring his companion because he felt the couple would disrupt the function and cause security issues.

A district court in Rhode Island held that even a legitimate interest in school discipline did not outweigh a student's right to peacefully express his views in an appropriate time, place, and manner, as required by the First Amendment to the U.S. Constitution. In addition, unless a school had a solid basis to believe that a same-sex couple would cause "severe disruption" to the school environment, the district was required to permit every student to attend with his or her chosen dates. The court also held that a school had an obligation to take reasonable measures to protect

and foster free speech and prevent harm to students exercising their free speech rights. The court in this case ruled that the school had adequate resources to take security measures that would control the risk of harm to the safety and security of students. Further, the court found that the threat of disruption to the school function was not adequately severe to justify school interference.

How the decision will effect your district: As indicated by the holding in *Fricke*, schools should permit same-sex couples to attend school dances and other school functions. School policies that ban same-sex couples from these events often result in community backlash, not to mention possible legal liability. Therefore, schools should proceed with extreme caution when they try to ban same-sex dating at school functions.

“As indicated by the holding in *Fricke*, schools should permit same-sex couples to attend school dances and other school functions.”

Changes to Collection of Tuition and Excess Costs for Special Education

Effective July 1st, resident districts must follow a new process to reimburse educating districts for tuition and excess costs of special education. Both House Bill 66 and House Bill 530 dictate the following changes.

First, prior law permitted a district to collect tuition or excess costs of educating special education students from resident districts, but not both. The new legislation now permits collection of excess costs if

the cost of education exceeds the value of tuition on a per pupil basis.

Second, the new legislation eliminates direct payment between districts (with the exception of MR/DD's). It also disposes of the necessity for a contract between districts when a court removes a child from his natural parents under R.C. 3313.64.

Third, the changes require the educating district to involve the resident district in the IEP process be-

fore it can receive any funding. The educating district must provide proof that the resident district participated in the IEP process to receive tuition and excess costs of education.

Under the process, ODE will credit the excess cost amounts of special education to the educating district and deduct that amount from the resident district.

Please don't hesitate to contact us with questions on the new process.

Change to School Tuition Obligation

R.C. §2151.357, signed into law on June 30th of this year, changes the procedure used to establish which school district is responsible for tuition expenses when a child's permanent custody is vested in a government agency or person other than a natural parent. The statute now permits courts to modify custody orders and reassign tuition obligations to school districts under certain circumstances.

As you know, R.C. §3313.64 controls assessment and collection of tuition for handicapped and non-handicapped children. The statute entitles a school district to payment of tuition for a child when the child attends school in a district other than that in which his parents reside. R.C. §3313.64(C)(2) provides that when a government agency or person other than the child's natural parents receives permanent custody, the district where the natural parents reside at the time of the custody transfer will remain responsible for the child's tuition. If a natural parent's residence is unascertainable, the school district where the child resided at the time he was removed from his parents' home is obligated to pay the child's tuition. **Only if tuition obligations cannot be ascertained by either of the methods above**, the responsible school district is determined to be the dis-

trict named by the juvenile court in its order to remove the child from the custody of his parents.

Initially, R.C. §2151.357 established that the court's original custody order (as used under the third method to determine tuition expense allocation under R.C. §3313.64(C)(2)) could not be modified. R.C. §2151.357, however, now permits a court to modify a custody order and name a different school district to bear the cost of education when a natural parent moves into a new district's boundaries.

The process requires the Department of Education ("DOE"), after receiving sufficient evidence from the original district that a natural parent's residence changed, to notify the court of the change. After DOE provides notice and a recommendation to transfer tuition, the court may transfer education costs to a new district.

DOE may only recommend transfers to the district in which the child's parent currently resides or, if the parent's residence is not known, the district in which the parent's last known residence is located. If DOE is unable to determine a parent's current residence, the school district designated in the initial court order will continue to bear the cost of the child's education.

R.C. §2151.357 now

provides school districts with an opportunity to transfer tuition costs. Due to these changes, districts may be able to transfer tuition obligations to other districts when a child's natural parents have moved into another district's boundaries. However, a district must provide evidence of a residence change to DOE by submitting form SF-DRC (available on the ODE website) along with any supporting documents. If DOE finds the evidence sufficient and approves a transfer, it can then request the court to modify the custody order and transfer costs.

Districts should be aware of one final possible modification to R.C. §2151.357, proposed by the Ohio House of Representatives on July 11th of this year. The modified law, known as House Bill 630, would permit DOE to bypass the court to approve tuition transfers. The legislation would specifically authorize DOE to transfer tuition obligations directly to a new district without court action once a district provides notice and proof of a change in the natural parent's residence. The revision currently awaits a vote in both the House and Senate. We will continue to monitor the situation and will keep you apprised of any further changes.

Don't hesitate to contact us with questions about his new procedure.

"The whole problem with the world is that the fools and fanatics are always so certain of themselves, and wiser people so full of doubts."

-Bertrand Russell

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We're on the Web!
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We hope to see you on November 14th at the 2006 Capital Conference and Trade Show, where Bill Deters will address the topic of Non-Certified Employee Contracts, Liabilities, and Termination.

Is your district planning to build new schools?

Ennis, Roberts & Fischer has experience in this area, and can guide you through the process start to finish, avoiding legal pitfalls along the way.

Let us help you through this exciting opportunity!

Contact One of Us!

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