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## Recent Constitutional Law Decisions Have Important Implications for Education Law

by Adam S. Breipohl\*

Two recent decisions in California and Virginia hold significant implications for the constitutionality of both the status quo and legislative reforms in the public school system as well as the larger debate surrounding these issues.

In the California case, *Vergara v. State of California*, No. BC484642 (Super. Ct. Cal. June 10, 2014), several statutes governing teachers' job protections were overturned as unconstitutional after nine California public school students brought suit alleging that state statutes related to public school teachers' tenure, termination procedures, and seniority rights made it too easy for ineffective teachers to become tenured and too hard for administrators to fire or lay off ineffective teachers. Because these ineffective teachers often ended up in schools serving predominately lower-income and minority students, the plaintiffs argued that the system created a disparity in quality of ed-

ucation that violated their right to equal protection under the law.

The opinion set out the terms of its analysis according to California precedent by stating that under *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976), and *Butt v. California*, 842 P.2d 1240 (Cal. 1992), equal educational opportunity is a fundamental right of Californians, and statutes that impact this right are subject to strict scrutiny, a form of judicial review that requires a statute to serve a compelling state interest and be necessary to further the state's interest.

Turning to the statutes, the court held that California's tenure statute could not survive strict scrutiny because the two-year deadline it imposed for tenure decisions was too short to accurately evaluate which teachers should be retained, disadvantaging students and teachers alike for "no legally cognizable reason." The dismissal statute also failed the strict scrutiny test because the

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"tortuous" process it required to fire an ineffective teacher, which could take from two to ten years and cost \$50,000 to \$450,000, exceeded what was necessary to protect teachers' due process rights, harmed students, and failed to serve a compelling state interest. Finally, California's "last in, first out" statute, which required layoffs to be based only on seniority, did not meet the strict scrutiny standard because the state had no compelling interest in retaining ineffective teachers over effective teachers merely because the ineffective teachers had seniority. Therefore, the court overturned each of the statutes.

In the Virginia case, *School Bd. of City of Norfolk v. Opportunity Educational Institution*, Nos. CL13-6955/CL14-1002 (Cir. Ct. Va. June 10, 2014), a Virginia court struck down a statute that created the Opportunity Education Institution (OEI) and gave the Opportunity Education Institution Board (OEI Board) the power to take control of any school denied accreditation away from the school board. When the OEI Board used this power to take control of four Norfolk, Virginia schools, the school board filed a lawsuit alleging that the enabling statutes violated the Virginia constitution, specifically, the provision stating that "[t]he supervision of schools in each school division shall be vested in a school board."

The court held that the statute enabling the OEI Board to take over underperforming schools violated the constitution's provision that local school boards are to control pub-

lic education. The court stated that while Virginia's legislature has the authority to formulate policies and standards to ensure Virginia schools are efficient and of high quality, the responsibility of supervising the operation of public schools was indefeasibly vested in the local school boards. Because the OEI statute infringed on school boards' constitutional right and duty to supervise public schools, the court overturned the statute as unconstitutional.

While both the California and Virginia cases were only trial court decisions and certainly involved idiosyncrasies of their respective states' law, both also implicate very important (and often contentious) issues in education law and may lead to significant repercussions in Oklahoma and around the country.

Tenure laws are among the most controversial issues in education, and in light of the *Vergara* decision, it is hard to imagine that a successful challenge in California will not inspire advocacy groups in other states to bring their own actions in the near future. Furthermore, while Oklahoma cases like *Fair School Finance Council of Oklahoma, Inc. v. State*, 746 P.2d 1135 (Okla. 1987), construe students' right to an equal education more narrowly than *Vergara* or earlier California cases, the reasoning in *Vergara* consisted largely of a fairly standard equal protection analysis that could potentially be replicated by courts in other states. In broader terms, *Vergara* illustrates that even the most well-established practices of public schools are not necessarily immune from

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constitutional scrutiny and that the standards can change. The *Vergara* court repeatedly criticized California's overprotective statutes as being in the minority and behind the times, taking this as evidence that California's statutes went beyond what was necessary to accomplish their goals and therefore could not survive strict scrutiny.

On the other hand, the *Norfolk* decision also engages with a salient policy issue, the division of power between the state and local levels. Although Oklahoma does not have a constitutional provision mandating school board control of public schools and therefore the constitutionality of a similar statute would probably be analyzed very differently in Oklahoma, the case is significant in two ways. First, it demonstrates the resilience of the deeply-embedded principle (sometimes to the point, as in Virginia, of being constitutionalized) of local control of public schools against legislative efforts to fundamentally change the public education system. Second, it is an example of the many battles waged in the legislature and in the courtroom over the proper role of every level of government in overseeing public education, which will undoubtedly continue in the future.

Overall, these decisions are indicative of the larger trends in policy, a move away from teacher job protection and local control, and the key role constitutional jurisprudence could play in both spurring on and holding off these developments.

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\*Adam S. Breipohl is a third year law student at the University of Texas School of Law. Adam worked as a summer associate for Rosenstein, Fist, and Ringold in the summer of 2014.

## A Civil Remedy for Violation of the Oklahoma Open Meeting Act

by Staci L. Roberds

In *Rabin v. Bartlesville Redevelopment Trust Authority*, 2013 OK CIV APP 72, 308 P.3d 191, the Oklahoma Court of Civil Appeals was faced with an appeal brought by two residents of Bartlesville, Oklahoma, against the Bartlesville Redevelopment Trust Authority ("BRTA"), for violation of the Oklahoma Open Meeting Act ("OMA"), OKLA. STAT. TIT. 25, §§ 301-314. The residents alleged that the BRTA improperly entered into executive session. The trial court dismissed the residents' claim, determining they lacked standing to bring the action and there was no private cause of action for a violation of the OMA. The Court of Civil Appeals reversed the trial court, determining the Bartlesville residents had standing to bring their claim, as they were members of the public and the creation of the OMA was to promote governmental transparency to the public. The court further held that the residents had a private cause of action to enforce their rights under the OMA against the BRTA, because: (i) they were members of the general public, the special class for whom the statute was enacted; (ii) the Oklahoma legislature intended to create a remedy beyond a criminal penalty, as evidenced by Sections 307(F) and 313 of the OMA; and (iii) the imposition of a civil remedy under the OMA was consistent with the underlying purpose and policy of the Act.

During the most recent Oklahoma legislative session, the legislature amended the OMA to codify the *Rabin* decision in Section 314 of the Act. The legislation was signed by Governor Mary Fallin, and effective November 1, 2014, Section 314 of the OMA will include a provision for "any person" to bring a civil suit for declaratory or injunctive relief or both following a violation of the Act, and if successful in such a suit, the statute entitles that person to reasonable attorney fees against the public body. However, the statute also provides that if a public body defends the civil suit and it is determined by the court to be "clearly frivolous," then the public body is entitled to reasonable attorney fees against the person bringing the lawsuit. Furthermore, the new legislation retains the criminal penalty for a willful violation of the OMA, which is considered a misdemeanor, and if convicted, punishment shall include a fine not to exceed \$500, imprisonment not to exceed one (1) year, or both.

As a result of this new legislation, boards of education and other public bodies subject to the OMA should continue to be vigilant to ensure that they comply with the requirements of the OMA, in order to avoid a civil action associated with a mere violation of the Act and a possible attorney fee

award if the action is successful. Thus, when questions arise regarding compliance with the OMA, it is imperative to contact your school district attorney.

## Related Service Providers and Attendance at IEP Meetings

*by Cheryl A. Dixon*

As you are preparing to begin a new school year, it is a good time to review the importance of related services providers' attendance at IEP meetings. The IDEA does not specifically require related services personnel to attend IEP meetings. If a student with a disability has been identified as in need of related services, however, it is appropriate to involve the related services provider in the student's IEP meeting.

There are two provisions in the IDEA's implementing regulations that permit a related service provider's attendance at IEP meetings. The first is if your District designates a related service provider as a required IEP Team member. If a related service provider is designated as a required Team member, the related service provider must attend the student's IEP meeting unless; 1) the parent, in writing, and the public agency consent to the provider being excused from the meeting, and 2) the related service provider submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting. Regarding excusal of related services providers from IEP meetings, "[the Office of Special Education

any person  
[can] bring a civil  
suit for declaratory or  
injunctive relief or both  
following a violation  
of the Act . . .

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Programs] expects excusal decisions to be made on an individualized, case-by-case basis, and would consider a public agency to be in noncompliance with the IDEA if it were to routinely or unilaterally excuse a required IEP Team member from attending an IEP Team meeting without obtaining parental consent or agreement.” *Letter to Rangel-Diaz*, 58 IDELR 78 (April 25, 2011).

If a related service provider is not designated as a required IEP Team member, a provider may still attend an IEP meeting as an individual with knowledge or special expertise regarding the child. However, the excusal provisions are not

applicable to a related service provider invited to attend an IEP Team meeting at the discretion of the parent or the school district.

In sum, the Office of Special Education Programs of the United States Department of Education expects school districts to ensure that each student’s IEP Team is composed of persons knowledgeable about the student’s education needs, including the type and amount of special education and related services necessary for the student to receive FAPE, and requires excusal decisions of required IEP Team members to be made on an individualized, case-by-case basis.

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*Chalkboard* is a Rosenstein, Fist & Ringold publication that addresses current education law issues. *Chalkboard* is published monthly through the school year and is sent without charge to all education clients of Rosenstein, Fist & Ringold and all other persons who are interested in education law issues. We invite you to share *Chalkboard* with your friends and colleagues. We think you will find *Chalkboard* to be informative and helpful with the difficult task of operating our educational institutions.

*Chalkboard* is designed to provide current and accurate information regarding current education law issues. *Chalkboard* is not intended to provide legal or other professional advice to its readers. If legal advice or assistance is required, the services of a competent attorney familiar with education law issues should be sought.

We welcome your comments, criticisms and suggestions. Correspondence should be directed to: Rosenstein, Fist & Ringold, 525 South Main, Seventh Floor, Tulsa, Oklahoma 74103-4508, or call (918) 585-9211 or 1-800-767-5291. Our FAX number is (918) 583-5617. Help us make *Chalkboard* an asset to you.

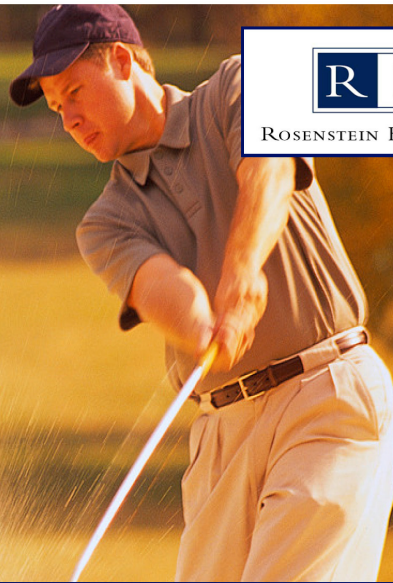
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# 2014 Fall School Law Update and Golf Tournament



ROSENSTEIN FIST & RINGOLD



**Date - Wednesday, October 8, 2014**

## SCHEDULE

8:30 a.m.	Registration
9:00 a.m. – 11:00 a.m.	School Law Update
11:00 a.m. – 12:00p.m.	Lunch (provided) and Practice Time
12:15p.m.	Golf – Shotgun Start
5:00 p.m.	Awards Presentation



**Cost:** Seminar Registration Fee – \$50 per person (first-come first-serve).

**Note – This seminar is limited to the first 120 registrants – Please register early (we will confirm every registrant via e-mail)**

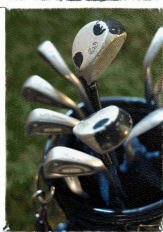
**Where:** White Hawk Golf Club, 14515 S. Yale Ave., Bixby, OK

**Seminar Format:** 2 hour update on school law related issues and relevant topics designed to provide you with new insight and direction.

**Golf Format:** 4 person scramble – no charge for seminar attendees

All participants will receive a complimentary Nike® golf shirt (women's sizes available)

**Deadline to Register – Friday, October 3**



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If you list more than  
one person on your  
registration form,  
please contact them  
prior to submission of  
this form. If the person  
is with another school  
district, we will bill  
them directly.







## 2014 FALL SCHOOL LAW UPDATE AND ROSENSTEIN, FIST & RINGOLD

### 2014 Fall School Law Update

**PLEASE REGISTER THE FOLLOWING FOR THE SEMINAR AND GOLF:**  
**(PLEASE NOTE – ONLY SCHOOL DISTRICT EMPLOYEES or BOARD MEMBERS ARE ELIGIBLE FOR SEMINAR AND GOLF)**

Please register:

Please mark an "X"  
in the appropriate  
box

Seminar and Golf    Seminar only

Name _____	School District Employed By/Position/Board Member _____	<input type="checkbox"/>	<input type="checkbox"/>
E-Mail Address (PLEASE PRINT LEGIBLY) _____			
Name _____	School District Employed By/Position/Board Member _____	<input type="checkbox"/>	<input type="checkbox"/>
E-Mail Address (PLEASE PRINT LEGIBLY) _____			
Name _____	School District Employed By/Position/Board Member _____	<input type="checkbox"/>	<input type="checkbox"/>
E-Mail Address (PLEASE PRINT LEGIBLY) _____			
Name _____	School District Employed By/Position/Board Member _____	<input type="checkbox"/>	<input type="checkbox"/>
E-Mail Address (PLEASE PRINT LEGIBLY) _____			

Method of Payment

☐ Bill School

☐ Check Enclosed

Total: \_\_\_\_\_

Confirmation of registration will be sent via E-Mail. Please make sure the information is legible.

Please Note: If you have a team request, please list each name and if applicable, the related school district. If you are listing a team request or a special pairing, please contact each member of your request prior to submitting a registration form. If you do not list any additional players on your team request, please do not request a specific team assignment on the day of the tournament. It is too difficult to shuffle teams on that day.

**Deadline to Register – Friday, October 3**  
**Registration cancellations after October 4 will be charged \$50**

