Chalkboard

An Education Newsletter from the Attorneys of Rosenstein, Fist & Ringold 2016 Issue 7

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School Finance: A Short Reminder

by Eric P. Nelson

Oklahoma school districts are prohibited by the Oklahoma Constitution from obligating future year revenues in any way without first obtaining the consent of 60% of the voters at an election called for that purpose. Except for such bonded indebtedness, school districts must operate on a cash basis. School districts may not borrow money or enter into installment contracts if payment obligations extend beyond the end of the current fiscal year. Lease-purchase agreements with multi-year terms are allowed only if the agreement requires mutual ratification of renewal by both lessor and lessee for each successive year. Put another way, the school district must have the unrestricted right to reject or terminate the lease on a fiscal year to fiscal year basis.

In any transaction to acquire personal property and equipment by lease-purchase, school districts should make sure that the agreement permits termination by non-ratification on a fiscal year to fiscal year basis. It is not sufficient that the agreement permit early termination for "non-appropriation". If the agreement calls for multi-year payments and is silent regarding the school district's right to terminate at the end of any fiscal year, the agreement violates constitutional debt limits.

Likewise, school districts may not simply borrow money from a local bank to pay for the acquisition of property or equipment. Banks may or may not know of the limitations on school districts and may suggest funding mechanisms that violate the law.

The penalties associated with violation of Oklahoma Constitution's debt limits are severe. Contracts entered into in violation of constitutional debt limits are void as a matter of law. Board members knowingly voting for the payment of a void claim may be subject to personal liability, criminal prosecution and forfeiture of office. If ever in doubt about the legality of a proposed financing method, you should consult with your district's attorney.

Addressing Parental Refusal to Participate in Meetings

by Cheryl A. Dixon

I have written on the topic of parent participation previously, but this issue seems to be recurring at districts currently and needs to be readdressed. If your district has been faced with the dilemma of being unable to get parent participation at an IEP meeting for a student, you have probably asked, "What do we do?" While a district cannot compel the attendance of parents in the same way it can demand attendance of its own personnel or contractors, the district must invite parents and strongly encourage them to attend. However, districts may conduct an IEP meeting when the district is unable to convince the parents to attend.

Although there is no specific timeline, districts must notify parents of the IEP meeting early enough to ensure that parents have an opportunity to attend. Accordingly, districts must make *substantial efforts*, which has been established to be at least three (3) separate attempts, by different means of communication, to secure parent attendance at the IEP meeting. Generally, courts will look to the reasonableness of the district's attempts in order to determine compliance, and some courts have determined parent participation in the IEP process to be more important than complying with other procedural safeguards, such as meeting the annual IEP date deadline. The IDEA requires districts to schedule IEP team meetings, "at a mutually agreed time and place." Although a district is not generally required to schedule an IEP meeting on an evening or weekend to suit a parent's schedule, the Office of Special Education Programs ("OSEP") has concluded that there could be extenuating circumstances when a district should meet such a request. Although the preferred method for parent participation is a face-to-face meeting, the IDEA contemplates participation by other means including conference or video calls. Districts should not rely solely on the availability of these alternatives, however, and still must make substantial efforts to schedule the IEP meeting at a mutually agreeable time and place.

Districts are required to keep a record of their attempts to arrange a mutually convenient meeting and the attempts to convince parents to attend. This record should include detailed logs of telephone calls made or attempted and the results of those calls, copies of correspondence sent to parents and any responses received, and detailed records of visits made to the parents' home or places of employment and the results of those visits. Even when parents fail or refuse to cooperate, the school district is not relieved of its obligation to provide FAPE to IDEA-eligible students. As a result, the IDEA permits districts to conduct IEP meetings without parental participation after substantial attempts to convince the parents to attend.

School District Hearings and the Fifth Amendment Right against Self-Incrimination

by Adam S. Breipohl

When a school district conducts a hearing regarding alleged misconduct by a student or employee that could also constitute a crime, the accused may attempt to avoid answering questions by invoking the Fifth Amendment privilege against self-incrimination. While school districts are not held to the same standards as courts of law in criminal proceedings when a party invokes the Fifth Amendment, there are several rules that

school districts must follow to ensure that their actions are constitutionally valid.

The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself." Therefore, if the defendant in a criminal trial chooses not to take the stand and testify, the court or prosecutor cannot force the defendant to do so. However, this rule only applies in criminal court cases, so, for example, the Fifth Amendment privilege does not prevent a school district from compelling an employee accused of criminal misconduct to testify at a due process hearing to determine if the employee should be terminated.

Even if a party is compelled to testify at a hearing before an administrative body, the witness may still respond to certain questions by invoking the Fifth Amendment privilege and refusing to answer. If this occurs, the school district cannot compel the witness to answer, although the natural inference from this kind of response is that if the witness had answered, the answer would have indicated that the witness had engaged in criminal conduct. The Fifth Amendment allows such an adverse inference to be drawn against a party who invokes the Fifth Amendment privilege in a civil or administrative proceeding "when they refuse to testify **in response to probative evidence offered against them**." *Baxter v. Palmigiano*, 425 U.S. 308 (1976) (emphasis added). However, it is important to note that a school district cannot base its decision **solely** on the fact that the party invoked the Fifth Amendment privilege, but instead must present some independent evidence of misconduct to justify its findings, which can then be bolstered by a negative inference from the fact that the party invoked the Fifth Amendment in response to the school district's evidence.

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The case of *Butler v. Oak Creek-Franklin School District* illustrates what school districts should take care to avoid in this area. 172 F.Supp.2d 1102 (E.D. Wisc. 2001). In *Butler*, a student appealed his long-term suspension from participation in athletics after being arrested and charged with violations of municipal ordinances in connection with two incidents involving intoxicating substances, fireworks, and disorderly conduct. At the hearing, the student was silent in response to the charges against him but called witnesses to testify in his defense, whereas the school did not present any additional evidence; the appeal panel ultimately affirmed the suspension simply because they knew of the arrest and charges and made a negative inference of guilt from the student's silence. In the student's ensuing lawsuit for violation of his due process rights, the court held that the adverse inference was **not proper** under the circumstances because the school had no evidence of guilt other than the fact that the student had been arrested and charged with violations of city ordinances.

Overall, school districts should take care to follow these requirements when they conduct hearings on matters that could be related to criminal activity to avoid taking actions that could inadvertently violate a party's due process rights. School districts that have questions about proper procedures for conducting hearings should consider contacting their legal counsel.

Legislative & Policy Follow Up

This year the legislature mandated that several state agencies develop rules/procedures impacting public education. The following matters currently have rules pending comment (through November 4th), and the firm does not anticipate any additional changes to these proposed rules:

Requirements related to posting child abuse signs (HB 2432)

The district is required to post signs advising individuals of the toll-free number for reporting child abuse. Click here to access sample signs or click here to access the minimum requirements for designing a unique sign. You can also click here to learn about the minimum posting standards and requirements.

Age limits for early childhood education programs (HB 2404)

The district may now permit students who are 5 or older to enroll in early childhood programs – if the district establishes a policy regarding this practice. The district is not required to permit older students to enroll in the early childhood program, but an optional policy will be available with 2017 policy packs for any district wishing to engage in this practice.

Districts permitting older student enrollment in early childhood programs may count those students as an early childhood student for purposes of State Aid.

Rules regarding the Apprenticeships, Internships, and Mentorships Act (HB 2535)

Starting in 2017-2018, the district may, but is not required to, enter into agreements with organizations to create outside learning opportunities for 11th and 12th graders. These opportunities can be used as a part of elective class credit. Any district wishing to engage in this practice is required to adopt a policy regarding this, and an appropriate policy will be available with 2017 policy packs.

Standards of Performance and Conduct for Teachers

OSDE has also submitted proposed revisions to "Principle III" of the *Standards* in response to recent legislative changes associated with changes to teacher termination laws. Please ensure that the next time you distribute these standards to your employees you are using the correct version of the document.

We are continuing to monitor other OSDE rules and will keep you updated regarding any additional changes needed.

Reminder – HB 1065

Starting this year, annual employee information worksheets containing salary and benefit information must be distributed with the first payroll in November.

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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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