Chalkboard

An Education Newsletter from the Attorneys of Rosenstein, Fist & Ringold 2017 Issue 4

In this issue:

1 Update on Board Resolutions Regarding State Ballot Measures

2 Verifying Employee Federal Employment Authorization Status

4 OSDE Issues Guidance on 4-Day School Week and Special Education Services

5 Temporary Teacher Contracts

Update on Board Resolutions Regarding State Ballot Measures

by Adam S. Breipohl

Last September, I wrote an article for *Chalkboard* regarding advocacy and distribution of information regarding state ballot measures by boards of education, in which I recommended that board members exercise great caution before doing so due to the risk of violating OKLA. STAT. tit. 26, § 16-119, which forbids public officials from "directing or authorizing the expenditure of public funds to support or oppose" any ballot initiative or referendum election. On April 17, 2017, the Attorney General released an opinion[1] that offers some clarification regarding the state of the law and confirms that certain specific activities involving advocacy for or against state questions can be permissible.

In the recent opinion, the Attorney General addressed the question of whether an elective governing body of a city or municipality would violate Section 16-119 by passing a resolution that supports or opposes a State Question which has been referred to a vote of the people. Although the opinion dealt with a municipality's governing body, there is no reason to believe that the same analysis would not apply to a school district's board of education.

The Attorney General stated that because Section 16-119 carries criminal penalties, it must be "strictly" (i.e. narrowly) construed in order to avoid having a chilling effect on constitutionally protected free speech. The opinion concluded that because Section 16-119 only prohibits public officials from **expending public funds** to support or oppose a ballot initiative or referendum, not from **expressing a position** on such issues, "[t]he act of voting on a city or municipal resolution that solely expresses a viewpoint on an initiative or referendum measure does not itself, and without more, authorize 'the expenditure of any public funds'" and is therefore permitted. It is

important to note that this applies only to the specific action of a board passing a resolution expressing a position on a ballot measure, and not other forms of advocacy or distribution of information that could arguably involve the use of public funds, e.g. using district funds to mail out pamphlets expressing the same position.

The Attorney General went on to state that certain activities that are ancillary to the passage of a resolution expressing a position on a ballot measure are also permissible, specifically the use of a public building for a meeting to debate or discuss the resolution and the use of staff time to research the effects of the relevant ballot measure or prepare the resolution itself. The Attorney General reasoned that, unlike the act of voting on the resolution, while these activities do involve the use of public funds, they also do not necessarily support or oppose the ballot measure. The Attorney General **did not** find that there is a general "de minimus" exception to Section 16-119 that would exempt activities not directly related to a board resolution that support or oppose a ballot measure and technically involve small amounts of public funds being used, for example, the use of an employee's time used to prepare a mass email to parents detailing the district's position on a state question and urging them to vote accordingly. Therefore, school districts still must be careful to avoid spending even very small amounts of public money on activities that do advocate for a position on a ballot measure.

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Overall, while the recent Attorney General opinion provides a certain amount of "safe harbor" for school boards that wish to pass resolutions advocating for or against a ballot initiative or referendum election, board members must recognize the limited scope of the conduct that the opinion permits and continue to exercise great caution in this area. Before engaging in any distribution of information or advocacy regarding a state question, school districts should consider contacting their legal counsel.

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[1] Okla. Atty. Gen. Opin. No. 2017-1, *available at* http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=479884.

Verifying Employee Federal Employment Authorization Status

by N. Roxane Gebhart

Federal law requires employers to employ only individuals who may legally work in the United States, either United States citizens, or foreign citizens who have the necessary authorization. E-Verify is an electronic program through which employers verify the employment eligibility of their employees after hire. The program was authorized by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. E-Verify is administered by the United States Department of Homeland Security, United States Citizenship and Immigration Services, Verification Division, and the Social Security Administration. E-Verify is free and a convenient resource for employers to ensure a

legal workforce. E-Verify works with, and exists to strengthen, the Form I-9 process by offering employers the ability to compare information that employees provide on the Form I-9 to Social Security Administration and Department of Homeland Security records.

E-Verify is an electronic program through which employers verify the employment eligibility of their employees after hire.

In 2007, the Oklahoma legislature passed House Bill 1804, commonly known as the Oklahoma Taxpayer and Citizen Protection Act (the "Act"). The Act was meant to address economic hardship and lawlessness of illegal immigrants in Oklahoma. The Act specified the means by which public employers, as well as contractors and subcontractors engaged in business with the government, are to verify the immigration status of all job applicants. Some parts of the Act were later declared unconstitutional by state and federal courts while other portions of the Act remain intact and have been upheld. Employers must not use verification of federal employment authorization status of employees in a discriminatory manner. Employment verification cases must not be based upon national origin, citizenship status, race, or any other characteristic prohibited by law. Persons hired by employers participating in E-Verify have the right to work without fear of discrimination and to remain in employment while resolving tentative non-confirmation of citizenship status results.

The Act requires that school districts verify the federal employment authorization status of all new employees. The Act specifically requires that every public employer register with and utilize a Status Verification System to verify the federal employment authorization status of all new employees. Public employer is defined by the Act as every department, agency, or instrumentality of the state or a political subdivision of the state. Thus, school districts are included within the Act's definition of a public employer. The Act defines Status Verification System as an electronic system operated by the federal government, through which an authorized official of an agency of the State of Oklahoma or of a political subdivision (i.e. a school district) may make any inquiry to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for purposes of verifying an employee's citizenship and ability to lawfully work within the United States.

School districts may comply with the Act by using E-Verify. School districts can utilize E-Verify by submitting information from an employee's Form I-9 into the E-Verify system. E-Verify then compares the employee's Form I-9 information to electronic records maintained by the Social Security Administration and Department of Homeland Security to confirm whether or not the employee is authorized to work in the United States. The process typically takes only seconds. There is no charge for an employer to enroll in or use E-Verify. In order to comply with the requirements of the Act, school districts must verify that all new employees may lawfully work within the United States.

If you have any questions about verifying employees' citizenship status and ability to work within the United States, please contact your school district's attorney.

OSDE Issues Guidance on 4-Day School Week and Special Education Services

by Cheryl A. Dixon

On April 25, 2017, the Oklahoma State Department of Education, Special Education Services Division, issued guidance which addresses the provision of special education and related services to students at school districts which have moved, or may be moving, to a 4-day school week. The guidance reminds school districts that they must consider how a 4-day school week impacts all students, including students with disabilities. Under the Individuals with Disabilities Education Act ("IDEA"), Part B, students with disabilities are afforded the right to a free appropriate public education ("FAPE") that emphasizes special education and related services designed to meet their unique needs. Districts must ensure that students' IEPs are written such that they are reasonably calculated to enable a student to make progress appropriate in light of the student's circumstances. In considering how a shortened school week may affect IEP services, the guidance emphasizes that IEP services may be modified, but should not be reduced, when a school moves to a 4-day school week.

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The guidance further discusses that district must consider certain requirements of the IDEA to (1) provide a FAPE, (2) ensure parent participation, and (3) consider extended school year services ("ESY"). Most importantly, as to the provision of FAPE, the guidance stresses that districts cannot unilaterally modify the amount of services provided to a student without conducting an IEP team meeting that includes parent participation. For example if a student received a specific service 5 days per week previously (rather than the IEP indicating a certain number of minutes or hours per week/semester) and the district transitions to a 4-day school week, the amount of services could be provided 4 times per week, if instructional time in the school day is the same as their non-disabled peers. Those services must be changed in the IEP, however, and the guidance points out that in order to make that change an IEP addendum would be appropriate.

Finally, the guidance also discusses ESY and reminds school districts that each is responsible for establishing an ESY policy and to provide ESY special education and related services to its special education students whose IEP teams have determined that ESY services are necessary. The guidance reminds districts that ESY services are those which are provided beyond a school day and may be provided during the evening, after school, on weekends, holiday breaks and/or summer breaks. Although districts are generally accustomed to considering ESY services during summer break, the guidance seems to suggest that IEP teams at districts on shortened school weeks must be considering the effect of the shortened school week on the provision of FAPE to its special education students and be considering whether ESY is necessary during the regular school year in addition to summer or other extended breaks.

If you have any questions about this particular subject, or any other special education questions, please contact your district's lawyer.

Temporary Teacher Contracts

by Staci L. Roberds

Under Oklahoma law, a school district may utilize temporary contracts for teachers. Temporary teacher contracts may be advantageous to a school district, as they allow a school district to place certified teachers who are new to the school district on temporary contracts instead of on continuing contracts. Oklahoma law provides that a school district may place a certified teacher on a temporary contract for up to four semesters (or on multiple temporary contracts that together total no more than four semesters), except the period may be extended if: (a) the teacher hired is to replace another teacher who is on approved leave of absence and is expected to return to the school district, (b) the teacher hired has been on multiple temporary contracts with the school district with distinct breaks in service, or (c) the teacher hired is a retired member of the Teachers' Retirement System of Oklahoma. Temporary teacher contracts generally are for a stated period of time and will automatically expire at the end of the stated period without any notice or reason for termination being provided to the teacher by the school district. Thus, temporary teacher contracts are not subject to the rights and protections afforded under the Teacher Due Process Act of 1990.

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However, a school district must be cognizant of certain situations which can undercut the advantages of utilizing temporary teacher contracts. For instance, if a school district fails to provide written disclosure of the temporary contract at the time a position is offered, including setting forth the terms and conditions of the temporary contract, the teacher will be considered employed by the school district on a continuing contract basis and entitled to all the rights and protections of the Teacher Due Process Act of 1990. Also, if a temporary contract is for the complete school year and a school district seeks dismissal of a temporary teacher prior to the expiration of the temporary contract, the teacher must be afforded due process protections of notice and a board hearing. Further, a teacher may be entitled to due process protections if the language included by the board of education in the temporary teacher contract exceeds the statutory requirements.

Other requirements under Oklahoma law with regard to temporary teacher contracts include that teachers who are employed on temporary contracts for a complete school year be evaluated by a school district and that teachers who have worked a complete school year under a temporary contract be granted a year of service credit toward career status in that school district. Moreover, a teacher who is employed on a continuing contract basis by a school district cannot subsequently be reemployed by that district on a temporary teacher contract.

If a school district has specific or general questions about temporary teacher contracts, it should contact its attorney for guidance.

Red Banner Updates

RFR Red Banner Updates provide concise overviews of new laws impacting public education, and the first updates of 2017 have already been added to the client only section of the firm's website.

Please contact Michelle (msiegfried@rfrlaw.com) if you need to update your access information.

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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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