# Webinar recap: Hot Topics in Education

March 18, 2019

### Public records: What's old is new again

Topic presented by Warren Grody and David Hasman

*Sheil v. Horton*

School districts need to keep their eye on *Sheil v. Horton*, a case pending before the Ohio Supreme Court. This case involves the analysis of when records of a private entity are public records. While a 2006 Supreme Court case, *State ex rel. Oriana House, Inc. v. Montgomery*, provided a framework for the analysis of records of a private entity, the "functional-equivalency test" mandated by the Court was reinterpreted by the court of appeals in *Sheil*.

In the 2006 *Oriana* case, the Ohio Supreme Court determined that a private entity is a public institution and subject to the Public Records Act when the entity performs a governmental function. In making this determination, the Ohio Supreme Court has focused on whether the entity performs what has "traditionally been a uniquely governmental function." To meet this standard the "private entity [must] exercise powers which are traditionally exclusively reserved to the state, such as holding elections . . . or eminent domain." In addition, a court must consider the level of government funding, the extent of government involvement or regulation, which the Supreme Court defined as the extent the governmental body controlled "the day-to-day operations" of the entity in question and whether the entity was created by the government or to avoid the requirements of the Public Records Act.

In *Sheil*, a private foundation raised funds for a community college and brought in a renowned speaker for a luncheon to raise scholarship funds. A local television station made a request for a copy of the contract between the foundation and the speaker.

The Special Master in the Court of Claims, as well as the court of appeals, found that solicitation and receipt of funds for an institution are government functions. They further found that the college did not need to control the day-to-day operations of the foundation and, instead, the entities are "closely intertwined," to a degree that the foundation's records are public records.

The matter is now before the Ohio Supreme Court. If the Court upholds the court of appeals decision, the implications may be far-reaching. Ultimately, depending on the decision of the Court and the particular circumstances of each relationship, the records of a booster group, education foundation, or parent-teacher organization could be characterized as public records.

Innovation

For school districts responding to public records requests, technology can save time and money and help to avoid legal compliance headaches. However, these software applications have limitations, and, if not used correctly, can put a school district at risk of inadvertently sharing redacted information. Understanding the limitations of the software you are using is crucial when responding to records requests. Some programs simply put a layer on top of the redacted text that acts as a sort of "electronic sticker." This electronic sticker can be removed by other software. Some software performs the removal automatically, so the person who receives the electronic records does not even realize the record was redacted in the first place. It is extremely important, then, that you are certain that you use a robust redaction process that will avoid this result.

Raising money through crowdfunding

Topic presented by Katie Johnson

This past summer the Ohio Auditor of State released a report highlighting a number of the risks associated with crowdfunding campaigns in our schools. School districts are encouraged to adopt policies to manage these legal, financial and reputational risks, including the following:

- Student Privacy Concerns. All crowdfunding campaign requests published on websites should be reviewed to ensure compliance with the Family Educational Rights and Privacy Act (FERPA), O.R.C. 3319.321, and the Individuals with Disabilities Education Act (IDEA).
- Financial Controls and Accounting. Under Ohio law, the treasurer of the board of education must deposit all money received from any source in a timely manner (ORC 3313.51) and all money received, collected by or due to a public official under color of office, or collected on behalf of a public office must be deposited with the treasurer of that public office (O.R.C. 9.38). A treasurer could be legally liable for any amount of money that she or he cannot account for related to a crowdfunding campaign.
- Other Legal Concerns.
    - Public employees are prohibited from soliciting or accepting any compensation for performing their official duties or for any other act or service in the employee's public capacity, or to supplement the employee's public compensation (O.R.C. 2921.43).
    - Donations or bequest of money or other personal property is the property of the school district. Gifts, fundraising and other related Board policies should be followed (ORC 3313.17; 3313.36).
    - Student activities funds management; student fundraising activities (O.R.C.3313.53; 3315.062).
    - Board policies related to public solicitations and advertising in school districts should be followed (O.R.C. 3313.811).

To protect against these risks, boards of education are encouraged to adopt a crowdfunding policy either prohibiting or allowing crowdfunding. If allowed, the board of education should consider the following in its crowdfunding policy and related procedures:

- Identify a list of *pre-approved crowdfunding sites.*

- Require an administrator (superintendent or his/her designee) to review and approve all crowdfunding campaigns prior to the project being posted on a district-approved crowdfunding platform.
- School administrator reviewing crowdfunding proposals should ensure:
    - The project promotes the school district's educational philosophy, curriculum, technology needs and other plans related to capital improvements;
    - The project is registered in the name of the school district (not teacher);
    - That all funds or materials are the property of the school district;
    - That all donations must be paid directly to the school district (not teacher); and
    - That the project complies with FERPA or any other student confidentiality laws.

A board of education should accept all donated funds or materials in accordance with district policies and use donations only for the stated purpose.

### Suicidal students: What school districts need to consider

Topic presented by Melissa Martinez Bondy

Suicide is the second leading cause of death in youth ages 15-24. The CDC has also reported that, between 2006 and 2016, the suicide rate for children and teens ages 10-17 increased *between 70-80 percent*. From 2008-2015, a study of pediatric hospitals showed that admissions for patients aged 5-17 for suicidal ideation *more than doubled*.

Ohio Revised Code Section 3319.073 requires in-service training for the prevention of child abuse and other violent behaviors. The law requires school districts to provide professional in-service training on, among other topics, youth suicide awareness and prevention. This training requirement applies to every teacher, counselor, school psychologist, school nurse, and administrator, as well as other personnel that the board deems appropriate. A recent amendment to Ohio law (H.B. 502, effective March 22, 2019), requires that training on suicide awareness and prevention occur once every two years. Quality professional development should include, at a minimum, a discussion of risk factors, warning signs, responsive protocols and procedures, the availability of suicide prevention resources, and information about populations at increased risk of engaging in suicidal behaviors. Districts may also want to consider how some of the district's other policies and procedures, like anti-discrimination, anti-harassment, bullying, as well as other policies, may be implicated as part of the district's suicide prevention efforts.

In addition to training requirements, suicidal ideation may trigger "Child Find" obligations. Under the IDEA and Section 504 of the Rehabilitation Act of 1973, districts have an *affirmative* obligation to identify children who may qualify as students with disabilities, and who may, therefore, be in need of special education and related services. A child may qualify under the eligibility category of "emotional disturbance" if the student displays one or more of certain characteristics over a long period of time *and* to a marked degree. The discipline of disabled students under IDEA or Section 504 is prohibited for conduct that is related to their disabling condition.

### *Janus* continued: The current status of "exclusive representation" and union withdrawal

Topic presented by Beverly Meyer

In *Janus v. AFSCME, Council 31,* No. 161466, 138 S. Ct. 2448 (U.S. Supreme Court, June 27, 2018), through a 5-4 decision, the Supreme Court of the United States declared that compulsory agency fees, more commonly known in Ohio as fair share fees, are unconstitutional and that the extraction of fair share fees from bargaining unit employees without their consent violates their First Amendment rights.

Bargaining unit employees have newly recognized rights, and they are asserting them. As the exclusive bargaining representative, the union is required to represent all individuals holding positions identified in the certified bargaining unit and recognition clause of the applicable collective bargaining agreement. This was true regardless of whether the individual was a full dues-paying

"member" or an individual who paid only fair share fees (a chargeable percentage of union dues), and this remains true after *Janus*. There is no change in the existing exclusive bargaining representative(s) for your employees, at this point.

Through its holding in *Janus*, the Supreme Court emphasized that forcing public employees to pay fair share fees, which compels them to subsidize private speech with which they may disagree, violates the First Amendment. It also made clear that public employers and public-sector unions may no longer collect fair share fees from nonconsenting employees. Public employers must stop collecting fair share fees and religious objector contributions (and maybe regular dues) immediately if the employee withdraws consent. Before collecting any form of payment for a public-sector union, the employee must affirmatively consent. This has promulgated legal issues concerning the resignation of membership and collection of union dues from employees who have withdrawn their consent post-*Janus* and outside union-recognized window periods.

Federal lawsuits continue to be filed in Ohio over the deduction of dues and fees from bargaining unit employees, often naming the union and the school district as co-defendants. Class certification has been requested in several of them. If you receive notice of a lawsuit, contact your board counsel and insurance provider immediately, *even if* the union asserts it will indemnify the employer and hold it harmless.

Internal union issues are also arising, including allegations of coercion and intimidation to join the union, the application of fines and penalties, and unions' refusals to allow members to resign or cease deductions. Districts should familiarize themselves with board policies on harassment in the event employees complain of harassment and intimidation by co-workers related to union membership. Employees may also be directed to SERB for assistance.

What should districts be doing now? They should be monitoring payroll and continue to identify employees for whom they withhold fair share fees. In addition, for current, regular, dues-paying members, determine whether the district has evidence of affirmative consent. This includes consulting with the union to obtain any evidence it has. If there is no evidence of affirmative consent, the district may want to immediately stop withholding dues for that employee or risk an alleged violation of the employee's constitutional rights. For religious objectors (who are not union members based upon religious beliefs and who pay charitable contributions instead of union dues), districts may want to immediately stop withholding contributions if there is no evidence of affirmative consent to their continued deduction.

For public employers that have fair share fees in their collective bargaining agreements, engaging in mid-term bargaining or entering a memorandum of understanding may be necessary or advisable. Beware, the union may request "effects bargaining," and a district should engage in them when requested. Revisions to the CBA will likely need to be made during the regular negotiations cycle. In those negotiations, employers may seek to remove fair share fee payer language from the collective bargaining agreement altogether. Employers may also choose to bargain with the union to define affirmative consent and include requirements in the collective bargaining agreement for the union to provide evidence that it exists. They may want to bargain language that revises membership/ dues revocation periods or allows employees to stop dues deductions at any time. In addition, employers may want to bargain language requiring the union to adhere to established procedural requirements, such as the provision of *Hudson* notices and the establishment of internal rebate and objection procedures to contest calculated chargeable fees. Additionally, employers may agree to incorporate individual employee rights into their collective bargaining agreement. Finally, employers should look to strengthen the indemnification clauses contained in their collective bargaining agreements.

During these uncertain times, employers must leave internal union matters to the unions. Membership enrollment forms and dues deductions authorizations are matters of private contract between the member and the union subject to the union's constitution and bylaws. Employers should forward any resignation and revocation to the union and refer the employee to the union as well.

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