# School Law for Administrators

## You Be the Judge

# Did school district violate school psychologist's due process rights in not renewing her contract?

**The Facts**

A woman had been employed by a school district since 2011. In her 2010-2011 contract, she had responsibilities as Director of Special Education and School Psychologist. The contract stated it was governed by the rules of the state of Wisconsin and the rules and regulations of the school board. Her contract included language which said that her duties could include participation in "professional meetings and college level courses for the purpose of improving and stimulating [her] professional growth." Her salary in 2010 was $76,405 and she earned about $80,708 in 2011.

In December 2010, the woman received a "Preliminary Notice of Consideration of Non-Renewal" based on budgetary concerns. She requested a public hearing, which was held January 4, 2011. At the hearing, the superintendent advised the board that elimination of the woman's position was a budgetary, cost-saving measure. In response, the woman "detailed several reasons why eliminating her position would not save the District money." She also proposed reducing her contract to 10 months, reducing her compensation to 80% of what it was, and combining her positions with a guidance counselor role.

At the meeting, the woman also raised what she later called issues of public concern, including that the elimination of her position would drop the district below the National Association for School Psychologists' prescribed ratios for the number of psychologists per student, that reduction of the Director of Special Education position to part-time would prevent the district from meeting the needs of students, and that many of the district's existing practices had the effect of discriminating against students with disabilities.

Despite all of this, the board voted not to renew the woman's contract for the following year. Thereafter, the district announced that the superintendent would assume some of the woman's responsibilities as related to the Director of Special Education role and that the district would hire a part-time employee to fill the position of psychologist. The woman requested to be considered for the part-time position but the district indicated that it would not consider her. According to the amended complaint, in previous instances where the district's full-time positions have been reduced to part-time, the district offered the eliminated full-time employee the part-time position before posting it.

In May 2011, the district changed the posting for the school psychologist position to full-time and the woman applied. Ultimately the district hired a new employee as a full-time psychologist at a starting salary of $60,247. According to a publication reporting the new hire, the superintendent also received a $15,000 raise for assuming the woman's special education responsibilities.

After all of this, the women filed a complaint with the EEOC. Subsequently, the district contacted the state of Wisconsin Department of Public Instruction (DPI) and alleged that the women had engaged in immoral conduct. The district sought revocation of the woman's professional licenses, but the DPI ultimately determined there was no probable cause to revoke her licenses.

After the EEOC closed its file on the case without finding whether any violations occurred, the woman sued the district, alleging various things, including a due process claim, which is the claim relevant here. The district requested that the court dismiss the claim.

**The Question**

*Did the woman show that the district violated her due process rights when it did not renew her contract and did not hire her back when the contract nonrenewal decision was allegedly made for budgetary reasons?* *(See the answer on Page 2.)*

***—School Law Bulletin,***
**Vol. 42, No. 14, July 25, 2015, p. 3.**

# Around the Nation ~ New Jersey

# Lawsuit over Pledge of Allegiance shot down in court

Battles over the "Under God" part of the Pledge of Allegiance have bubbled up periodically in states across the country. The question is whether or not it is legal to require students to recite these words in public schools. In a recent case, Attorney David Rubin, who defended Matawan-Aberdeen Regional School District against the American Humanist Association's lawsuit challenging daily recitation of the Pledge of allegiance in school, says the suit was without merit and cost taxpayers about $16,000 in legal fees.

Rubin believes that this is money that could have served a better purpose. "It is money that could have been spent on something else," Rubin said. "It was spent here and was not available to be spent on something else." In dismissing AHA's suit, the trial court said the Pledge of Allegiance historically was never viewed as a religious exercise, but one that transmits "core values of duty, honor, pride, and fidelity to country."

Rubin said the legal work was billed at a highly discounted hourly rate charged to public-sector clients, otherwise the bill would have been more than double the $16,000.

Rubin claims that the discounted hourly rate charged to the district is $165, so more than 90 hours were spent defending the district against the lawsuit. Noting that AHA had allowed the time for filing an appeal in the suit to expire, Rubin said, "I think it was certainly without merit, and we're grateful the trial judge agreed, so much so that the plaintiff feels an appeal would have been futile."

Source: *Ashbury Park Press*

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**Vol. 42, No. 11, June 10, 2015, pp. 7-8.**

# You Be the Judge (Answer)

*Did school district violate school psychologist's due process rights in not renewing her contract?*

**The Judgment**

The court dismissed the claims. On the due process claim, the court rejected the woman's various arguments that she had a protected property interest in continued employment or in future employment. To have a right to due process, an employee has to show they had a protected property interest in continued employment. There must be a legitimate entitlement to continue employment for an employee to show a property interest and the Supreme Court has described the bar as needing to show a "unilateral expectation" of continued employment, not just an abstract need or desire.

While the woman argued that she had such an interest because she could not be terminated without "just cause," the court found her interpretation of her contract and of Wisconsin law to be faulty. There was no expectation set within the contract or state law that the woman's employment could be terminated only for "just cause." In fact, her contract specified the term of employment and noted an end date to the contract. While the woman's contract (as an administrator) provided that there was some procedure to be followed upon termination, it did not give her the expectation of continued employment beyond the term of the contract.

The court also found the woman's argument that she had an expectation of continued employment based on the district's request that she engage in professional development, including additional schooling, without merit. Encouragement of professional development by an employer, the court noted, "falls far short of the sort of mutually explicit understanding of continued employment required to give rise to an interest in continued employment."

The court's conclusion was similar in regards to the woman's argument that she had a legitimate expectation of re-employment based on the district's past practice of offering part-time positions to the full-time employees whose positions were being reduced or eliminated. The court wrote: "The fact that a school district has retained other employees in part-time positions after their full-time positions have been eliminated falls far short of establishing a property interest in re-employment under which every employee whose position is reduced is entitled to reemployment." Thus, the woman failed to show she had a property interest in her job.

The court also found that the woman's attempt to base her due process complaint on a liberty interest fell short. The woman argued that the district's decision to report her for "immoral conduct" violated her liberty interest. However, the court noted that it has been well-established that a person does not have a cognizable liberty interest in their reputation and "mere defamation by government does not deprive a person of liberty protected by the Fourteenth Amendment, even when it causes serious impairment of one's future employment." In the woman's case, there is no evidence that the report by the school district "precluded" her from further employment.

This scenario is based on *Wurm v. Valders Area School Dist., 2015 WL 2351487(E.D. Wis. 2015).*

***—School Law Bulletin,***
**Vol. 42, No. 14, July 25, 2015, p. 5.**

# Headlines on School Law

## Legislative storm over after-school programs

*by Rob Taylor, Ph.D.*

As Republican Senator Lamar Alexander's Health, Education, Labor & Pensions (HELP) Committee has forged ahead on a bipartisan bill—called Every Child Achieves—to reauthorize ESEA, one of the committee's attempts to appeal to Republicans has been to pull out the dedicated funding stream for many not-purely educational programs, including after-school care. The idea was to put these funds into a separate block grant, with the promise of much greater state and local control.

It was uncertain whether this ESEA reauthorization attempt will reach the Senate floor for debate and amendments by the May 22 deadline for this session, but what *did* happen was a 22 to 0 committee vote supporting the amended bill on April 16.

Federal funding for after-school (as well as many before-school and summer) programs has been collected in Title IV of ESEA under the moniker 21st Century Community Learning Centers (CCLC). CCLC funds amounting to about $1.2 billion have been distributed to states annually in support of after-school programming.

Under the newly proposed block grant program in Senator Alexander's early 2015 draft reauthorization, however, after-school funds would have been joined with other program funding into a separate $1.6 billion block grant called Safe and Healthy Students program. Other services under the block grant would include mental health counseling, drug and violence protection, art, music, mentoring, tutoring, physical activity, and nutrition.

States and school districts under this block grant strategy would have been awarded wide latitude on how to use the funds, including moving any or all of the Safe and Healthy Students monies away from Title IV purposes and into other areas such as Title II, which funds professional development for teachers and administrators.

As Joel Packer from the Washington, D.C. Raben Group put it, as quoted from a blog by *EdWeek* writer Kathyrn Baron, the reauthorization bill was based on the philosophy that "the federal government should impose very little accountability requirements and the Secretary of the Department of Education should be restricted in what states and local districts do."

Catching wind of his unwanted development, many proponents of after-school programs rushed into the fray. In a letter to the HELP Senate committee, a coalition of advocates wrote, "Now is the time to step up support for students during the time when they are not supported by school or family, the hours after school when 11.3 million children are unsupervised and juvenile crime and other inappropriate activities peak."

The letter, signed by 266 community and national organizations, went on to say, "Eliminating the dedicated CCLC funding stream would mean most, if not all, of the funding supporting 1.6 million students in after-school and summer programs is at risk of being redirected to the other purposes."

The Afterschool Alliance, a major nonprofit advocate, began publishing data from its 2014 report called America After 3PM showing that for every child already attending a high-quality after-school program, two other children *would* be enrolled if only more accessible and affordable programs were available.

The report was based on 30,720 households from every state and it revealed that more than 10 million children attend after-school programs, an increase from the 6.5 million attending in 2004. Yes, said Alliance executive director, Jodi Grant, about 19.4 million students were going without wanted afterschool care, with low-income black and Hispanic families hit the hardest by the lack of good, affordable after-school care.

Working as a spokesperson for the Alliance, ex-California Governor Arnold Schwarzenegger—whose Republican administration year after year provided major financial support to after-school efforts–wrote, "After-school programs do remarkable things for our children, families, and communities . . . These programs help kids with homework, teach them teamwork, engage them in community service, pair them with mentors, help them to be physically fit, involve them in activities like rocketry and robotics, and much more."

While the number of children participating in such programs rose from 11% of the K-12 population in 2004 to 18% in 2014, the demand has gone up from 30% to 41%. Underlining the importance of the gap in demand and supply, and the need not to cut the CCLC funds, an Alliance letter to HELP says, "A wide range of research has found that regular participation in high-quality after-school and summer learning programs is linked to significant gains in academics, school attendance, and work habits, as well as reductions in behavior problems among disadvantaged students."

**BIPARTISAN SUPPORT FROM SENATORS MURKOWSKI AND BOXER**

As the senate HELP committee has been bombarded with letters pleading that the ESEA rewrite not cut dedicated after-school funding, senators Barbara Boxer, Democrat-California, and Lisa Murkowski, Republican-Alaska, joined in two strategies to impact the reauthorization process.

First, to strengthen the CCLC itself and make it less vulnerable to political tampering, the Senators introduced a bill in early February called the "After-School for America's Children Act." The bill promised to assist struggling programs and to ramp up communication between schools and community after-school program partners.

This bill's strategy was intended to polish the image of the CCLC, which has been subject to a variety of critiques. For example, Mark Dynarski from the Mathematica Policy Research

*(Continued on Page 4)*

# Texas School District In A Tough Situation When It Comes To Cyberbullying That Takes Place Off Campus

There is a lot of gray area when it comes to off campus, online behavior and this puts school districts in a tough spot. School administrators and school law experts in Texas are encountering difficulty discipling students for off-campus online speech, even though the state enacted a law four years ago to combat bullying and cyberbullying in schools. "How far does the school district's arm really reach? It just depends on the situation," said Christina Ruiz Blanton, a senior attorney for the Texas Association of School Boards. "It's very case-by-case."

Students have been bullying each other for as long as schools have been around. That has not changed. However, the face of bullying has changed in that more students can be involved, and students can hide behind a blanket of anonymity when using social media. Research shows that social media sites allow a large number of students to work together and play off each other. It also multiplies the spaces where they can prey on others without ever having a face to face confrontation. Devin Padavil, first vice president of the Texas Association of Secondary School Principals, called social media "the largest unsupervised playground in the world."

According to the 2011 Texas law, school districts are required to adopt their own policies against bullying. A number of school districts, including McKinney ISD, already had rules in place, but the law defined in more detail what the behavior looks like and what steps schools should take. For instance, lawmakers clarified that "expression through electronic means" can be bullying if it occurs at school, in a district-operated vehicle or at a school-related activity. The law does not address expressions made off campus—such as videos or social medial posts—that seep into school life.

One legal obstacle is defining what kind of behavior constitutes bullying. The law clarifies that to be considered bullying, the behavior must exploit an imbalance of power. It must interfere with a student's education or substantially disrupt school operations. Those two aspects are key to determining whether a student's actions constitute bullying, said Curtis Clay, an associate director of the state-funded Texas School Safety Center.

"If you got two kids calling each other names and this and that and they're both going at it, to me that's not really bullying," Clay said. "Because when you talk about bullying . . . you got kids who for whatever reason don't feel like they can stand up for themselves."

School districts are required to take action if they believe that the safety of a student is at stake. If a school investigation finds that a student was bullied and used reasonable self-defense, state law forbids the school from punishing the student. It also gives school boards the choice to transfer the bully to another classroom or another campus.

At the same time, when it comes to punishing students for off-campus speech, schools have to meet "a pretty high bar" because of students' First Amendment rights, said Blanton. She indicated that case law shows that a district may be able to act if it can prove that the speech "materially and substantially" disrupted the educational process, such as causing a teacher to lose control of her classroom. She also noted that if the district perceives the speech to be a threat, it should take measures to protect students and let law enforcement determine whether it is criminal activity.

Source: *The Dallas Morning News*

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## Headlines on School Law. . . *(Continued from page 3)*

group, which did a report on the CCLC program more than a decade ago, published a recent paper through the Brookings Institution questioning whether after-school programs actually improve student academic outcomes.

His contentions were immediately disputed by an array of researchers. For example, Deborah Vandell from the school of education at the University of California, Irvine, claims in an *EdWeek* piece that recent data prove an "unequivocal" role of "organized after-school programs, namely that "students who regularly attended high-quality programs demonstrated significant gains in standardized mathematics-test scores as well as self-reported work habits." Her results were corroborated by a study of statewide evaluations conducted by the American Institutes for Research which found students attending after-school programs to have better school attendance, better promotion records, and fewer disciplinary incidents.

The clincher for senators Boxer and Murkowski was a second strategy to support CCLC, an amendment to the reauthorization bill during mark-up mandating the continued inclusion of the threatened CCLC funding stream of approximately $1.2 billion annually.

An Action Alert published April 15 by the Policy and Action Center in Washington, D.C. reads in part, "On April 15, 2015 the Senate HELP committee passed by unanimous consent Senator Murkowski's bipartisan 21st CCLC amendment that would ensure quality after-school and summer learning programs continue to be provided for more than 1.6 million students."

Should Lamar Alexander's ESEA reauthorization bid pass out of the Senate, it may well find itself amended further on the Senate floor before moving ahead for full congressional approval, then, ultimately, presidential approval. At the moment, however, after-school proponents are overjoyed to see CCLC funding reinstated as debate continues.

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