Miller, Tracy, Braun, Funk & Miller, Ltd. presents

School Law Advisor

News and Notes for School Administrators

April 25, 2008

School Districts Weigh New Revenue Source For School Facilities

The General Assembly enacted Public Act 95-675 over Governor Blagojevich's veto last October. The new law adds provisions to the Counties Code and the School Code to allow the voters of a county (except for Cook County) to authorize a county-wide sales tax to be used exclusively for school facility purposes.

A proposition shall be submitted to the voters of a county upon one of the following methods: 1) a resolution or ordinance adopted by the county board, or 2) resolutions adopted by the school boards of districts that represent at least 51% of the student enrollment within the county. "Enrollment" is defined to mean the head count of the students residing in the county on the last school day of September of each year, as reported to the State Board of Education. If a majority of the voters voting on the proposition vote "yes," then the county may thereafter impose the tax. The tax may be imposed in one-quarter percent increments up to one percent (1%) and is imposed on all persons or businesses engaged in the sale of personal property in the county. The tax may not be imposed on food to be consumed off the premises where it is sold (except for alcoholic beverages, soft drinks and food that has been prepared for immediate consumption) or on prescription or non-prescription drugs and medicines.

The proceeds generated by the tax shall be collected by the State Department of Revenue, and then paid by the State Comptroller on a monthly basis to the appropriate regional superintendent of schools, who in turn shall distribute such proceeds to the school districts in the county within thirty days of the regional superintendent's receipt of the same from the State.

The proceeds must be distributed to the school districts in the county on an enrollment basis and "allocated based upon the number of each school district's resident pupils that reside within the county collecting the tax divided by the total number of students for all school districts within the county." Upon receipt of the proceeds from the regional superintendent, school districts must maintain the proceeds in a separate fund known as the "school district facilities occupation tax fund." Moneys in that fund may only be used for the following purposes:

- Acquisition, development, construction, reconstruction, rehabilitation, improvement, financing, architectural planning, and installation of capital facilities (buildings, structures and durable equipment).
- Acquisition and improvement of real property and interest in real property required, or expected to be required, in connection with the capital facilities.
- Fire prevention, safety, energy conservation, disabled accessibility, school security and specified repair purposes under Section 17-2.11 of the School Code.

On February 5, 2008, voters in Williamson County in southern Illinois became the first to approve a one percent sales tax under the new legislation. Other counties will likely soon follow suit in submitting similar propositions to the voters. Anyone interested in more information concerning the procedures for putting a question on the ballot can contact our office. * * *

Also in this issue…

Indiana Court Rules on FMLA Claim

The Indiana Court of Appeals has recently held that a teacher did not have FMLA protections in his position as football coach, but only in his capacity as a teacher. In *Gary Community School Corp. v. Powell*, 881 N.E.2d 57, the court held that the teacher could not claim that the school district violated his rights under the Family and Medical Leave Act ("FMLA") when it failed to reinstate him to his position as football coach following a qualified leave under the Act.

Citing the Seventh Circuit's interpretation of the FMLA, the court differentiated between Powell's full-time job as a teacher and part-time job as a coach:

> Here, we are faced with an employee who performed two discrete, separate, independent jobs for the same employer. One of those jobs was a full-time position and undisputedly qualified for FMLA coverage. The other, however, was a part-time position and did not meet the 1,250-hour threshold for eligibility. The question, which appears to be an issue of first impression nationwide, is whether we focus on the total hours worked for the employer, in which case both jobs are eligible for coverage, or where we instead examine the jobs separately, in which case the full-time job is covered by the FMLA and but the part-time job is not.

As the Act makes clear, an employee is eligible for the protections of the Act if the employee has been employed by the employer for at least twelve months and for at least 1,250 hours of service with the employer during the previous twelve-month period. 29 U.S.C. 2611(2).

When the court examined the specific facts of the employment relationship between Powell and the school district, it determined that both parties treated the two jobs separately and independently. The relevant factors included that the two jobs had separate application processes, different hiring criteria, and separate termination processes. Further, an individual did not have to be a teacher in order to be a head coach, and the contract provided for separate compensation and different supervisors. Accordingly, the district was not obligated to restore Powell to his coaching position when he returned form FMLA leave. * * *

Moment of Silence Case Now a Class Action

Sherman v. Township High School District 214 and Koch (Case No. 07-C-6048), a case currently pending in the Northern District of Illinois, which challenges the constitutionality of the Silent Reflection and Student Prayer Act, 105 ILCS 20/1, has been made a class action. The defendants, originally District 214 and Dr. Koch, State Superintendent of Education, now include, as a class, all Illinois public school districts.

In November, 2007, the Court issued a preliminary injunction, against the original defendants, prohibiting them from implementing or enforcing the Act. All Illinois public school districts will receive notice of their inclusion in the defendant class and other information, through the office of the State Superintendent of Education. A hearing at which the Court will decide whether to extend the preliminary injunction to all school districts will be held on May 29, 2008. Districts are able to, but not required to, intervene in the case to state any objections they may have. * * *

Closed Session Comments Haunt Board in FMLA Case

The Seventh Circuit reversed in part the district court's granting summary judgment to the school district defendant in *Lewis v. School District No. 70 et al.* (No. 06-4435, decided April 17, 2008), based on, among other factors, the comments of the Board of Education during closed session.

In *Lewis*, a former bookkeeper brought an action against the school district, alleging violations of the Family and Medical Leave Act ("FMLA"), as well as supplemental state claims for breach of contract, defamation, and intentional infliction of emotional distress. The district court granted summary judgment in favor of the school district on all counts, but the Seventh Circuit reversed the lower court's summary judgment as to the FMLA claim because "Ms. Lewis has presented sufficient evidence of an impermissible retaliatory motivation under the direct method of proof to create a genuine issue of material fact for trial."

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The Court found that the "most prominent" evidence of impermissible motive were the letters to her from the superintendent, as well as his statements to her about her "absenteeism" (due to leave taken in accordance with the FMLA). The court also stated that the conduct of the school board, as inferred from their comments made during closed session, raised "serious questions about their reason for discharging her."

The comments in question, as reflected in the record before the court, were in response to the superintendent discussing the district's obligations under the FMLA with the board in closed session. The board members responded by discussing the FMLA "with disdain" - including statements that the FMLA was "just ludicrous" and "it's such a fiasco that you can't just say thank you for your services, good-bye" because of "FMLA and Bill Clinton." The board further encouraged the superintendent to continue documenting any performance-related problems in order to build a case against Ms. Lewis that was unrelated to her absences.

The Court did note, however, that the comments of school board members were not necessarily enough by themselves to create an inference of impermissible motivation, but that taken in the aggregate, the district court should have "left to the jury the question of whether Ms. Lewis' job performance, unrelated to the impact of her absenteeism, justified her removal from the bookkeeper position."

On remand, the jury may find that the performance-related issues warranted Ms. Lewis' removal from her position, but as the Seventh Circuit summarized, "the actions of the school board and the superintendent cast doubt on their claim that her removal from the bookkeeper position was for incompetence." * * *

Would you like to receive the School Law Advisor by email? If so, please let us know by contacting Kay Lacy at klacy@millertracy.com.

Meet the Attorneys: S. Jeff Funk

Miller, Tracy, Braun, Funk & Miller, Ltd., has specialized in representing school districts for 30 years, and has grown from one attorney and secretary to nine attorneys and a full support staff. The firm currently represents over 150 school districts throughout Illinois, with student populations ranging from less than 200 students to over 9,000, and provides a wide array of legal services relating to the many issues faced by Illinois school districts.

S. Jeff Funk

Undergraduate Education:
University of Illinois (1982)

Juris Doctor:
University of Illinois (1985)

Admissions:
Supreme Court of Illinois, 1985
United States District Court for the Central District of Illinois, 1987

Jeff Funk joined the firm upon his admission to the Bar in 1985, and has been a partner since 1992. He graduated from the University of Illinois (1982) and the University of Illinois College of Law (1985). His areas of concentration are labor relations, collective bargaining, public sector civil litigation, unfair labor practice representation, and grievance representation. Jeff has also been a member of the Executive Committee of the Illinois Council of School Attorneys, and speaks regularly at such venues as the Illinois Association of School Boards Annual Conventions, Division Meetings and other Workshops, Illinois Association of School Administrators Workshops, Illinois Association of School Business Officials Annual Conferences, School District and Regional Office of Education Seminars and In-services, Illinois Council of School Attorneys Annual Meetings, Western Illinois Annual School Law Conferences, Eastern Illinois University Roundtables and Southern Illinois University Roundtables. Jeff resides in Bement, IL, and has been a member of the Bement Community Unit School District No. 5 Board of Education since 1995. * * *

Use of Tort Levy Again Reviewed by Court

Another Illinois court has again reviewed the use of a school district's tort levy in *In re Objection to Tax Levy of Quincy School Dist. No. 172 For the Year 2003*, 04-TX-41 (8th Cir. Ill. July 6, 2007) ("*Quincy*").

Under Illinois law, neither a school nor any of its employees can be liable for several various torts, including failure to act, libel and slander, inadequate negligent inspection of the school, failure to investigate licensure of its employees, and several other types of negligent conduct. 745 ILCS 10/1-101 et seq. The act protects against liability for negligent discretionary decisions (those which are a determination of policy and an exercise of discretion), but not against negligent ministerial decisions, allowing school officials to exercise their best judgment. *Albers v. Breen*, 806 N.E.2d 667 (4th Dist. 2004).

Illinois law, at 745 ILCS 10/9-107, gives local government entities, including schools, the right to levy:

> an extraordinary tax for funding expenses relating to (i) tort liability, (ii) liability relating to actions brought under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 or the Environmental Protection Act, but only until December 31, 2010, (iii) insurance, and (iv) risk management programs. Thus, the tax has been excluded from various limitations otherwise applicable to tax levies. Notwithstanding the extraordinary nature of the tax authorized by this Section, however, it has become apparent that some units of local government are using the tax revenue to fund expenses more properly paid from general operating funds. These uses of the revenue are inconsistent with the limited purpose of the tax authorization. (emphasis added).

These levies, because they are for "extraordinary" purposes only, are unlimited in the sum that can be levied, and are not subject to approval from the voters by referendum. *Id.* This makes them very attractive to use for funding various school district needs.

However, because of the broadness of authority to use such taxes, the courts have not been particularly favorable to their usage. The court in *In re Objections to Tax Levies of Freeport School Dist. No. 145*, ("*Freeport*"), held that a "school district could not use the tort immunity levy to pay portions of the salaries of various employees, absent a formal process by which the school district identified loss exposure, selected and implemented techniques to address potential liability, and monitored the effectiveness of its chosen techniques." 310 Ill.Dec. 37, 372 Ill.App.3d 562, 865 N.E.2d 361 (App. 2 Dist.2007). rehearing denied. Reading this decision liberally, many have concluded that so long as the district has a plan to manage risks, determines a percentage of employee tasks which is designated for avoiding risk, and pays only that portion of the salary or activity out of tort, then the plan is sufficiently within the law.

While this would seem a rational reading of the *Freeport* case, the court further indicated its disfavor with the usage of Tort funds in the recent *Quincy* decision. In that case, the court found that another risk management plan was inappropriately designed to pay salaries of employees so as to fit within the law. Moreover, *Quincy* held that the risk management plan must be created prior to the levying of taxes to satisfy the costs to be paid by the plan, and that the plan could only fund activities by employees which constituted "extraordinary" functions. Therefore, any function which constitutes an "ordinary" duty of the position cannot be funded out of tort levy money.

Because of this holding, it appears there is no valley through which a school district can run and avoid the peaks which impale even the most narrowly tailored of risk management plans. However, the question, in this case, may not be one of legal care, but rather a question of practicality and local politics. A school district has a colorable legal argument that using a risk management plan to pay portions of salaries out of tort is acceptable – neither *Quincy* nor *Freeport* prohibited such plans; they only held the plans involved in those cases were insufficiently tailored to the law. While it does not appear clear that any such plan has the ability to perfectly escape the bounds of those holdings, the total loss a district will suffer if challenged will be that portion of money which was removed from tort.

Because these funds result from taxes levied against citizens in the district, it is important to understand that anyone who pays taxes in the district may challenge the usage of tort funds in court. If the community is supportive of the district using tort funds to pay

portions of salaries to prevent torts (in accordance with a narrowly tailored risk management plan), and if the board is not afraid of the response from the local community and media, then the risk which is being undertaken is only the money used, plus any costs incurred in fighting any tax objection. If the district were to budget to cover any challenge, and resolve not to fight a challenge which resulted, then the potential loss is probably *de minimus* – The district would only have to replace the tort fund money as budgeted. However, this would also raise the question as to why the district should not simply pay the costs as otherwise planned. Either way, the bottom line for a district is a question of how safe to play it, and how will the local community respond to the proposed usage of their tax dollars. * * *

MILLER, TRACY, BRAUN, FUNK & MILLER, LTD.

would like to thank all the Superintendents, Assistant Superintendents, Principals and Administrators who attended our March 10th Seminar.

Handouts and Seminar materials, along with past versions of the ***School Law Advisor*** *are available on the our website:*

www.millertracy.com

We welcome suggestions for future Newsletter or Seminar topics.

Highlights from the Illinois Special Education Regulations

The new Illinois special education regulations, found at 23 Ill.Admin.Code 226, became effective for this school year, and include important changes such as:

*Makes clear that a student remains eligible for special education through age 21 inclusive (i.e. through the day before the student's 22nd birthday).

*"Autism" includes any Autism Spectrum Disorder that adversely affects a child's educational performance.

*Requires a school district to determine whether or not to conduct an evaluation upon request of the parent within 14 school days of receiving such a request.

*Requires an evaluation to be completed within 60 school days following the date of written consent of the parent to perform the evaluation.

*Requires the use of an RTI process in determining whether a student has a specific learning disability by the 2010-2011 school year, and each district must develop a plan for the transition to an RTI process by January 1, 2009.

*In the case of a child whose behavior impedes his or her learning or the learning of others, the IEP team must include a person knowledgeable in positive behavior strategies.

*Requires the IEP team to meet and write/review a Behavior Intervention Plan "upon the occurrence of any act that may subject the student either to explusion or suspension resulting in more than ten cumulative days of suspension during any one school year.

*Sets new class size provisions, and requires each district to develop a plan for the work load for special educators in cooperation with the bargaining representative prior to the 2009-2010 school year.

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School Code Now Requires Notice of Transfer of Parental Rights

Section 14-6.10 of the Illinois School Code (105 ILCS 5/14-6.10) provides that when a special education student reaches 18 years of age, all rights accorded to the student's parents under Article 14 of the School Code transfer to the student except for in certain circumstances under this section. This new section further requires the school district to notify the student and the student's parents of the transfer of rights in writing during the year that the student turns 17.

The Delegation of Rights form must be provided at an IEP meeting (and if the student *and* his or her parents are not present, it must be mailed to both), and must be renewed annually.

Under the statute, the rights shall not transfer if the student who has reached the age of majority has been adjudged incompetent under state law. Further, the rights shall not transfer if the student has executed a Delegation of Rights form to make educational decisions.

The statute provides the specific language the Delegation of Rights form must include, including declarations that the student is 18 years of age or older, has not been adjudged incompetent, the adult to whom the student intends to delegate decision-making rights, the student's right to be present at any IEP meetings, and the student's right to terminate the Delegation of Rights at any time.

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