

A TSBA Publication for School Board
Attorneys, Board Members, and
Administration



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Theodore Elaster, Jr., ET AL. v. Hamilton County Department of Education, ET AL.

This case centers on a May 1, 2012 incident at Dalewood Middle School when the Child, then a seventh-grade student, collided with Rowe in a hallway. Mother filed a complaint on her son's behalf against Defendants in the Trial Court, alleging violation of civil rights under 42 U.S.C. § 1983, negligent supervision, negligent retention, common law assault, common law battery, intentional infliction of emotional distress, negligent infliction of emotional distress, and common law negligence. Mother alleged that Rowe assaulted the Child. Rowe, on the other hand, has denied throughout this case that he intentionally struck the Child, but rather that any contact in the hallway was unintentional on his part. This case was removed to the United States District Court. The § 1983 claim was dismissed in the United States District Court. The remaining Tennessee Governmental Tort Liability claims raised by Mother were remanded for resolution in the Trial Court.

The Child told guidance counselor Ashley Medley that Rowe had struck him. Medley brought the matter to Thomas's attention. No injuries to the Child were visible. When asked, the Child said that another student had witnessed the incident. The student, Trevon H. ("Trevon"), stated that the Child had tripped Rowe. When questioned about the incident, Rowe acknowledged that the two had collided. However, Rowe denied intentionally striking the Child, stating instead that he accidentally hit him with his elbow while regaining his balance. Thomas concluded that the Child's version of events was not the true one when weighed against the other two eyewitness accounts of Rowe and Trevon. Thomas explained to the Child and Mother that if the matter were pursued, it would result in the Child's expulsion for kicking a teacher under the zero tolerance policy.

At trial, the Child testified that Rowe intentionally struck him. Trevon's testimony vacillated. Initially, Trevon denied having stated that the Child tripped Rowe. Trevon was confronted with his earlier account stating that the Child tripped Rowe, which he acknowledged as true. Mother testified that she took the Child to the hospital five days after the incident, and he was diagnosed with a contusion. In November 2015, the Trial Court entered its final judgment. The Trial Court found in favor of Defendants on all counts. In its final judgment, the Trial Court found for the Defendant.

The Court of Appeals found as follows: Having carefully reviewed the record on appeal, we find that the evidence does not preponderate against the Trial Court's finding. The only firsthand witness to the incident to state consistently that the Child was assaulted was the Child himself. Trevon's testimony was inconsistent. Rowe testified that while he collided with the Child, he never intentionally struck the Child. The Trial Court implicitly made credibility determinations, as was its prerogative, in determining which version of events was the correct one. The Court affirmed the judgment of the Trial Court.

<https://www.tncourts.gov/sites/default/files/elasterjrtopn.pdf>

John Richardson, ET AL., v. Trenton Special School District

This case centers around the following policy language:

While on duty, you are responsible for the children in your group. Their safety and well being are your most important consideration. CHILDREN MUST NEVER BE OUT OF SIGHT!!! Monitor your students in the halls and bathrooms (emphasis in original).

During the 2006-2007 school year, C.N.R., age six, was enrolled in kindergarten in a school operated by Trenton Special School District. The case arises from allegations that C.N.R. was sexually assaulted five times during the school year by another kindergarten student, B.S. The assault first came to the Parents' attention when C.N.R. told his mother that he was afraid to go to the bathroom at school. P.R. initially thought that the other student, B.S., was bullying C.N.R. Mother suspected that B.S. was using foul language, showing his private parts, writing on the bathroom walls, and throwing paper wads. P.R. first learned that C.N.R. may have been sexually assaulted by B.S. when the school principal called P.R. to say that he was informed of the alleged incident by the school guidance counselor, who had been notified by the children's teacher. The teacher was told, by another student who was in the bathroom at the time of the alleged assault, that B.S. and C.N.R. were in the stall together. After questioning B.S. and C.N.R., B.S. allegedly admitted to the teacher that B.S. had put his mouth on C.N.R.'s private parts.

It is undisputed that, prior to the alleged assault on C.N.R., there was an incident at the school where one student sexually assaulted another child in the bathroom during after-school care. Concerning this incident, the principal testified, in his deposition, that the children involved in the after-school care incident were in first or second grade, as opposed to the children involved in the instant case, who were in kindergarten. Furthermore, the principal testified that the after-school incident occurred when the two students were alone in the bathroom. The incident at issue here occurred when the students were in the bathroom with other students. When C.N.R. was allegedly assaulted, the children's teacher was standing in the hallway between two bathrooms so that she could monitor what was happening in either facility. Regardless, it is undisputed that the elementary school changed its bathroom policy in the after-school care program in direct response to the prior assault such that teachers accompanied students into the bathrooms. However, the school did not change its policy concerning the main school day.

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On September 29, 2011, Appellants filed suit against TSSD. Appellants claimed that TSSD was negligent because its employee had violated the school's policy and that this violation resulted in a failure to protect C.N.R. Following discovery, on January 13, 2015, TSSD filed a motion for summary judgment alleging that TSSD did not owe a duty to C.N.R. Appellants opposed the motion for summary judgment. Following hearing, the trial court granted TSSD's motion by order of July 30, 2015. In relevant part, the trial court held that the "alleged sexual assault against the six-year-old minor . . . by another six-year-old student in the boys' bathroom . . . was unforeseeable as a matter of law." This appeal followed.

The Court of appeals concluded that disputes of material fact did exist and this precluded the grant of summary judgment. The case was reversed and remanded.

<https://www.tncourts.gov/sites/default/files/elasterjrtpn.pdf>

AG Opinion 16-37 – LEA Property Available for Use by Charter Schools

Question 1

If a local education agency (“LEA”) identifies a property as underutilized and vacant pursuant to Tenn. Code Ann. § 49-13-136(c) and the Tennessee Department of Education subsequently publishes the property on the list made available to charter school operators in the LEA as well as sponsors seeking to establish a charter school in the LEA, is the LEA required to make such property available for use by the charter school and execute a binding agreement with the charter school for the use of such property?

Opinion 1

The LEA is required to make the underutilized and vacant property available for use by charter schools operating in the LEA; however, the LEA is not necessarily required to execute a binding agreement with the charter school for the use of the property.

Question 2

If the answer to the first question is “yes,” when does the obligation of the LEA to make the property available to charter school operators and sponsors expire?

Opinion 2

The statute does not expressly state when the obligation expires, but it expressly calls for one update each year to an LEA’s listing of underutilized and vacant properties. By implication, then, the obligation of an LEA to make a listed property available to charter school operators and sponsors remains in place for at least one year after the property has been listed.

<https://www.tn.gov/assets/entities/attorneygeneral/opinions/op16-037.pdf>

AG Opinion 16-34 – Non-Structured Physical Activity for Students

Question

Do the guidelines for “classroom activity breaks” in the Tennessee Department of Education’s June 8, 2016, and June 23, 2016 memoranda comply with the requirements of Tenn. Code Ann. § 49-6-1021?

Opinion

To the extent that the guidelines authorize physical activities for “classroom activity breaks” that are structured, the guidelines do not comply with the “non-structured physical activity” requirements of Tenn. Code Ann. § 49-6-1021.

<https://www.tn.gov/assets/entities/attorneygeneral/opinions/op16-034.pdf>

AG Opinion 16-27 – School Nutrition Associations and the Definition of “School Support Organization” in Tenn. Code Ann. § 49-2-603(4)(A).

Question

Do local school nutrition associations meet the definition of “school support organization” under Tenn. Code Ann. § 49-2-603(4)(A)?

Opinion

Based upon available information regarding the purposes and activities of local school nutrition associations, these organizations do not appear to qualify as “school support organizations.” In the event, however, that a local school nutrition association were to solicit or accept moneys or other items of value in support of school activities, or engage in other school support activities encompassed by the Act, these organizations would place themselves within the purview of the Act, thus subjecting themselves to its requirements.

<https://www.tn.gov/assets/entities/attorneygeneral/opinions/op16-027.pdf>

AG Opinion 16-22 – Tennessee Professional Educators Collaborative Conferencing Act of 2011

Question 1

Does the Tennessee Professional Educators Collaborative Conferencing Act of 2011 (“PECCA”) prohibit a public professional employees’ organization from using member dues collected through payroll deductions to engage in political communications (e.g., communications that identify a specific candidate for state office and encourage the recipient to vote for or against a candidate)?

Opinion 1

Yes, if the dues deduction was obtained through collaborative conferencing. If the payroll deduction was made pursuant to a memorandum of understanding reached between professional employees and the relevant board of education, the funds may not be used for political communications.

Question 2

Does PECCA prohibit a public professional employees’ organization from allocating or transferring member dues collected through payroll deductions to organizations, such as parent or affiliate associations, that engage in political communications?

Opinion 2

Yes, if the deduction was obtained through collaborative conferencing, and with some exceptions. If the payroll deduction was made pursuant to a memorandum of understanding reached between professional employees and the relevant board of education and if the allocation or transfer is a “contribution” under PECCA, the transfer or allocation is an impermissible use of funds.

Question 3

Does PECCA prohibit a public professional employees’ organization from directing member dues collected through payroll deductions to a third party that directly or indirectly financially supports political communications?

Opinion 3

There is no categorical bar on directing dues obtained through PECCA payroll deductions to third parties that merely support, but do not engage in, political communications. Many specific situations that fall within this description may nevertheless be prohibited by the general ban on use of PECCA payroll deductions in political activity, depending on the details of the individual case.

Question 4

Does PECCA prohibit a public professional employees’ organization from commingling member dues collected through payroll deductions with other funds that are used directly or indirectly to support political activities?

Opinion 4

Although PECCA does not prescribe any particular requirements for separating funds obtained via payroll deductions from other funds, individual employees’ organizations must select appropriate mechanisms for maintaining funds to ensure compliance with PECCA’s ban on use of payroll deductions for political activities.

<https://www.tn.gov/assets/entities/attorneygeneral/attachments/op16-022.pdf>

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AG Opinion 16-19

Question 1

Does the “sole supplier” exception in Tennessee Code Annotated § 12-4-101(b) apply only when a county official is the sole supplier located in the county or may the exception apply when a county official is the sole supplier doing business in the county?

Opinion 1

The “sole supplier” exception in Tennessee Code Annotated § 12-4-101(b) applies only when a county official is the sole supplier located in the county.

Question 2

If the answer to question 1 is that a supplier doing business in the county prohibits a business located in the county from being a sole supplier, can there ever be a sole supplier in a county?

Opinion 2

This question is pretermitted by the response to question 1.

Question 3

If a county official contracts with the county in violation of Tennessee Code Annotated § 12-4-101, does the county official have to refund all of the funds paid to him by the county for the goods or services rendered by the official or does the doctrine of quantum meruit apply?

Opinion 3

Under the general rule established by Tennessee courts, the doctrine of quantum meruit does not apply if an official contracts with the county in violation of Tennessee Code Annotated § 12-4-101.

<https://www.tn.gov/assets/entities/attorneygeneral/opinions/op16-019.pdf>

AG Opinion 16-16

Question

Whether third parties, including but not limited to the Tennessee School Board Association and the Tennessee Organization of School Superintendents, hired by school boards to conduct searches for directors of schools, are subject to the Tennessee Open Meetings Act, Tenn. Code Ann. §§ 8-44-101 – 108 and the Tennessee Public Records Act, Tenn. Code Ann. §§ 10-7-501 – 516.

Opinion

Any records obtained by a third party in conjunction with an employment search for a director of schools for a school board are public records and subject to inspection under Tenn. Code Ann. § 10-7-503(f). Additionally, if the third party is one whose “origin and authority may be traced to state, city, or county legislative action,” then its meetings are subject to the Open Meetings Act.

<https://www.tn.gov/assets/entities/attorneygeneral/opinions/op16-016.pdf>

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Tennessee School Boards Association Pre-Convention Legal Workshop November 5, 2016 Agenda

1:00 p.m.	Welcome and Introductions	Randall Bennett TSBA Deputy Executive Director & General Counsel
1:05 p.m.	Fair Labor Standards Act <i>How the New Changes Will Affect Your School District.</i>	Steven Shields Jackson, Shields, Yeiser & Holt
2:00 p.m.	BREAK	
2:15 p.m.	Employees, Students & The 1st Amendment <i>A Look at Religious Accommodation and Free Speech Rights.</i>	Randall Bennett TSBA Deputy Executive Director & General Counsel
3:15 p.m.	BREAK	
3:30 p.m.	The Superintendent's Contract <i>What Boards of Education Should Know about Superintendent Contracts</i>	D. Scott Bennett Leitner, Williams, Dooley & Napolitan, PLLC
4:25 p.m.	Wrap-Up	
4:30 p.m.	Adjourn	

Attendees can receive up to 3 hours of CLE credit

For additional details and registration visit,
<http://tsba.net/tsba-leadership-conference-annual-convention-2/>



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TCSBA Annual Meeting

When: Sunday, November 6, 2016
9:30 a.m. - 11:00 a.m.

Where: TSBA Annual Convention
Gaylord Opryland Resort and
Convention Center
Presidential Boardroom B

Along with planning CLE for 2017 we will be electing a new slate of officers for the two year 2017-2018 term.

Registration:

<https://tsbaregistration.wufoo.com/forms/m23m23t175cc4b/>