



# Communiqué

To: Board members, superintendents, business officials and OCSBA members  
From: Richard J. Dickinson, deputy executive director/general counsel  
Re: **House Bill 79 and Ohio Supreme Court collective bargaining decision**  
Date: March 15, 2007

The purpose of this *Communiqué* is to inform the school community about several important events that may require prompt action. It will describe some portions of Amended Substitute House Bill 79 and a recent decision of the Ohio Supreme Court.

## **Amended Substitute House Bill 79 (HB 79)**

HB 79 was enacted during the recent lame-duck session of the Ohio General Assembly. It will become effective on March 30. Its original purpose was to strengthen Ohio's teacher misconduct laws. As sometimes happens, however, it became the vehicle for numerous legislative changes that have nothing to do with the original subject matter. Each of these significant changes will be described below.

While interpreting newly enacted legislation is always difficult, because we do not have the benefit of any analysis of the new language by either the courts or administrative agencies, some of the provisions of HB 79 require immediate responses that do not permit more deliberate consideration.

### **Community schools' boards of directors**

HB 79 amends several Revised Code sections that deal with Ohio's community schools. Specifically, Ohio Revised Code (RC) 3314.02(E)(3) was enacted to read as follows:

No present or former member, or immediate relative of a present or former member, of the governing authority of any community school established under this chapter shall be an owner, employee, or consultant of any nonprofit or for-profit operator of a community school, as defined in section 3314.014 of the Revised Code, unless at least one year has elapsed since the conclusion of the person's membership.

An "operator" of a community school is defined in RC 3314.014 as either:

1. An individual or organization that manages the daily operations of a community school pursuant to a contract between the operator and the school's governing authority.
2. A nonprofit organization that provides programmatic oversight and support to a community school under a contract with the school's governing authority. (*This portion of the definition came from Amended Substitute House Bill 276, not HB 79.*)

For community schools where a school district is the sponsor, members of the governing board of the community school often include administrators and/or teachers employed by the sponsoring school district. If a school district meets the definition of “operator” as specified in the law, then the prohibition of RC 3314.02(E)(3) would apply. It would prohibit a member or former member of the community school governing board from being employed by the operating school district until one year had passed after the employee’s term on the governing board had ended. The prohibition would extend even to an employee who has a relative who serves on the governing board.

Are there ways to eliminate this problem?

At this time there appear to be three possibilities. The first is corrective legislation. OSBA is talking to legislators about this possibility. But in order to solve the problem, emergency legislation with an immediate effective date would have to be enacted before March 30, 2007. The second possibility is if the amended law were to be declared unconstitutional for retroactively penalizing behavior that was lawful at the time. The third method is for individuals who are employed by a school district or educational service center to resign from their position on a community school governing board prior to March 30, 2007, the effective date of the statute.

**Note:** In her March 12 weekly update, *ODE This Week*, Superintendent of Public Instruction Dr. Susan Tave Zelman states the following:

ODE has received a number of questions regarding the impact of House Bill 79 on the governing authority membership of conversion community schools. The new law, which takes effect March 30, prohibits a current or former governing authority member from being employed by a community school operator for one year after leaving a governing authority. An operator is essentially an independent contractor hired by a governing authority to run a community school. Districts that sponsor conversion community schools are not operators, so the new law will not affect the employment of current district employees serving on governing authorities. The bill also does not affect a conversion school sponsor’s ability to determine which employer duties will be delegated to a community school or the community school’s authority to contract with the sponsor for fiscal or other services.

If you are a person impacted by RC 3314.02(E)(3), OSBA urges you to obtain legal advice immediately about how to respond to HB 79.

### **Expanded rights of community schools to purchase school district property**

Under current RC 3313.41, when a board of education determines to sell real property that would be suitable for classroom space, the board must first offer the property for sale to any start-up community school located within the district. The sale price must not be higher than the appraised fair market value of the property.

HB 79, effective March 30, 2007, **requires** school districts to sell real property suitable for classroom space, if the district has not used the real property for “academic instruction, administration, storage, or any other educational purpose” for one full school year, **unless the board of education has adopted a resolution outlining a plan for the use of the real property in the next three school years**. The sale price must not be higher than the appraised fair market value of the property.

This means that a community school could force the sale of real property that has not been used for the specified educational purposes in the last year if the board does not take action to adopt a plan outlining the use of the real property in the next three school years. Therefore, a board must take action to assess whether the district has property that has not been used in more than one full school year or will not be used throughout the 2006-2007 school year, and adopt a resolution to outline the use of the property for one of the specified educational reasons, or risk losing the property in a sale to a start-up community school within the district.

## **Criminal records checks**

HB 79 amends RC 3319.291 to require that the state board of education require persons seeking employment or employed in the public schools to submit fingerprints and written permission authorizing criminal records checks in all of the following situations:

1. any person initially applying for any certificate, license or permit;
2. any person applying for renewal of any certificate, license or permit;
3. any person teaching under a professional teaching certificate no later than five years after the original certificate was issued or renewed;
4. any person teaching under a permanent teaching certificate on a date prescribed by the state board and every five years thereafter.

The law recognizes exceptions to the four situations above if the individual provides proof that a criminal records check was conducted within the immediately preceding year.

Questions about how the Ohio Department of Education will implement these background check requirements should be directed to the Office of Education Licensure at (614) 466-3593.

## **School safety plans**

HB 79 amends RC 3313.536 to clear up some uncertainty with regard to the filing of safety plans and building blueprints. Current law requires the board of education of each school district to adopt a comprehensive school safety plan for each school building. The plan must be developed with the involvement of community law enforcement and safety officials, parents of students, teachers and nonteaching employees who are assigned to the building. Plans have to be updated at least once every three years and whenever a major modification to a building is made.

The school board or governing authority of a community school is required to file a copy of the safety plan and building blueprint with the law enforcement agency that has jurisdiction over the school building and, upon request, with the fire department that serves the political subdivision in which this school building is located. Under previous law, blueprints also were required to be filed with the state Attorney General's Office. HB 79 amends that requirement to say that the board of education or governing authority of a community school must file a copy of the safety plan and a floor plan of the building, but not a building blueprint, with the Attorney General's Office. Copies of the safety plans, building blueprints and floor plans must be filed not later than the 91st day after the effective date of the amendment. Since the amendment date is effective March 30, 2007, the 91st day thereafter is June 28, 2007.

The law specifies that copies of the safety plan and building blueprint are not public records nor is the building floor plan filed with the Attorney General's Office.

## **Teacher misconduct**

HB 79 also enacted provisions significantly amending the teacher misconduct reporting requirements to the Ohio Department of Education. Information on that portion of HB 79 can be found in the OSBA lame-duck legislation booklet mailed to all board members, superintendents, treasurers and OCSBA members in February 2007.

## **Ohio Supreme Court collective bargaining decision**

The Ohio Supreme Court recently issued a decision that may have a significant impact on the way collective bargaining is conducted in school districts and other public entities. The case is *Ohio State Bar Assn. v. Burdzinski, Brinkman, Czarzasty & Landwehr, Inc.*, 112 Ohio St.3d 107, 2006-Ohio-6511, decided on December 27, 2006. At issue in the case was whether non-lawyers engage in the unauthorized practice of law by performing certain labor relations functions for clients. Here is the syllabus of the case:

1. It is not the unauthorized practice of law for a nonlawyer to represent another in union-election matters or in the negotiation of a collective-bargaining agreement when the activities of the nonlawyer are confined to providing advice and services that do not require legal analysis, legal conclusions, or legal training.
2. It is the unauthorized practice of law for a nonlawyer to draft or write a contract or other legal instrument on behalf of another that is intended to create a legally binding relationship between an employer and a union, even if the contract is copied from a form book or was previously prepared by a lawyer.

The decision raises some important questions:

Does a non-lawyer union representative engage in the unauthorized practice of law when acting as chief spokesperson for the bargaining unit during negotiations with a board of education?

Does a non-lawyer superintendent of schools or other administrator engage in the unauthorized practice of law when acting as chief spokesperson for a board of education during negotiations with a union?

We have had discussions with attorneys for one of the teacher unions about the case. That union apparently will take the position that the decision will not apply to their non-lawyer negotiators, based primarily on the following sentence found in paragraph 9 of the opinion: "Our disposition of this case will not affect the ability of employers or unions to represent themselves in these matters; rather, this case is limited to third-party, nonemployee, or nonunion persons." If this interpretation of the decision is accepted by the courts, superintendents or other administrators acting as representatives of a board of education would not be engaging in the unauthorized practice of law. The unions would argue that the same reasoning would apply to a person employed by the union acting as representative for the union at the negotiation table. Others would argue that union representatives are employees of the statewide union, not members of the local union, so the exception should not apply to them.

It is too early for conclusive interpretations about the effects of the ruling. It is possible that the Ohio Supreme Court will further clarify the issue in subsequent rulings, or that the Ohio Supreme Court's Board on the Unauthorized Practice of Law will issue an advisory opinion clarifying the decision. However, such advisory opinions can be issued only in response to a request from a local bar association or the Ohio Supreme Court's Disciplinary Counsel. OSBA suggests that this topic be discussed with your board's counsel.

If you have questions about any of the above, please contact OSBA's legal division or your board's legal counsel.

*The information in the Communiqué is intended as general information. It should not be relied upon as legal advice. If legal advice is required, the services of an attorney should be obtained.*