Citizen's Campaign for Commercial Free Schools, Seattle, WA

Anti-Obesity Attorneys Threaten Seattle School Board Members Potential Legal Liability for Renewing Soft Drink Contract

June 30, 2003

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Last week members of the Seattle School Board were told that a national group of lawyers using legal action as a weapon against obesity were considering filing law suits against members of school boards who renew contracts to provide sugary soft drinks to children in return for a commission.

Now a local Seattle attorney has aligned himself with this effort, and has sent his own letters to school board members suggesting why they should get a written legal opinion regarding their potential legal liability from their own attorney before taking any further action towards renewing the contracts.

His letter suggests that, for various reasons, the individual School Board members may not be fully protected from personal legal liability and the threat of litigation either by the qualified immunity provided by Washington law, or by a provision in an insurance statute [RCW 28A.320.060] providing for Hold harmless insurance for Board members.

Public interest law professor John Banzhaf, of the George Washington University Law School, recently reported on the fourth victory which has been achieved by the so-called fat law suits. He said that New York City had just voted to eliminate soft drinks from all New York City schools, and that the decision grew out of a law suit.

Two other fat law suits have resulted in settlements of over $15 million, and another has forced the manufacturer of Oreo cookies to agree to remove the trans fatty acids [trans fat] from the product. Months earlier, after his Law and Obesity group first announced their interest in suing school board members of so-called pouring rights contract, the Los Angeles School Board voted to keep soft drinks out of their school system.

The Seattle School Board is scheduled to meet on Wednesday to decide whether or not to renew a contract with Coca Cola under which the beverage manufacturer pays

the school money for the privilege of selling its product in the school to the children. The lawyers are suggesting that consumption of sugary soft drinks by school children can be harmful to the health of many of them, and that renewing such a contract would therefore constitute a breach of the school's duty to protect the health of the students.

This concern is bolstered by a recent report from the Centers for Disease Control that fully one third of all students will contract diabetes; a very serious disease which can easily lead to kidney failure and the need for dialysis, amputation, and blindness, as well as vastly increased risk for heart attack, stroke, and other cardiovascular disease.
The letter from the Seattle attorney is set forth below in its entirety.

LETTER FROM LAW OFFICE OF DWIGHT VAN WINKLE
119 First Avenue South, Suite 200, Seattle, WA 98104; (206) 442-1408

Nancy Waldman
President and District III Representative
Seattle School Board
School Board Office
2445 Third Avenue South
Mail Stop: 11-010
PO BOX 34165
Seattle, WA 98124-1165

Via personal delivery to School Board Office and via electronic mail to:
nwaldman@seattleschools.org

June 30, 2003
RE: Potential Board and Individual Liability for Renewing "Pouring Rights" Contract

Dear Ms. Waldman:

As you know, I am a resident of District III and parent of children in District III schools, and a fellow member of the Washington State Bar Association, and have been strongly opposed to the initial contract between Seattle Public Schools and Coca-Cola. I am writing to you to urge you to delay your vote on renewing the Coca-Cola contract so that you may carefully consider very important new information that has come to our attention.

I write to advise you that I am aware that you and the other Board members have been advised that the Board, as well as the individual Board members, might be subject to legal action and potential legal liability for renewing a contract under which your students will be encouraged to consume sugary soft drinks with virtually no nutritional value, especially now that you have been placed on legal notice of the health and legal consequences of such action. I am attaching a copy of a letter that was sent to me by

Professor John Banzhaf of George Washington University, which I understand was sent to you the week of June 23, 2003.

Please be advised that the communication you received does raise serious legal issues, including some novel points of law for which there are no definitive answers. I believe that it would be in the best interests of the Board as an entity, and of individual Board members, to obtain written advice from the Board counsel and/or other qualified attorneys representing the Board or individual directors, before proceeding further.

The issues upon which you should request written opinions for your own protection include:

1. The nature and extent of the Board's legal obligations and duties regarding the health of its students; whether there is a heightened standard in the nature of a fiduciary and/or quasi-fiduciary duty; and how this relates to actions which the Board may take which might be characterized not only as "negligent" but also "intentional" since the Board is acting with "substantially certain knowledge" that there will be harmful consequences to at least some of the students, who might not be the same students who predominately benefit from the funds received from Coca-Cola.

2. The extent to which, in addition to naming the Board as a defendant, an attorney representing one or more parents or students could include individual Board members as defendants and, if so, their potential liability. I phrase the issue this way because being named as a defendant in a civil action can by itself have serious consequences in terms of public documents, credit ratings, etc., and attorneys are permitted to bring actions under legal theories which have not yet be recognized provided that they can make a good faith argument for an extension and/or modification of existing law. I am aware that the school district has likely purchased insurance to hold individual school board directors personally harmless; however, my understanding is that such insurance would not itself insulate individual directors from lawsuits but would merely pay any judgments obtained against them.

3. The extent to which the law of Washington provides qualified immunity for the Board and/or its individual members; the limits or exceptions to such immunity; and whether the immunity applies once a Board member is on notice of the legal and health-related effects of an action, and then acts intentionally in the face of that knowledge.

4. The extent to which a court might consider that the school board has exceeded its statutory authority, express or implied, by contracting to receive money from Coca-Cola in exchange for allowing Coca-Cola to market its products to the students which the school board is charged with protecting; and whether such an ultra vires act might weigh into a court’s decision to allow suits to go forward

against the school board and/or individual directors under the fiduciary duty or other legal theory.

As you may remember, I told you and the School Board five years ago that I believe that school board has no legal authority to raise money by selling its students as a market for a private business. At that time, the health issues related to caffeine and empty calories were also obvious. You apparently chose to view these issues as a philosophical concern of a vocal minority, as a necessary political trade-off, and/or as the responsibility of parents. Since then, very disturbing research has shown an alarming increase in adult-onset diabetes among juveniles, which you cannot brush aside as the views of a vocal minority or as a problem for parents alone. The school board is now on legal notice that it may be causing serious harm to some of its vulnerable students by encouraging them to consume unhealthy beverages, and the board must ask itself whether its legal exposure will be limited merely by restricting its next business deal to students in high school.

As an attorney with a strong interest in this issue, I will be closely watching your deliberations and votes on the pouring rights contract, and may decide, should the facts warrant, to take further action as may appear to be appropriate. I believe you owe it both to your students and to the taxpayers of Seattle to carefully consider these legal issues before proceeding further with the Coca-Cola contract.

Sincerely,

Dwight Van Winkle