Ennis Roberts Fischer
# School Law Review


1714 West Galbraith Rd.
Cincinnati, Ohio
45239

PHONE
(513) 421-2540
(888) 295-8409

FAX
(513) 562-4986

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## Training Required for Employees Administering Prescription Drugs to Students

As of July 1, 2011, there is a new requirement for school districts that allow employees to administer prescription drugs to students. If a school district allows employees to administer prescription drugs to students, the designated employees must either be licensed health professionals or have completed a drug administration training program that was conducted by a licensed health professional.

This rule change gives a good opportunity to review the requirements for boards of education and employees of school districts when it comes to administering drugs on campus.

All Ohio boards of education must have policies regarding the ability of their employees to administer prescription drugs to students. There are two options when developing these policies.

The first option is for the board to decide that no employee will administer any drug prescribed to a student, except as otherwise required by federal law. As used here, federal law refers to the Individuals with Disabilities Education Act (IDEA) and section 504 of the Rehabilitation Act. Therefore, if one of these federal laws requires that a student be administered prescription drugs on a school campus, then it must be done regardless of the board policy.

The second option is for the board to adopt a policy that grants certain employees authorization to administer prescription drugs to students. The persons may be identified by name, position, training, qualifications, or other distinguishing factors. In addition, the policy can restrict the types of drugs and methods by which these prescriptions are administered, unless a particular type or method is required by IDEA or section 504.

Before administering a prescription to a student, school officials must receive documentation from the student's doctor indicating dosages, special instructions, possible adverse reactions, and any other pertinent personal information. Also, the parent or guardian of the student must sign a written request for the administration of the drug and consent, in writing, to submit any revisions to the doctor's statement. All of this information must be provided to the employee administering the prescription.

The prescription must be contained in the container in which it was originally dispensed and must be stored in a place established by the board or by a person authorized by the board to make such decisions. If a drug requires refrigeration, then that drug should be stored in a refrigerator not commonly used by students.

So long as a drug administrator does not act with gross negligence or wanton and reckless misconduct, he or she cannot be held liable for administering or failing to administer drugs to a student. However, because of the change in the law, there is a possibility that a school district could be held liable for the misadministration of drugs if its designated drug administrators are not licensed health professionals or trained by licensed health professionals

Also, school systems are not allowed to practice "coercive" medication practices. According to IDEA, if a state is receiving federal funding for special education it must prohibit the "mandatory medication" of students as a condition of attending school.

**How this Affects your District:**

If a board of education adopts a policy allowing its employees to administer prescription drugs, the board must develop failsafe procedures for delivering prescription drugs to students. These procedures should include who is allowed to administer drugs, the methods and types of drugs that should be administered, where drugs should be located in a school, and how the board will verify its drug administrators are qualified to hold that position. Additionally, the board of education should develop a program for training designated employees to be administrators of prescription drugs in order to follow the change in law.

The other option for a board of education is to maintain a policy that only licensed health professionals can administer prescription drugs. In that case the board would not need to provide training for non-licensed health professionals.

If a board of education does not allow its employees to administer prescription drugs, it should be aware of IDEA and 504 requirements and how they may affect its policy. When a student with a disability is required to have prescription medication administered the board must allow that student to take the pre-

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## Training Required for Employees Administering Prescription Drugs to Students, Cont.

scription on campus and should train those employees who will need to administer the prescriptions.

## ESC Superintendent Can be Hired as School District Superintendent with Some Restrictions

The Ohio Ethics Commission recently wrote a letter answering whether the superintendent of an Educational Service Center (ESC) could also serve as part-time superintendent for a local school district within the boundaries of and receiving services from the ESC. As a general rule, the answer is no.

If the two public agencies do not have any contracts between them, then the Ethics Law does not prohibit public officials or employees from simultaneously serving in more than one public position. However, an ESC may provide special education programs, gifted and talented programs, grants, administration, Head Start programs, insurance consortia, home school oversight, and professional development programs to a school district and thus there are public contracts between the ESC and the district. Consequently, the Ethics Law does apply.

O.R.C. 2921.42(A)(4) prohibits a public official from having any definite or direct financial or fiduciary interest in the profits or benefits of a public contract entered into by any commission or board with which he or she is connected. Since the district does gain services from the ESC, there is a public contract. Additionally, as the superintendent of an ESC, a person has a fiduciary interest in the contracts of the ESC. As a district superintendent, a person would have a fiduciary interest in the contracts of the district. Therefore, because a person who holds both positions would have a fiduciary interest in both, the revised code prohibits a person from serving simultaneously as the superintendent of an ESC and a district within that ESC, unless that person can meet the exception to the law. To meet the exception to this law, there are four requirements:

1. **The goods or services must be necessary goods or services.**

A person must show that the district needs to acquire the goods or services that the ESC provides. The example given in the Ohio Ethics Commission letter is that a person could show there is a statutory requirement that the ESC provide services to local school districts.

2. **The goods or services the ESC provides to the district must be provided as part of a "continuing course of dealing" that began prior to the person's service with the district <u>OR</u> the products or services the ESC provides are "unobtainable elsewhere for the same or lower cost."**

A person is able to meet this requirement so long as the terms and conditions of a particular contract have been around before that person and are not changed or altered after the person's arrival in the position

If it is a new contract, the district must be able to objectively prove that the services provided by the ESC are the least costly alternative. It is likely in the case of an ESC dealing with a school district that the nature of the services provided by an ESC can only be offered by that ESC.

3. **The treatment provided to the district must be preferential to or the same as that given to its other "customers."**

The person must show that the ESC treats the district the same or better than it does any other school district it serves.

4. **The entire transaction between the school district and the ESC must be done at arm's length.**

The district must have knowledge of the person's interest in its contract with the ESC and the person must take no part in the decisions of the district with respect to that contract.

If all four of these requirements are met then a person would not be prohibited from serving as both the superintendent for an ESC and a school district that deals with that ESC.

**<u>Participation in Contracts Between the ESC and the District</u>**

As an ESC superintendent or district superintendent, a person is also a "public official" and would be subject to O.R.C. 2921.42(A)(1) and O.R.C. 102.03(D). According to 2321.42(A), a public official shall not knowingly "authorize, or employ the authority or influence of his office to secure authorization of any public contract in which the public official … has an interest." 102.13(D) states that "no public official … shall use or authorize the use of authority or influence of office … to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties."

If these two statutes are read together, they prohibit a person holding both superintendent positions from authorizing or securing any contracts between the two agencies. Additionally, a person holding both positions cannot perform duties on behalf of either the ESC or the school district if the interests of the other agency would be affected by his or her actions. Therefore, unless a person is able to fully withdraw from contractual matters between the two entities, that person would be prohibited from serving in both positions simultaneously. The governing boards of each entity would need to delegate these duties to another person in their organization who would not answer to the superintendent on these issues.

**<u>Other Restrictions:</u>**

- The person would be prohibited from disclosing or using, without authorization, any confidential information that he or she acquired in the course of his or her official duties as superintendent of either entity.
- The person would be prohibited from representing either entity before the other entity on any matter which that person participated in as an official or employee of the other agency.
- The person would be prohibited from receiving any compensation for representing either entity before the other entity.

**How this Affects your District:**

The main point to gain from this Ethics Commission letter is that while it is possible for a person to serve as both the super-

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## ESC Superintendent Can be Hired as School District Superintendent with Some Restrictions, Cont.

intendent of an ESC and the superintendent of a school district served by the ESC, there are many different rules that must be followed.

First, if this person takes both positions, he or she must disclose their fiduciary interest to both parties when contracts are being negotiated and then must not be a part of the negotiations.

Second, the person must be completely removed from all contract decisions that involve both parties. These duties must be delegated by the board to another employee who will not answer to the superintendent on these matters.

## Specificity a Must When Developing Transition Plans

***FCI Academy School District,* 56 IDELR 184 (SEA OH 2011)**

Recently the Ohio Department of Education ordered a high school student's school district to revise a vague transition plan in order to include appropriate goals and services. In addition, the district was required to begin training its staff to produce adequate transition plans.

When constructing this student's transition plan the IEP team listed as the postsecondary goal, "To get a job as a mechanic." Then, under "transition services," the team wrote "to take a career life course to decide if he likes it or not." The document also stated that the student would "have an opportunity to enroll in tech. bridge in tenth grade and pursue classes or courses that are connected with his career goals of becoming a mechanic."

According to IDEA, an IEP must include appropriate measureable postsecondary goals based upon age appropriate transition assessments related to training, education, employment and, when appropriate, independent living skills. This plan must be documented no later than the first IEP in effect when the student turns 16 and must include any transition services needed to assist the student in reaching the above-mentioned goals.

In this case, the student's parent filed a complaint with the Department of Education, alleging the plan did not meet the standards set forth in IDEA. The Department of Education sided with the parent finding the plan did not address the exact transition services that would be provided and the only postsecondary goal was not written in post-high school terms. Additionally, while the student's teacher stated that the student had expressed interest in becoming a mechanic, the IEP did not explain how the team obtained this information. Finally, the Department of Education found that, as was required, there were no goals related to postsecondary education or training on the transition plan.

The district was required to revise the transition plan to follow the standards in IDEA and the district was required to begin training its staff to develop proper transition plans.

**How this Affects your District:**

When your district's IEP teams are developing postsecondary transition plans they should be reminded that the plans must include specifics related to the transition services to be provided. The IEP must identify the exact services that will be provided. Also, it is important that an IEP team discuss and document the student's goals related to the transition plan and how the team became aware of those goals.

School districts should think about doing periodic training and staff development regarding developing transition plans. Training will help districts avoid these issues and may also aide the district if the Ohio Department of Education is called in to look upon any situations of this kind. If a district can show that its employees have been well trained in these concerns, the Ohio Department of Education may be less likely to decide against your IEP teams' decisions.

## EEOC Releases New Regulations Related to the ADA

The final regulations for the ADA Amendments Act (ADAAA), issued by the U.S. Equal Employment Opportunity Commission (EEOC), became effective May 24, 2011. These regulations expand who is considered "disabled" under the ADA and require employers to be more cognizant of ADA obligations and the accommodation process. Employers' main focus, when making employment decisions, should be on an employee's ability to perform the essential functions of the job and not on whether an employee or individual applying for a position is "disabled."
The ADAAA defines disability as either:

1. A physical or mental impairment that substantially limits one or more major life activities; or
2. A record of physical or mental impairment that substantially limited one or more major life activities; or
3. Being regarded as disabled such that an individual was subjected to a prohibited action because of an actual or perceived impairment that is not both "transitory and minor."

"Substantially limits" should be construed expansively and does not require a limitation to be severe or even significant. This is a lesser standard than was used before the ADAAA. Also, there should not be an extensive analysis (i.e. scientific, medical, or statistical analysis) of whether a major life activity is substantially limited. A person's impairment should be compared to most people in the general population, not to those people similarly situated, when deciding whether there is a substantial limitation. Additionally, except where eyeglasses or contacts are used, employers may not take into account the benefits of "mitigating measures", when determining whether an impairment substantially limits a major life activity.

If a person has an episodic or intermittent impairment, a disability exists if the impairment would substantially limit a major life activity when active. Moreover, the EEOC stated that an impairment lasting shorter than 6 months could be a disability.

The designation of "major life activities" has been expanded as well. Major life activities no longer must be of "central importance to daily life." The non-exhaustive list provided by the EEOC included such tasks as sitting, reaching, and interacting with others.

Also in the final regulations, the EEOC included a list of impairments that will "virtually always" meet the definition of disability. These include deafness,

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## EEOC Releases New Regulations Related to the ADA, Cont.

blindness, intellectual disabilities, partially or completely missing limbs or mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. Individuals with the impairments listed above must undergo an individualized assessment, but also will receive a "predictable assessment," which makes certain a disability will be found with these conditions.

The third definition ("regarded as") does not require any showing of the severity of the impairment. This shifts the focus of a claim to whether an employer discriminated against an employee or applicant on the basis of disability. Basically, the court will ask the question "Was the person actually qualified for the position he or she held or applied for, regardless of the availability of accommodations?" The one limitation to this definition is that the impairment cannot be both transitory (lasting or expected to last for six months or less) and minor.

**How This Affects Your District:**

These new regulations make it much easier for a person to claim he or she has a disability. School districts should assume any employee who is hurt or sick will now be covered by the ADA. Therefore, when a school district makes an adverse employment decision that is based on the employee's inability to perform due to an illness or an injury, it should expect an ADA case to be filed by the employee.

As an employer, it is important to take the correct steps to assess individually whether an employee or applicant can perform the essential job functions and also whether there are any reasonable accommodations that could be made in order to overcome any limitations the employee or applicant may have. School districts should be prepared to defend employment decisions by showing an individual was not qualified for the position, with or without reasonable accommodations. Therefore, documentation is essential in order to prove there was no discrimination.

## Supreme Court Overturns Third Circuit "Right to Petition" Decision

***Borough of Duryea v. Guarnieri*, 2011 WL 2437008**

The United States Supreme Court overturned a recent decision by the Third Circuit Court of Appeals. The lower court held that public employees who file a grievance are constitutionally protected from retaliation by their employer, even if the grievance concerns matters of solely private concern. The Supreme Court held the government has no liability under the First Amendment's Petition Clause unless the employee's grievance relates to a matter of public concern.

Part of the Court's decision was based on an amicus brief filed by the National School Boards Association (NSBA). NSBA used the precedent of *Connick v. Meyers*, to argue that courts have "long refused to allow public employees to transform personal disputes with employers into constitutional claims." The Court agreed and also reiterated the idea that "while the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.'"

**How This Affects Your District:**

This decision is binding on all Federal Courts in the United States. While the Sixth Circuit already held this view, this decision ensures that the Sixth Circuit will not change their viewpoint unless and until the Supreme Court overturns this ruling.

Therefore, school districts should understand that when a public employee files a grievance related to personal employment matters, the grievance does not constitute a "petition" under the First Amendment. There may be collective bargaining rules or state laws that are applicable to retaliation in relation to grievances, and that would be the remedy an employee could seek. School systems should be mindful of these collective bargaining and state law issues, but need not fear defending a First Amendment claim of "Right to Petition" in cases of personal grievances.

## Two New Model Policies Available

Ennis Roberts & Fischer has developed two new policies that school districts may be interested in adopting.

The first policy is a social media policy, which sets up parameters for the use of social media by employees. Social media policies establish a series of rules and guidelines that put employees on notice that if their posts are unprofessional and irresponsible it could lead to disciplinary action at work. However, it is important to note that employees do have First Amendment rights and cannot be silenced about matters of public concern. Further, the NLRB has held that social media policies cannot interfere with an employee's right to engage in concerted action. These legal issues make it vital to consult a legal advisor when drafting these types of policies.

The second policy is a network administrator acceptable use policy. Network administrators have the ability to access employee files that no one else has access to. With this type of responsibility comes a great need for knowing when and how the information gleaned from this access should be used. Employers should be clear with these employees about their responsibility to follow proper professional procedures in dealing with sensitive information. Therefore, we recommend that employers adopt a network administrator acceptable use policy that network administrators sign on a yearly basis.

If you are interested in either policy please contact us.

## Education Law Speeches/Seminars

**Ennis, Roberts & Fischer regularly conducts seminars concerning education law topics of interest to school administrators and staff.**
**Popular topics covered include:**

**Cyber law**
**School sports law**
**IDEA and Special Education Issues**
**HB 190 and Professional Misconduct**

Pamela Leist
Northwest Ohio ESC Administrator's Conference, Pokagon State Park August 5, 2011
*Ohio School Law Legal Update*

Bill Deters
At the OSBA Capital Conference School Law Workshop on November 15, 2011
*Strategies for Managing your eNightmares*

### Administrator's Academy Dates at Great Oaks Instructional Resource Center

**August 11, 2011 — *Student Residency, Custody and Homeless Students***

**December 8, 2011 — *FMLA***

**March 22, 2012 — *New Teacher Evaluation Procedures***

**June 14, 2012 — *Special Education Update***

## Contact One of Us

**William M. Deters II**
wmdeters@erflegal.com

**J. Michael Fischer**
jmfischer@erflegal.com

**Jeremy J. Neff**
jneff@erflegal.com

**Ryan M. LaFlamme**
rlaflamme@erflegal.com

**Pamela A. Leist**
pleist@erflegal.com

**C. Bronston McCord III**
cbmccord@erflegal.com

**Gary T. Stedronsky**
gstedronsky@erflegal.com

**Rich D. Cardwell**
rcardwell@erflegal.com

**Erin Wessendorf-Wortman**
ewwortman@erflegal.com