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School Law Review

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Medical Marijuana Bill Passes

Ohio's new medical marijuana law takes effect September 8, 2016. Patients in Ohio may now use medical marijuana in forms such as edibles, tinctures, oils, and vaporization, but smoking is still prohibited. Although it will likely be a few years before the state can fully implement new regulations to govern manufacturing and distribution, qualifying patients will be able to travel out of state by the end of the year to purchase medical marijuana to treat 20 medical conditions. People may petition the state medical board to add conditions. Neighboring states that permit the use of medical marijuana include Michigan and Pennsylvania.

- AIDS/HIV
- Alzheimer's disease
- ALS
- Cancer
- Chronic traumatic encephalopathy
- Crohn's disease
- Epilepsy or seizure disorder
- Fibromyalgia
- Glaucoma
- Hepatitis C
- Inflammatory bowel disease
- Multiple sclerosis
- Pain that is chronic, severe, and intractable
- Parkinson's disease
- Post-traumatic stress disorder
- Sickle cell anemia
- Spinal cord disease or injury
- Tourette's syndrome
- Traumatic brain injury
- Ulcerative colitis

It is critical for employers to understand how the new bill will affect their policies. Nothing in the bill requires an employer to permit or accommodate an employee's use, possession, or distribution of medical marijuana. Employers may continue to conduct drug tests and to enforce a drug-free workplace policy or zero-tolerance drug policy. However, it is recommended that employers update these policies to specifically prohibit the use of medical marijuana, despite the new law. Employers that do not already have a drug-free workplace policy in place must draft and adopt one before the new law takes effect, or employees could potentially use medical marijuana in the workplace.

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Because marijuana remains a Schedule 1 Controlled Substance and possession is illegal at the federal level, employers will not be required to accommodate the use of medical marijuana under the Americans with Disabilities Act (ADA). The law does not qualify a user of illegal drugs for any protection under the ADA, so employers may fire their employees for use, possession, or distribution of medical marijuana. If the cause of the discharge is medical marijuana use, the employer's actions would be deemed for just cause, and the employee will not be eligible for unemployment benefits. Finally, employees are ineligible for workers' compensation benefits if they are under the influence of marijuana and the use of the drug was the proximate cause of injury.

The new law makes it clear that employers are not obligated to accommodate employees' use of medical marijuana – whether on or off the job – but the question remains as to whether or not schools will be able to accommodate students' use. Under the new law, medical marijuana will not be prescribed but rather recommended by doctors who have registered with the state board of pharmacy. Ohio law requires only that schools administer prescription medications to students, and medical marijuana is not a prescription medication. It is recommended that school districts update student codes of conduct and extracurricular codes of conduct to specifically prohibit the use of medical marijuana,

The legalization of medical marijuana in Ohio will bring many changes in the coming years, including the possibility of related ballot initiatives in November. However, it is important for schools and other employers to remember that the changes do not interfere with federal regulations, and employers still retain the same rights to enforce their workplace policies as before the law was signed.

Allegations Lead to Title IX Claim against School District

A U.S. District Court in Massachusetts has allowed a legal claim against city and school administrators for peer-on-peer sexual harassment under Title IX. Several of the plaintiff's other claims were dismissed, but the Title IX harassment claim was allowed to proceed. The case will be pursued in the U.S. District Court of Massachusetts.

Title IX of the Education Amendments of 1972 prohibits sex discrimination and harassment in education:

> *No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.*

In *Harrington v. City of Attleboro*, student Noelle Harrington alleges years of sexual harassment from school bullies and, along with her mother, is suing the school district. Harrington attended Brennan Middle School in Attleboro from 2008 to 2010, where she first experienced harassment from a student who repeatedly called Noelle offensive names related to her sex and sexual stereotyping. Two other students also joined in the name calling. The bullying escalated to a physical assault, resulting in bruising, a sprained ankle, and a fractured wrist. The Harringtons had notified school principals, assistant principals, and the school psychologist and were told that the problems would be dealt with. They also contacted the Attleboro Police Department, which did not intervene, noting that this was a school issue.

The name calling and comments continued when Noelle went to Attleboro High School in 2010. As a matter of school policy, documentation of the harassers' conduct was not transferred from the middle school. Noelle was placed in classrooms with the same boys who had harassed her, and the harassment continued by them and other students as well. In January 2012, the school prepared a "Safety Plan" for Noelle, giving her the right to report harassment to administrators, to access the nurse "in times of stress," and to leave class early in order to avoid the students in the hallways. In February 2012, the student who had physically assaulted Noelle in middle

school followed her from the library to her home. When her mother told a school administrator, she was told that the school would not address this conduct because it occurred outside of school and off the school property. Also that month, students shined a laser pointer into Noelle's eyes. She went to the nurse, who contacted Noelle's mother. The Harringtons again contacted the police department and were told that the school police officer would have to handle the complaint. The Harringtons allege that the school police officer failed to respond to their complaint. The Harringtons then informed school administrators that they wanted to transfer Noelle to another school but allege that the school did not assist in placing Noelle elsewhere. When Noelle posted on Facebook about suicide, her mother consulted a crisis team who advised Noelle not to return to the high school. She was registered at a treatment center for psychotherapeutic care. Her mother withdrew her from school on March 1, 2012.

The Harringtons allege in this case that the school violated Title IX on the basis of sexual harassment. To state a claim under Title IX for student-on-student sexual harassment, a plaintiff must show the following elements:

1. He or she was subject to "severe, pervasive, and objectively offensive" sexual harassment by a peer
2. The harassment caused the plaintiff to be deprived of educational opportunities or benefits
3. The funding recipient (the school) knew of the harassment
4. The harassment took place in school programming or activities
5. The school was **deliberately indifferent** to the harassment such that the response, or lack of a response, was **unreasonable** given the nature of the known circumstances

In allowing this claim to proceed, the U.S. District Court acknowledged that the Harringtons have a plausible Title IX claim. Allegations of sex-based discrimination must show that the harassment was because of the person's sex. The court noted that the students' conduct was severe, not just "tinged with offensive sexual connotations," and appears to be based on sexual stereotyping, such as appearance, mannerisms, and sexual preference.

The standard of deliberate indifference is stringent and requires more than allegations that a school should have done more. However, other courts have suggested that a school's failure to take additional measures after its initial measures were ineffective might constitute deliberate indifference. In *Harrington v. City of Attleboro*, the district court allowed this Title IX claim because the Harringtons' allegations suggest that the school "failed to take additional reasonable measures after it learned that its initial remedies were ineffective."

What This Means for Your District

The standard of **deliberate indifference** is not simply a standard of doing nothing to prevent discrimination or harassment. A school may take action, yet the action may not be found **reasonable** given the known circumstances. As the known circumstances increase and intensify, the action the school takes should increase and intensify accordingly. Ennis Britton attorneys are available for consultation with Title IX issues as with other school-related issues.

Harrington v. City of Attleboro, -- F.Supp.3d --, (D. Mass. 2016) 2016 WL 1065804

House Bill 512: Identifying and Replacing Outdated Water-Service Fixtures in Ohio Schools

House Bill 512 passed unanimously in the House and Senate and was signed into law on June 9, 2016. The new law will become effective in September.

The Ohio Water Development Authority, in partnership with Ohio EPA, will make funding available to help Ohio's public schools identify sources of lead in drinking water from outdated, lead-based fixtures. The Ohio Facilities

Construction Commission will provide funding to identify sources of lead in private schools and to replace fixtures not covered by a recall in public and private schools.

School District Barred from Enforcing Board's Public Participation Policy

A federal district court in Georgia has issued a permanent injunction barring a school district from enforcing its public participation policy for board meetings. The court concluded that the policy is facially unconstitutional.

Georgia teacher Jim Barrett filed suit against his employer, Walker County School District, challenging its policy on the grounds of the First Amendment's Free Speech Clause. He requested to speak to the board regarding grading procedures that the superintendent had changed but says that he "was not permitted to speak to the full board in a timely manner" because of the way the policy is written. The policy stated that complaints against any employee would not be heard by the board but instead must be brought to the superintendent.

The court applied a three-pronged test to determine whether the First Amendment was denied to Barrett:

1. The court looked at whether Barrett's speech is protected by the First Amendment. Because of the nature of Barrett's speech, which addressed his complaints about grading procedures in the district, the court found that this speech was protected.
2. The court analyzed the nature of the forum – whether it was public, designated or limited public, or nonpublic. The court determined that "the public comment portions of the Board's meetings and planning sessions are limited public fora" and held that the Board "has discretion and ability to regulate speech during those periods."
3. However, in the final prong, the court found that the board was inappropriately discriminating against speakers through prohibiting speech involving complaints about public employees. Boards of education are permitted to restrict speech in a limited public forum such as a school board meeting, but restrictions may be placed only on content-neutral speech. In this case, the court determined that the policy was not narrowly tailored due to its prohibition on all complaints about employees, not just complaints that would qualify as sensitive personnel matters.

What This Means for Your District

Although this case is not controlling in Ohio, the court's decision is informative in terms of how boards of education review and amend their public participation policies. At best, this case highlights the varying opinions of courts throughout the country as it relates to policies prohibiting personal attacks on individuals during public comment periods of school board meetings. At worst, this case should be concerning for boards of education, as a large number of policies prohibit complaints or personal attacks on employees during public participation of board of education meetings. The safest approach is to prohibit public comment on individual employees, including both praise and criticism, both in policy and in practice. For review and discussion of your policies, please contact your Ennis Britton attorney.

Barrett v. Walker Cnty. Sch. Dist., N.D. Ga. No. 15-0055 (Apr. 4, 2016)

Kentucky School District Did Not Discriminate in Service Delivery

The U.S. Sixth Circuit Court of Appeals, which includes Ohio, Kentucky, Tennessee, and Michigan, held that the parents of a Kentucky elementary school student could not recover money damages in their Section 504 and Title II claims. The parents of the child, who has Type I diabetes, requested that their son attend his neighborhood

school; however, the school district, recognizing the need for the student to attend a school with a full-time nurse, placed him in another school in the district.

For Section 504 and Title II claims, parents must be able to prove *intentional discrimination* to receive money damages. This means the parents would have to establish deliberate indifference and show that the district knowingly acted in a manner that violated the child's federal rights. The court decided that the parents' request for their son to attend the neighborhood school was not necessary because the school district did not ignore his need for help but rather chose a different way to deliver the services to him, which was through a different school.

What This Means for Your District

Intentional discrimination may be difficult to establish in a dispute such as this, which is centered around the way the district chose to meet a student's needs and not a failure to identify the student's needs.

Note: Since the date this decision was made, Kentucky law has been amended to give students with diabetes the right to attend their neighborhood schools, regardless of whether those schools have full-time nurses on staff.

R.K. by J.K. and R.K. v. Board of Education of Scott County, Ky., 67 IDELR 29 (C.A. 6, 2016)

Proposed Bill (HB 410) Aims to Reform Truancy Policy

Efforts to reform truancy policy in Ohio have resulted in House Bill 410, which would eliminate suspension or expulsion of students as a punishment for excessive absences. The bill, which was passed in the House and now awaits action in the Senate Education Committee, would take effect in the 2017–2018 school year.

Boards would need to adopt or amend existing policy and corresponding handbooks and codes of conduct to address student absences. Schools would be required to set up absence intervention teams – a district or school administrator, a teacher, and the parent or guardian of the student – aimed at finding solutions to get students to class via "absence intervention plans." HB 410 suggests that the team collaborate with school psychologists, counselors, and social workers, as well as public agencies and nonprofit organizations, which can provide additional assistance.

Schools would be required to report to the Department of Education any cases of habitual truancy, which has been redefined by the bill in terms of hours missed instead of days missed. The student would be assigned an intervention team, which must also be reported to the Department of Education. Though the bill is aimed at avoiding court interactions, juvenile court may issue an order to require that a child attend a certain number of consecutive hours unless the student has a legitimate excused absence.

For schools, the absence intervention plan and the new protocol for truants is perhaps comparable to the implementation of a Section 504 plan. Likely, the intervention team will conduct an equivalent to a functional behavioral assessment and come up with modifications in accordance with the findings. In contrast to IEPs, which are detailed, goal oriented, and enforceable by the ODE in numerous ways, the solutions of the intervention team are not nearly as rigidly enforced by the language of the bill.

Should a student fail to complete the absence intervention plan laid out by the intervention team, the school may file a complaint to adjudicate the student in juvenile court as unruly. At that point, this complaint would be held in abeyance until the student either completes or fails to comply with a court diversion program. A studentwho fails to complete the program could be adjudicated as a delinquent child because of chronic truancy. The consequences for the parent or guardian of a chronic truant include a minor misdemeanor charge if the court finds that their actions in any way contributed to the behavior. In addition, the parents must pay a surety bond of $500.

The practical implications of these changes will place a burden on schools. Further constraints will be imposed on staff members, who must participate in the intervention teams at additional time and expense. School budgets will

be forced to accommodate in-school suspensions in place of expulsions or out-of-school suspensions, which may require an extra classroom and teacher, yet the bill provides for no funding to implement these changes. The new approach to truancy will undoubtedly present a challenge to districts through initial implementation.

Legislation in the Works

SB 297: Student Expulsions for Threats

Senate Bill 297 was introduced in the Ohio Senate in March and referred to the Education Committee in April. It aims to put the responsibility on those who make the threats – both the students who make them and their parents. Students who make threats would face mandatory expulsion. Threats cost school districts and law enforcement thousands of taxpayer dollars for things such as investigation and security – and these costs may be recovered from the parents, under SB 297. A summary of this bill is as follows:

- Permits a school district, community school, or STEM school to establish a policy that authorizes the district superintendent (or equivalent for community or STEM schools) to expel a student for not more than 60 days for communicating a threat to kill or do physical harm to persons or property under prescribed conditions.
- Authorizes a district board, community school governing authority, or STEM school governing body to require a student to "undergo an assessment" to determine whether the student poses a danger to self or others.
- Authorizes the district superintendent to either (1) reinstate the student if the student shows sufficient rehabilitation or (2) extend the expulsion for not more than one calendar year if the student fails to undergo a required assessment.
- Requires the school district to develop a plan for the continued education of the student during the expulsion period.
- Permits a district board or law enforcement agency to file a civil action to seek recovery for restitution from the parent, guardian, or custodian of a student who is expelled under the provisions of the bill for the district's costs that gave rise to the expulsion.

SB 321: Public Records

Senate Bill 321 passed both the Senate and House unanimously and was delivered to Gov. Kasich for signature on June 23. Kasich has 10 days to sign (or veto) the bill. Under this bill, a person who makes a request for public records but is denied would have a procedure to either file a complaint with the court of claims or commence a mandamus action ordering compliance with Public Records Law. This bill would amend the Ohio Revised Code to create a procedure for the following:

- For the court of claims to hear complaints alleging a denial of access to public records
- To modify the circumstances under which a person who files a mandamus action seeking the release of public records may be awarded court costs and attorney's fees
- To expand the infrastructure record exemption under Public Records Law
- To generally protect a private, nonprofit institution of higher education from liability for a breach of confidentiality or other claim that arises from the institution's disclosure of public records

The bill allows for a $25 filing fee in the court of claims. As the bill does not have an emergency provision, the bill would be effective after 90 days.

SB 326: School Technology

Senate Bill 326 aims to establish a program to assist school districts in purchasing technology in making physical alterations to improve technology infrastructure and school safet and security. The program would begin on July 1, 2017, and would be available to school districts that have not yet received assistance under the classroom facilities assistance program (R.C. §§ 3318.01–3318.20). The bill was referred to the Senate Finance Committee in March.

Upcoming Deadlines

As your school district prepares for the next couple of months, please keep in mind the following upcoming deadlines. For questions about these requirements, please contact an Ennis Britton attorney.

- July 1: Deadline for board to adopt appropriation/temporary appropriation measure. Deadline for salary notices for teachers and nonteachers. Annual emergency management plan certification due.
- July 10: Deadline for teachers to notify district of termination of contract without board consent.
- July 15: Gifted students self-report due.
- August 8–9: Occupational Therapy/Physical Therapy School-Based Practice, Hilton Columbus at Easton
- August 11–12: Ohio Charter School Summit, Hyatt Regency Columbus
- September 30: Report due for food and beverages sold on school premises

Upcoming Presentations

Administrator's Academy Seminar Series 2015–2106

***July 14 – 2015–2016 Education Law Year in Review**

Webinar or Archive Only!

*Participants must be registered to attend the webinar. The webinar will be archived for those who wish to access the event at a later time. You can register online at our Ennis Britton website or contact Hannah Reichle via phone (614-705-1333) or email.

Other Upcoming Presentations

August 3, 2016 – Mercer County ESC

August 4 – NWOESC Retreat

August 4 – Legal Update, Williamsburg High School

August 5 – OSBA Workshop, Nationwide Hotel & Conference Center, Lewis Center, OH

August 8 – Amherst Epecial Education In-Service

August 9 – School Resource Officers Basic Training Seminar

Feedback on Client Survey 2016

Ennis Britton would like to thank you for taking the time to provide your feedback about the services we provide to you. We are in the process of reviewing every comment and every survey we received. This information is

invaluable in enabling us to enhance the services we provide to our clients. Thanks again for your support and participation!

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Want to stay up-to-date about important topics in school law?
Check out Ennis Britton's Education Law Blog.

Webinar Archives

Did you miss a past webinar or would you like to view a webinar again? If so, we are happy to provide that resource to you. To obtain a link to an archived presentation, contact Hannah Reichle via phone (614-705-1333) or email. Archived topics include the following:

- Managing Workplace Injuries & Leaves of Absence
- Special Education: Challenging Students, Challenging Parents
- Fostering Effective Working Relationships with Boosters
- Effective IEP Teams
- Cyberlaw
- FMLA, ADA, and Other Types of Leave
- Levies & Bonds
- OTES & OPES Trends & Hot Topics
- Tax Incentives
- Prior Written Notice
- Advanced Topics in School Finance
- Student Residency, Custody, and Homeless Students
- Student Discipline
- Media and Public Relations
- Gearing Up for Negotiations

Ennis Britton Practice Teams

At Ennis Britton, we have assembled a team of attorneys whose collective expertise enables us to handle the wide variety of issues that currently challenge school districts and local municipalities. From sensitive labor negotiations to complex real estate transactions, our attorneys can provide sound legal guidance that will keep your organization in a secure position.

When you have questions in general areas of education law, our team of attorneys help you make competent decisions quickly and efficiently. These areas include:

Labor & Employment Law

Student Education & Discipline

Board Policy & Representation

There are times when you have a question in a more specialized area of education or public law. To help you obtain legal support quickly in one of these areas of law, we have created topic-specific practice teams. These teams comprise attorneys who already have experience in and currently practice in these specialized areas.

Construction/Real Estate
Construction Contracts • Easements • Land Purchases & Sales • Liens • Mediations • Litigation

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Ryan LaFlamme
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Gary Stedronsky

Workers' Compensation
Administrative Hearings • Court Appeals • Collaboration with TPAs • General Advice

Team Members
Ryan LaFlamme
Pam Leist
Giselle Spencer
Erin Wessendorf-Wortman

Special Education
Due Process Claims • IEPs • Change of Placement • FAPE • IDEA • Section 504 • any other topic related to Special Education

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Megan Bair Zidian

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