Ennis Britton Co., L.P.A.
Attorneys at Law
Cincinnati • Cleveland • Columbus

ENNIS BRITTON

School Law Review

APRIL 2019

ODE Releases Draft Changes to Licensure Code of Professional Conduct for Ohio Educators

The Licensure Code of Professional Conduct for Ohio Educators ("Code"), which was first adopted in 2008, outlines the framework for professional conduct for individuals who have a license or permit issued by the State Board of Education. On February 13, 2019, the Ohio Department of Education ("ODE") released a revised draft of the Code. The proposed changes highlight areas that ODE and the State Board have placed renewed focus on.

For instance, Principle One was revised to recognize that educators who have an ongoing physical or mental incapacity violate the Code. This includes an addiction to a substance that renders them unable to effectively perform their duties or maintain the care and custody of children. Acts of sexual harassment and dishonesty violate the Principle as well.

ODE clarified, under Principle Two, the expectation for educators to maintain appropriate relationships with students. The Principle was amended to outline that establishing an unprofessional relationship with a student for emotional, romantic or other reasons is prohibited and has severe implications.

Principle Three spells out in more detail how an educator may violate the Code by falsifying, intentionally misrepresenting, willfully omitting, or negligently reporting professional qualifications and/or prior discipline issued by the State Board. It also indicates that an educator commits a violation by failing to cooperate with a formal inquiry or investigation of any state or federal agency.

Additional language was added in Principle Six, titled "Use, Possession, or Unlawful Distribution of Alcohol, Drugs, and Tobacco," specifically to detail professional conduct of teachers in their personal behavior outside of school. It states that teachers may not engage in habitual use of alcohol as demonstrated by multiple alcohol-related convictions during a five-year timespan.

Cincinnati: 1714 West Galbraith Road • Cincinnati, OH 45239 • (513) 421-2540 • Toll-Free Number: 1 (888) 295-8409
Cleveland: 6000 Lombardo Center • Suite 120 • Cleveland, OH 44131 • (216) 487-6672
Columbus: 300 Marconi Boulevard • Suite 205 • Columbus, OH 43215 • (614) 705-1333

www.ennisbritton.com | www.twitter.com/EnnisBritton | www.linkedin.com/company/ennis-britton-co-lpa

A new Principle was created to address technology in light of the ever-growing use of technology in our schools. Principle Nine requires educators to demonstrate responsible and appropriate conduct when using electronic devices and accessing the data that have been entrusted to them. The Code summarizes the expectation that educators must be diligent in preventing students and others from accessing improper or confidential material on their professional and personal devices. Educators may not present inappropriate, non-school media to students or use technology or social media for inappropriate communications with students. Educators under the Code will be held accountable for reporting online harassment or bullying of a student and will be expected to intervene when aware of illegal or inappropriate images and media involving a student or minor. Educators may not use technology to distribute inappropriate material that could be reasonably accessed by the school community. Lastly, educators may not use school technology for a personal business venture.

The State Board receives and investigates complaints of Code violations and has the authority to issue discipline. Possible discipline for violations range from a letter of admonishment up to the permanent revocation of a license or permit. The draft Code may be accessed at: http://education.ohio.gov/getattachment/Topics/Teaching/Educator-Conduct/Licensure-Code-of-Professional-Conduct-for-Ohio-Ed/2019-DRAFT-Licensure-Code-of-Professional-Conduct-for-Ohio-Educators.pdf.aspx?lang=en-US

Two Boys Were Denied the Opportunity to Compete on Dance Team

In 2018, two boys from Minnesota sued the Minnesota State High School League (the "League") contending that they were denied their 14th Amendment right to Equal Protection under the U.S. Constitution, and their rights under Title IX of the Civil Rights Act. The boys alleged that the League unlawfully discriminated against them on the basis of sex by prohibiting them from competing on the girl's competitive dance team. The boys filed a motion for injunctive relief to require the League to let the boys try out and compete on the team. The District Court denied the motion and the boys appealed to the Eighth Circuit Court of Appeals.

Minnesota State High School League's Bylaw 412 limits competitive dance to female students. The bylaw states "[g]irls' Dance Team, in its current form, may not rise to the level of a gender equity activity for the purpose of Title IX. Schools may individually seek approval from the Minnesota Department of Educations [sic] to have Girls' Dance Team programs recognized as a sport." The League claims that the purpose of the bylaw is to address previous limitations in girls' athletic opportunities. This bylaw is supported by Minnesota state law. Pursuant to Bylaw 412, the boys were denied participation on the competitive dance team. The boys filed a motion for a preliminary injunction prohibiting the enforcement of Bylaw 412. The motion was denied, and the boys filed an appeal.

The League in defense claimed the bylaw helped expand girls' athletic opportunities by limiting the competitive dance team to girls only. According to the evidence submitted by the parties, historically, girls have been the underrepresented sex in Minnesota athletics. However, the school years of 2016-2017 and 2017-2018, the representation of girls in Minnesota athletics was proportional to enrollment, and further the boys were determined to be the slightly underrepresented sex.

The appeals court reversed and remanded the decision of the district court with instruction to issue a preliminary injunction in favor of the boys. The court concluded that the bylaw violated the Constitution's prohibition against discrimination based on sex. Since female participation in athletics remained proportional to the number of female students enrolled in Minnesota schools, there was no legitimate interest to uphold the otherwise discriminatory rule.

***D.M. v. Minnesota State High School League*, No. 18-3077 (8th Cir. 2019).**

Favoritism in Hiring Decisions Does Not Violate Title VII

In *McDaniels v. Plymouth-Canton Cnty Schs.*, the 6th Circuit Court of Appeals affirmed a decision in favor of a school district with regard to a custodian's Title VII gender discrimination claim. The custodian was hired in 1997. She applied for three openings as a Plant Engineer in March and June of 2013 and again in June 2014. She was not chosen for any of the positions, and sued the District claiming gender discrimination in violation of Title VII.

The 6th Circuit Court determined that the employee did establish a prima facie case of discrimination because she was able to show: 1) she was a member of a protected class; 2) she applied for and was qualified for the position; 3) she was denied the position, and 4) was rejected in favor of someone with similar qualifications who is outside of the protected class. In order to prevail, the burden shifted to the District to show a legitimate, nondiscriminatory reason for its hiring decision.

The District offered two reasons for not hiring the female candidate. The District contended that some of their hiring decisions were motivated by members of the hiring committee having a stronger familiarity and personal relationship with the candidates they ended up hiring. The Court explained that Title VII does not prevent employers from favoring employees because of personal relationships. Favoritism may violate Title VII if it is based on a person's status as a member of a protected class, e.g., the person's gender. Because the District's hiring decision was not based on a gender and the employee was unable to prove that the District's stated reason for the hiring decision was merely a pretext for discrimination, the 6th Circuit Court upheld the decision in favor of the District.

What this Means for Your District

School districts do not violate Title VII when they favor employees due to personal familiarity and relationships in hiring decisions as long as it is not based on the status of belonging to a protected class, such as race or gender.

***Paula McDaniels v. Plymouth-Canton Community Sch.*, No. 17-2412 (6th Cir. 2018)**

Family Medical Leave Act: A Letter From the WHD

On March 14, 2019, the U.S. Department of Labor's Wage and Hour Division (WHD) responded to an inquiry about the Family Medical Leave Act (FMLA) pertaining to whether an employer may delay designating paid sick leave as FMLA leave and whether employers are allowed to lengthen FMLA leave beyond the 12-week entitlement (or 26 weeks in the case of military related FML). The facts provided in the inquiry stated that some employers permit their employees to exhaust their paid leave (sick or other) before designating any additional leave as FMLA-qualifying, even when the initial leave is knowingly FMLA qualifying. The employers relied on an FMLA regulation which provides that employers must first observe employment benefit programs that have greater benefits than those established by the FMLA.

The WHD opinion letter states that an employer is prohibited from delaying the designation of FMLA-qualifying leave once it has sufficient information which would indicate the employee's leave is FMLA qualifying. Neither the employer nor the employee may decline the protection provided by the FMLA, even if the employee would prefer such. Upon FMLA leave determination, the employer must provide notice of the designation to the employee within five business days; exceptions are limited to extenuating circumstances. After leave is designated as qualifying, the leave is protected by the FMLA and counts toward the FMLA 12-week entitlement.

The WHD opinion also concludes that an employer is prohibited from expanding the 12-week entitlement or the 26 weeks of military caregiver leave. Providing additional leave would be tantamount to delaying the designation for those using paid leave for an FMLA-qualifying reason. Therefore, if an employee desires to substitute paid leave for unpaid FMLA leave, the time used will not expand the entitlement but will count towards his or her 12- or 26-week entitlement provided by the FMLA.

What this Means for Your District

It is important to review the policies provided by the WHD and compare them with the procedure followed by your district. Failure to follow the procedure for notice of designation may result in claim of interference with, restraint on, or denial of the exercise of an employee's FMLA rights. There is nothing in the FMLA that prohibits employers from adopting policies that are more generous than FMLA. For example, an employer could adopt a policy providing its own 12-week period of job-protecting leave for qualifying employees. However, those policies may not expand on the 12- or 26-week entitlement provided by the FMLA.

Changes Coming for Body Worn Camera and Dashboard Recordings

A new law may impact the obligations of schools, School Resource Officers, and law enforcement agencies in responding to a request for dash cam or body cam recordings. HB 425, which added new exceptions to the R.C. 149.43 definition of public records, becomes law on April 8, 2019. Under this new provision, portions of a body worn camera (BWC) or dashboard recording are not included in the definition of a public record. Those exceptions include:

- The image or identity of a child, or information that could lead to the identification of a child, who is the primary subject of recording, if police know or have reason to know the subject is a child.
- The death of a person or images of a dead body, unless the death was caused by a police officer or if the executor or administrator of the deceased's estate grants consent to production of the images. Similarly, images of grievous bodily injury or acts of severe violence resulting in severe physical harm are excluded, unless the same applies.
- Images of the death of a police officer or first responder in the course of their duties, unless the executor or administrator of the deceased's estate gives consent.
- Depictions of acts of severe violence resulting in severe physical harm to a police officer or first responder in the course of their duties, unless consent is obtained.
- Images of a person's nude body unless consent is obtained.
- Protected health information or other identifying information including the identity of a person in a health care facility who is not the subject of a law enforcement encounter.
- Any information that could identify a victim of a sex offense, menacing by stalking or domestic violence.

Further exceptions are:

- Information that could identify an informant and endanger the safety or property of such information.
- Personal information of those not arrested, charged, given a written warning or cited by law enforcement.
- Proprietary police contingency plans or tactics for crime prevention, public order and safety.
- Personal conversations unrelated to work of law enforcement and employees, or conversation between a police officer and citizen not concerning law enforcement activities.
- The interior of a residence or the interior of a business not open to the public, unless the residence is the location of an adversarial encounter or use of force by law enforcement.

If a request for body cam footage is denied pursuant to these provisions, the law now allows the requester to file either a mandamus action in civil court or a complaint in the court of claims. To receive the requested relief, there must be clear and convincing evidence that the public interest in recording outweighs the privacy interests and other interests asserted as reasons to deny release.

It is unknown how, or if, this new law will impact the case of *Cincinnati Enquirer v. City of Cincinnati Police Department* set for oral argument before the Ohio Supreme Court on May 19, 2019. Cincinnati Enquirer stems from a plainclothes police response to a call for adult children to leave the home of a parent, resulting in the use of force and a call for additional police reinforcements at the home. As expected, the responding officers were equipped with BWCs. The Cincinnati Enquirer requested the BWC footage and the request was denied based on the claim that the images constituted a Confidential Law Enforcement Investigatory Record (CLEIR). A CLEIR is not a public record if it pertains to a "law enforcement matter" involving a specific suspicion of misconduct and the investigating agency has the authority to enforce the law. The Cincinnati Police Department further claimed that disclosure of the footage would compromise the prosecution of the defendants (two adults in the home) by revealing work product. Nonetheless, the footage was disclosed after defendants plead guilty. If reviewed in conjunction with this new legislation, the court may provide further directive on the relation between BWC or dash cam recordings and the broader personal information revealed by such footage.

Special Education Spotlight: *Fry* Won't Bar 504 Claim Involving Child's Exclusion from Afterschool Program

The Sixth Circuit recently decided a case by interpreting and applying the principles set forth in the U.S. Supreme Court case *Fry v. Napoleon Community Schools*. The Supreme Court held in *Fry* that a parent need not exhaust the administrative procedures required under the Individuals with Disabilities Education Act ("IDEA") if the parent's claim is something other than the denial of a free appropriate public education ("FAPE"). The *Fry* Court encouraged judges to consider two questions when determining whether a claim should proceed:

> 1) Could the student assert the same claim against a public entity other than a school, such as a theatre or public library?
>
> 2) Would an adult be able to bring the same claim against the district?

If the answer to both questions is "yes", then the matter is not likely to involve a denial of FAPE and parents would not be required to exhaust their administrative remedies under IDEA.

In this case, the parent of a 7-year-old child with autism sued a school district under Section 504 and the ADA, claiming that the district discriminated against their daughter when it denied the student's enrollment in an afterschool program because she was not toilet trained. The District Court concluded that the case was related to FAPE primarily because it was part of a broader due process complaint filed previously. The due process complaint was settled before it reached court.

The Sixth Circuit overturned the district court's decision and remanded the case. The Sixth Circuit noted that the parent's lawsuit applied strictly to children and therefore did not fit within the hypothetical's framework set out in *Fry*. The parents in this case filed a complaint specifically regarding the student's exclusion from an aftercare program. The court recognized that this suit could not be brought against other public facilities nor could an adult bring the same claim against a school regarding the need for toileting assistance. The question therefore to be considered in this case is whether or not the same claim could be brought against another public childcare provider. This ultimately led the court to rule that the exclusion from the aftercare program was unrelated to the student's FAPE and therefore the parents did not need to exhaust administrative remedies before suing under Section 504 and Title II of the ADA.

What This Means for Your District

The hypothetical questions set out in *Fry* do not fit in every situation. Districts should be aware that a parent need not exhaust administrative remedies before bringing a lawsuit if the matter is unrelated to FAPE. Decisions issued by the Sixth Circuit are controlling in Ohio. We anticipate that cases such as this may increase in the future, especially in light of this decision and the earlier *Fry* decision.

***Sophie G. by Kelly G. v. Wilson County Schs.*, 72 IDELR 143 (6th Cir. 2018)**

Teacher Payment Reminder

On March 19, 2019, House Bill 491 took effect. This Bill makes important changes to the procedure of teacher payment procedures that schools must immediately comply with. Before any teacher can be paid, the district must follow the new procedures set forth below. Districts are encouraged to review the new procedures and take steps to bring the district into conformity. The new standards apply to any pending proceedings or investigations.

1. The teacher must file all reports required by ODE, the school district and the superintendent, along with his or her teacher's license, with the superintendent (or designee);

2. The treasurer must receive a written statement from the superintendent (or designee) that the teacher has filed with the superintendent (or designee) all required reports; and

3. The treasurer must receive a written statement from the superintendent (or designee) that the teacher has filed with the superintendent (or designee) a legal license to teach the subjects or grades taught and the dates of its validity.

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.

- **April 8**: Deadline for voter registration for May election – 30 days before election (RC 3501.10(B), 3503.01, 3503.19)
- **April 29**: Deadline to submit certification for income tax levy to Ohio Department of Taxation for August 6 Special Election (RC 5748.02)
- **May 3**: Deadline to submit August emergency or current operating expenses tax levy to county auditor for August special election (RC 5705.194, 5705.195, 5705.213)
- **May 7**: Primary election day (RC 3501.01, 3501.32)

Upcoming Presentations

SAVE THE DATE!
2018–2019 ADMINISTRATOR'S ACADEMY SEMINAR SERIES

April 18, 2019: Student Privacy
Keep current on FERPA, CIPA, COPPA, and other federal and state laws that impact student – and staff – privacy issues in your district.

July 11, 2019: 2018–2019 Education Law Year in Review
Find out the new education-related laws that passed in the budget bill and other legislation, as well as important court decisions and other changes that affect Ohio schools.

You spoke, and we listened! Based on client input regarding the preferred format for Ennis Britton's Administrator's Academy Seminar Series, these presentations will now be offered via a live video webinar professionally produced by the Ohio State Bar Association. As always, an archive will be available also.

Participants must be registered to attend each event. All three webinars will be archived for those who wish to access the event at a later time. You may register on our website or contact Kayla via email or phone at 513-674-3451.

OTHER UPCOMING PRESENTATIONS

April 9: Brown County ESC & Southern Ohio ESC
Presented by Bronston McCord and Gary Stedronsky

April 25: Ohio Association of School Business Officials Annual Workshop
Into the Woods: Advanced Public Records Law
Presented by Hollie Reedy

April 25: Ohio Association of School Business Officials Annual Workshop
Leave it to Me: Understanding Leave Options Available to School Employees
Presented by Gary Stedronsky

April 26: State Support Team 2
Special Education Legal Update

April 27: 2019 OSBA Board Leadership Institute
Hot Topics in School Law for Board Members
Presented by John Britton

May 7: 2019 OAEP Spring Conference
Attendance, Custody, & Divorce for Newbies
Presented by Hollie Reedy

Want to stay up-to-date on important topics in school law?

Follow Us on Twitter: @EnnisBritton
Check out Ennis Britton's Education Law Blog.

Need Access to a Webinar Archive?

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 Kayla via email or phone at 513-674-3451. Archived topics include the following:

Labor and Employment

- School Employee Nonrenewal
- Employee Licensure
- School Employee Leave and Benefits
- Managing Workplace Injuries and Leaves of Absence
- Requirements for Medicaid Claims
- Discrimination: What Administrators Need to Know

Student Education and Discipline

- New Truancy and Discipline Laws – HB 410
- Transgender and Gender-Nonconforming Students
- Student Discipline

School Finance

- School Levy Campaign Compliance

School Board Policy

- What You Should Know about Guns in Schools
- Crisis, Media, and Public Relations
- Low-Stress Solutions to High-Tech Troubles
- Ohio Sunshine Laws

Special Education

- Three Hot Topics in Special Education
- Supreme Court Special Education Decisions
- Special Education Scramble (2018)
- Special Education Legal Update (2017)
- Special Education Legal Update (2016)
- Effective IEP Teams

Legal Updates

- 2017–2018 Education Law Year in Review
- 2016–2017 Education Law Year in Review
- 2015–2016 Education Law Year in Review

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. In order 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

Team Members:
Ryan LaFlamme
Bronston McCord
Giselle Spencer
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

Team Members:
Megan Bair
John Britton
Bill Deters
Michael Fischer
Pam Leist
Jeremy Neff
Hollie Reedy
Giselle Spencer
Erin Wessendorf-Wortman

School Finance
Taxes • School Levies • Bonds • Board of Revision

Team Members:
Megan Bair
John Britton
Bill Deters
Ryan LaFlamme
Bronston McCord
Jeremy Neff
Hollie Reedy
Giselle Spencer
Gary Stedronsky

Attorney Directory

Megan Bair
6000 Lombardo Center, Suite 120
Cleveland, Ohio 44131
P: 216.487.6675
C: 330.519.7071
Email: mbair@ennisbritton.com

John Britton
6000 Lombardo Center, Suite 120
Cleveland, Ohio 44131
P: 216.487.6673
C: 216.287.7555
Email: jbritton@ennisbritton.com

William M. Deters II
1714 West Galbraith Road
Cincinnati, Ohio 45239
P: 513.421.2540
C: 513.200.1176
Email: wmdeters@ennisbritton.com

J. Michael Fischer
1714 West Galbraith Road
Cincinnati, Ohio 45239
P: 513.421.2540
C: 513.910.6845
Email: jmfischer@ennisbritton.com

Ryan M. LaFlamme
1714 West Galbraith Road
Cincinnati, Ohio 45239
P: 513.421.2540
C: 513.310.5766
Email: rlaflamme@ennisbritton.com

Pamela A. Leist
1714 West Galbraith Road
Cincinnati, Ohio 45239
P: 513.421.2540
C: 513.226.0566
Email: pleist@ennisbritton.com

C. Bronston McCord III
1714 West Galbraith Road
Cincinnati, Ohio 45239
P: 513.421.2540
C: 513.235.4453
Email: cbmccord@ennisbritton.com

Jeremy J. Neff
1714 West Galbraith Road
Cincinnati, Ohio 45239
P: 513.421.2540
C: 513.460.7579
Email: jneff@ennisbritton.com

Hollie F. Reedy
300 Marconi Boulevard, Suite 205
Columbus, Ohio 43215
P: 614.705.1332
C: 614.915.9615
Email: hreedy@ennisbritton.com

Giselle Spencer
6000 Lombardo Center, Suite 120
Cleveland, Ohio 44131
P: 216.487.6674
C: 216.926.7120
Email: gspencer@ennisbritton.com

Gary T. Stedronsky
1714 West Galbraith Road
Cincinnati, Ohio 45239
P: 513.421.2540
C: 513.886.1542
Email: gstedronsky@ennisbritton.com

Erin Wessendorf-Wortman
1714 West Galbraith Road
Cincinnati, Ohio 45239
P: 513.421.2540
C: 513.375.4795
Email: ewwortman@ennisbritton.com

Cincinnati Office: 513.421.2540

Cleveland Office: 216.487.6672

Columbus Office: 614.705.1333