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HB 244 Prevents Discrimination Against Unvaccinated Staff and Students

On July 14, 2021, Governor DeWine signed HB 244 into law. The bill enacts R.C. 3792.04, which states that public schools may not "...require an individual to receive a vaccine for which the United States food and drug administration has not granted full approval, or discriminate against an individual who has not received a vaccine described in division (B)(1) of this section, including by requiring the individual to engage in or refrain from engaging in activities or precautions that differ from the activities or precautions of an individual who has received such a vaccine."

As of today, none of the available vaccines have received full FDA approval, although at least two companies have applied. At this point, adult vaccinations may be fully approved sooner than vaccines for children. As of October 11 when the bill takes effect, a school district may not require a student or employee to be vaccinated in order to attend school or work, nor may a district require unvaccinated individuals to take precautionary measures that vaccinated individuals are not required to take.

The law's requirements apply specifically to schools, and not to other political subdivisions such as health departments. Districts should rely on local health departments to determine quarantine requirements for staff and students whether they are vaccinated or not. Consequently, if a district is presented with a situation in which contact tracing indicates that vaccinated and/or unvaccinated students are found to have been exposed, local or state health orders may require that an unvaccinated student to remain home from school during the quarantine period and allow a vaccinated student to remain in school and not quarantine in accordance with applicable health orders.

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Special Education Spotlight: Exhausting Administrative Remedies Under IDEA

On June 25, 2021, the federal 6th Circuit Court of Appeals decided *Perez v. Sturgis Public Schools* (MI) clarifying the requirement to exhaust administrative remedies under IDEA. While not the most exciting topic within special education, the exhaustion requirement is an essential tool to contain costs and keeps disputes focused on the needs of the student.

Perez is an adult who is deaf and has other disability needs that are not specified in the decision. When he first enrolled in Sturgis Public Schools he and his parents only spoke Spanish. Perez alleges that his needs were not met, and that Sturgis misled him and his family about his academic progress. He alleges that the aide assigned to him was not appropriately trained to assist deaf students, and that as he fell behind, Sturgis kept assuring his parents that he was progressing academically. It was not until shortly before his planned graduation that he was informed that he had not earned a diploma.

Perez and his family filed a due process complaint under IDEA (i.e. sought an administrative remedy). The family and district reached a settlement prior to the due process hearing. As part of the settlement Perez was assigned to Michigan's state school for the deaf. Shortly after this settlement, Perez filed a federal lawsuit alleging violations of the ADA and state laws.

Sturgis moved to dismiss, arguing that Perez had failed to exhaust administrative remedies. While Perez had filed a due process complaint, the settlement and resulting withdrawal of the complaint meant that administrative remedies had not been exhausted. Perez presented a two part argument: 1) Exhaustion did not apply because the claims were under the ADA; or 2) An exception to exhaustion should apply.

Regarding the first argument of Perez, the court applied the two hypothetical questions from the Supreme Court's *Fry* decision – 1) Could the same claim be made against a non-school public facility and 2) Could an adult in the school setting make the same claim – to “determine whether [the] claim is fundamentally about the denial of an education” and therefore subject to the exhaustion requirement. Because Perez's allegations centered on the inadequacy of his educational services, the court concluded that “under *Fry*, it's clear that Perez seeks relief for the school's failure to meet its IDEA obligations” and therefore the exhaustion requirement applied.

Turning to Perez's arguments for an exception to exhaustion, the court flatly rejected the existence of a futility exception. Acknowledging that a 1988 decision from the Supreme Court referenced futility, the court explained that an explicit exhaustion requirement was not part of the version of IDEA before the Court in 1988. Additionally, the Supreme Court has warned against lower courts creating exceptions to exhaustion requirements set forth in other laws. The court also rejected the argument that filing a due process complaint and settling it means that administrative remedies have been exhausted. Rather, exhaustion requires moving through due process hearings and appeals before appealing to court.

Only after reaching the above conclusions did the court engage in a hypothetical discussion of the applicability of a futility exception. The court found that no exception could be recognized based on the facts before it, because “the exhaustion requirement would have worked just as it is supposed to” if administrative remedies had been pursued by Perez. The relief sought was for the alleged denial of FAPE. The administrative process could have provided a remedy for this denial, “even if not the specific remedy [Perez] might have wanted.” In other words,

even though Perez was seeking monetary damages for the alleged failure of the District to provide an adequate education, IDEA could have offered a different remedy to the same alleged failures (e.g. compensatory education).

Because Perez had failed to exhaust his remedies his lawsuit was dismissed.

What does this mean for your district?

In its 2017 *Fry* decision the Supreme Court clarified and affirmed the exhaustion requirement of IDEA. More specifically, it made clear that litigation filed under a different law, such as the ADA, cannot evade the exhaustion requirement if the complaint is ultimately about a denial of FAPE. With the *Perez* decision, the 6th Circuit further clarifies the exhaustion requirement by finding that the settlement of a due process complaint does not satisfy exhaustion, and by finding that either there is no futility exception or if there is it is even more narrow than previously thought. This decision is good news for districts and students because it ensures that nearly all disputes must first work through the less costly and less time-consuming administrative remedies under IDEA before anyone lands in court.

Ohio State Budget: Updates to the Fair School Funding Plan

Nearly thirty years after the *DeRolph* litigation challenging the constitutionality of Ohio's school funding system was filed, and twenty years since the first three rulings from the Ohio Supreme Court declaring the system unconstitutional, significant changes to the school funding system have been enacted. As part of the new state budget, Ohio's recently approved Fair School Funding Plan (FSFP) will provide \$12.4 billion in 2022 and \$12.6 billion in 2023 to districts across the state.

While these funding levels are comparable to recent funding, under the FSFP, the state's cost per pupil is based on actual expenses faced by a district, such as teacher salaries and benefits, transportation, technology needs, and the number of administrators. This is a significant move away from the practice of "residual budgeting" that in the past has allegedly guided school funding decisions based on available resources without consideration of actual student needs.

One of the bases for the prior funding system repeatedly being declared unconstitutional was the overreliance on highly variable local property taxes. Under the new format, funding will be determined by a hybrid of property tax values *and* district residents' income. This new structure will likely phase out the previous "guarantee" that districts would not lose funding each year due to changes in enrollment, property values, and local incomes. Conversely, districts who previously had caps on funding will benefit under the new system.

Two areas of particular note include funding for mental health and student demographics. Gov. DeWine had previously advocated for programs that would enhance a child's educational needs outside of normal school requirements, particularly as it related to mental health. The FSFP incorporates wellness spending on a permanent basis.

Separately, the state will continue to support students in special education students and students in gifted and technical career programs by growing them as a percentage of the base cost instead of a specific dollar amount as

previously tendered. The exception to the rule is underprivileged students which will rise from \$272 to \$422 per student with a goal of transferring that funding to a percentage down the road.

The state budget also alters the method of directing funding to Jon Peterson and Autism Scholarship Program providers and school vouchers. Prior funding involved an overly complex system of dollars being sent to individual school districts and then transferred to private providers. While these “scholarship” programs will continue to divert public school funding from public schools, the budget provides for a simpler, more direct funding mechanism.

While the FSP addresses some fundamental and long-standing concerns regarding Ohio’s school funding system and largely tracks with the “Cupp-Patterson Plan” that has been in the works for a couple of years, it must be noted that no long-term commitment is made in the two-year budget. Moreover, the funding levels in the budget are based on an anticipated six-year phase-in. As a result, the short-term changes in actual funding levels are not reflective of the longer-term objective for a fairer, constitutional funding system.

Parental Consent in Disclosing Positive COVID-19 Test Results

A FERPA complaint was recently filed with the Student Privacy Policy Office through the U.S. Department of Education after a parent discovered their child’s COVID-19 positive test results had been shared with school staff beyond their child’s teacher and classmates. In general, written parental consent is required to share personal health details, however in this case, a school official felt compelled to share the information to prevent a schoolwide outbreak of COVID-19.

Under the “health and safety” exception to FERPA’s parental consent rule, the district may nonconsensually disclose a student’s education records to appropriate parties if knowledge of that information is necessary to protect the health or safety of the student or other individuals. The Student Privacy Policy Office found that there was not a violation of FERPA as there was reasonable cause to believe the health and safety exception applied to sharing the COVID positivity results within a school building in order to protect the health and welfare of students and staff.

So, how do you determine whether a “health or safety emergency” exists? The Student Privacy Policy Office encouraged districts to look at the totality of the risk to the population as whole – including both students and staff. If an articulable or significant threat is determined to exist, then districts may disclose information from school records to protect the health and safety of those in its care.

Keep in mind that making this determination is circumstantial and we encourage you to consult one of our attorney’s before navigating these waters alone.

Upcoming Presentations

We are currently scheduling administrator retreats for the 2021-2022 school year (in person or via videoconference). Contact us soon if you would like to schedule a retreat for your administrators, as calendars book up quickly.

August 2: EB Webinar Series – *SCOTUS Ruling on High School Cheerleader’s Free Speech*
Presented by The Ennis Britton Team

August 3: Greene County – *Legal Update*
Presented by Bronston McCord

August 5: High Schools That Work – *Legal Update*
Presented by Erin Wessendorf-Wortman

August 5: Trumbull County Administrator’s Retreat – *Legal Updates for Principals*
Presented by Pamela Leist

August 6: Northwest Ohio ESC Administrator’s Retreat – *Legal Update*
Presented by Bronston McCord, Ryan LaFlamme

August 6: Trumbull County Administrator’s Retreat – *Special Education Year in Review*
Presented by Pamela Leist

August 6: Attendance, Tuition and Custody Law Workshop – *“I’m Back!” Handling Students Returning from Atypical Attendance Situations*
Presented by Giselle Spencer

August 6: Ashtabula ESC Administrator’s Retreat – *Legal Update*
Presented by Hollie Reedy

August 6: Ashtabula ESC Administrator’s Retreat – *Special Education Law Year in Review*
Presented by Pamela Leist

August 27: OASPA – *Boot Camp*
Presented by the Ennis Britton Team

August 31: LRP National Webinar – *Anxiety’s New Look – Post-Pandemic Child Find and Eligibility Considerations*
Presented by Jeremy Neff

September 10: BASA Communications Conference – *Effectively Managing Contentious Board Meetings*
Presented by Pamela Leist and Hollie Reedy

Follow Us on Twitter: [@EnnisBritton](https://twitter.com/EnnisBritton)

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 via [email](#) or phone at 614.705.1333. 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
- Student Privacy

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 may have a question in a more specialized area of education or public law. In order to help you obtain legal support quickly, 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
Robert J. McBride
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
Kyle Wheeler

Special Education

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

Team Members:

John Britton
Bill Deters
Michael Fischer
Pam Leist
Jeremy Neff
Hollie Reedy
Giselle Spencer
Erin Wessendorf-Wortman
Kyle Wheeler

School Finance

Taxes • School Levies •
Bonds • Board of Revision

Team Members:

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