

McGown & Markling Co.

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Serving Ohio Schools

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SCHOOL LAW NEWSLETTER

A Note on Board Removal Actions

On September 27, 2004, Madison County Court of Common Pleas Judge Robert Nichols ordered three members of the Madison-Plains Local (Madison) Board of Education to be removed from office for violations of the Ohio Open Meetings Act and Ohio Public Records Act, engaging in nepotism, delegating board authority, authorizing payment to unlicensed individuals, and failing to report child abuse/neglect. A copy of the 130 page decision can be found at www.co.madison.oh.us.

There are strong concerns over whether this decision will survive an appeal. Nevertheless, this case serves as an important reminder to all school officials of the importance of strictly construing all school laws, including open meeting, public records, and the duty to report child abuse/neglect.

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Please route this newsletter to:

- Principals
- Pupil Services
- Special Education
- Board Members
- Other Administrators

A Note on Physical Therapist Evaluation and Treatment

Physical therapists may now evaluate and treat patients without a prescription or referral under R.C. 4755.481. Previously, a physical therapist could only practice pursuant to a prescription or referral. Now, if a therapist holds appropriate training and education, he or she may treat a patient without such a prescription or referral, but must, upon consent of the patient: (1) inform the patient's treating health professional within five business days of treatment and (2) make a referral or seek consult if within thirty days of initial visit no substantial progress is shown in the patient's condition. A template authorization form is contained on [Page 5](#).

A Clarification on the Grandparent Caretaker Legislation

On July 20, 2004, House Bill 130 took effect. The school law firm of McGown & Markling Co., L.P.A. has received numerous questions regarding this new Grandparent Caretaker Legislation. The application of this new law to current residency laws is simplified in the checklist on [Page 6](#). To obtain a courtesy copy of our updated residency handbook, please contact us at info@mcgownmarkling.com.

A Note on the New Ohio Pupil Transportation Regulations

On October 1, 2004, new Ohio Pupil Transportation regulations took effect. The school law firm of McGown & Markling Co., L.P.A. has prepared a comprehensive transportation handbook which addresses these new regulations. To obtain a courtesy copy of our transportation handbook, please contact us at info@mcgownmarkling.com.

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Volume I, Issue III, July-
November 2004



June-October 2004 Ohio School Legal Update

In *Elk Grove Unified School District v. Newdow* (June 14, 2004), 124 S.Ct. 2301, 159 L.Ed.2d 98, 2004 U.S. LEXIS 4178, a noncustodial father, who was an atheist, sued school district for requiring his daughter to recite the Pledge of Allegiance. Because the Pledge contained the words "under God," he argued that it was a religious indoctrination that violated the First Amendment. The United States Supreme Court ruled that in the custody hearings, the father had been divested of his rights to sue on his child's behalf and, thus, lacked standing to vest the court with jurisdiction to decide the case.

More Cases on [Pages 2-3](#).
Legislation/Ohio Attorney General Opinions on [Page 4](#).

Announcements

Susan McGown has been appointed to serve on the Kent State University College and Graduate School of Education Development Board.

Matthew John Markling has been reappointed to serve as a Senior Lecturer with the University of Akron College of Education.

The school law firm of McGown & Markling Co., L.P.A. has been accepted for inclusion in the *2005 Best's Directory of Recommended Insurance Attorneys and Adjusters*.

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SCHOOL LAW NEWSLETTER

June to October 2004 Ohio School Case Briefs

As discussed in our last *School Law Newsletter*, in *Yates v. Mansfield Bd. of Edn.*, 2004-Ohio-2491, the Ohio Supreme Court has ruled a school board may be held liable when its failure to report the sexual abuse of a minor student by a teacher proximately results in the sexual abuse of another minor by the same teacher.

In *Communities for Equity v. Michigan High School Athletic Association, Inc.* (C.A.6, July 27, 2004), 2004 U.S. App. LEXIS 15437, the United States Court of Appeals for the Sixth Circuit found that the Michigan High School Athletic Association's practice of scheduling female sports during non-traditional seasons discriminated against female athletes on the basis of gender.

In *Doe v. Porter* (C.A.6, July 7, 2004), 2004 U.S. App. LEXIS 11031, a Tennessee board of education allowed a local college to conduct a Bible ministry in three of its county schools for thirty minutes, one day a week on school property during the school day. The United States Court of Appeals for the Sixth District found that the program fostered excessive entanglement between the state and religion and also communicated a governmental endorsement of religion in violation of the First Amendment.

In *Mitchell v. Fanfhauser* (C.A.6, July 14, 2004), 2004 U.S. App. LEXIS 14383, the United States Court of Appeals for the Sixth District found that a tenured public employee is entitled to notice of termination and an opportunity to be heard, as well as a meaningful, full hearing with the possibility of judicial review. The Court held that two hearings (pre-termination and post-termination) are not necessary if the pre-termination hearing is meaningful, i.e. it ferrets out bias, pretext, deception, and corruption by the employer in discharging the employee.

In *Rhoads v. Board of Educ. of Mad River Local Sch. Dist.* (C.A.6, July 8, 2004), 2004 U.S. App. Lexis 14288, the plaintiff (a bus driver) failed a random drug test and subsequently resigned in lieu of being terminated. The plaintiff later tried to rescind her resignation claiming disability discrimination. The United States Court of Appeals for the Sixth District held that (1) the district did not violate the plaintiff's rights by refusing to accept a rescission of resignation and (2) the plaintiff did not prove she had a disability.

In *Weast v. Schaffer* (C.A.4, July 29, 2004), 377 F.3d 449, 2004 U.S. App. LEXIS 15617, the United States Court of Appeals for the Fourth District held that parents who initiate due process proceedings under the IDEA bear the burden of proof. This case should have important implications regarding who bears the burden of proof in cases brought in Ohio state or federal courts.

In *Williams v. Cambridge Bd. of Educ.* (C.A.6, Jun. 4, 2004), 370 F.3d 630, 2004 U.S. App. LEXIS 10951, three days after the Columbine High School killings, several junior high school students reported that two boys already on juvenile probation planned to commit acts of violence. As a result, the school initiated an emergency removal and subsequently the boys were arrested and placed on house arrest. The United States Court of Appeals for the Sixth District held that 1) probable cause existed for the student's arrests under the Fourteenth Amendment and 2) due process in school discipline required only adequate notice of the charge, an explanation of the evidence supporting the charge, and an opportunity to respond.

In *Winzer v. School Dist. for the City of Pontiac* (C.A.6, July 7, 2004), 2004 U.S. App. LEXIS 14166, under a Title IX claim for peer-on-peer sexual harassment, the United States Court of Appeals for the Sixth District held for the district because the plaintiff could not prove that the district was deliberately indifferent to known acts of student-on-student sexual harassment.

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In *Adams County/Ohio Valley Sch. Dist. Bd. of Edn. v. South Central Ohio Educ. Serv. Ctr. Governing Bd.*, 158 Ohio App. 3d 253, 2004-Ohio-4256, 814 N.E.2d 1239, a court found that under Ohio's Sunshine Laws a board of education could be considered a "person" for the purpose of challenging an ESC's creation of new school districts.

In *Cox v. Zanesville City Sch. Dist. Bd. of Educ.*, 5th Dist. No. 04 CA 14, 2004-Ohio-4253, a Board was ordered to reinstate a teacher because it failed to comply with R.C. 3319.111(B)(3) when the teacher's evaluation included feedback regarding the teacher's areas of improvement but failed to offer recommendations or means by which the teacher could obtain assistance to make improvements.

In *Daniel v. Cleveland Mun. Sch. Dist.*, 5th Dist. No. 83541, 2004-Ohio-4632, the Board had statutory immunity in negligent retention claim where no showing of malice or bad faith in discretionary act of hiring or supervision.

In *Lines v. Ashtabula Area City School Dist.*, 11th Dist. No. 2003-A-0062, 2004-Ohio-4535, where a board was sued for negligence for inadequate lighting, a court held that lighting is a discretionary function and, as a result, the board was statutorily immune from liability.

In *Milhoan v. Eastern Local Sch. Dist. Bd. of Educ.*, 157 Ohio App.3d 716, 2004-Ohio-3243, 813 N.E.2d 692, the Meigs County Court of Appeals held that the trial court did not have jurisdiction to hear an appeal from a board of education's decision not to renew a non-teaching employee's limited contract. The court held that the board did not have to comply with the termination procedures in R.C. 3319.081(C) since non-renewing an employee's contract was not the same as terminating it.

In *Napier v. Centerville City Schs.*, 157 Ohio App.3d 503, 2004 Ohio 3089, 812 N.E.2d 311, the Montgomery County Court of Appeals found that a handbook was not an implied contract that overcame the at-will nature of the job, as the handbook was merely a unilateral statement of rules and policies that created no rights or obligations.

In *State ex rel. Ohio Congress of Parents and Teachers v. State of Ohio Bd. of Educ.*, 10th Dist. No. 03AP-508, 2004-Ohio-4421, the court refused to dismiss four out of ten claims of a complaint alleging the unconstitutionality of community schools. The appeals court remanded the case which is now pending in a trial court.

In *Spencer v. Lakeview Sch. Dist.*, 11th Dist. No. 2002-T-0175, 2004-Ohio-5303, a court held that a school district's immunity under R.C. 2744 is constitutional.

In *Sturdivant v. Toledo Bd. of Educ.*, 157 Ohio App.3d 401, 2004-Ohio-2878, 811 N.E.2d 581, in accordance with a collective bargaining agreement, a teacher under a limited contract was not rehired following her first year. The teacher appealed to common pleas court under R.C. 3319.11 and 3319.111. The trial court remanded the matter to the school board for an additional hearing pursuant to R.C. 3319.16. The Lucas County Court of Appeals held that R.C. 3319.16 applies only to teachers with continuing contracts, not those with limited contracts.

In *Thayer v. West Carrolton Bd. of Educ.*, 2nd Dist. No. 20063, 2004-Ohio-3921, the Montgomery County Court of Appeals held that the school district enjoyed sovereign immunity against employer intentional tort, and further, enjoyed sovereign immunity against claim for failure to provide a safe workplace because a relevant statute did not expressly impose liability for same.

To request a copy of an entire decision, please e-mail us at info@mcgownmarkling.com.

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SCHOOL LAW NEWSLETTER

**June to October 2004
Legislation/Ohio Attorney General Opinions**

Am. Sub. H.B. 106, Effective 9/16/04

Upon discharge and release from custody of Department of Youth Services certain records are required to be released to the juvenile court and superintendent of the school district in which the child is entitled to attend.

Established a one (1) year conditional teaching permit for intervention specialists, not to be issued beyond 11/20/04. This bill will remove the 11/20/04 deadline established by H.B. 196.

The State Board of Education or Superintendent of Public Institution must request a random background check on all who apply for any certification, license, or permit issued by the State Board.

Purchase of services or supplies by reverse auction satisfies the law regarding competitive bidding.

Requires county probate courts instead of educational service center governing boards, to perform duties of and fill vacancies of boards of education of local school districts

2004 Ohio Atty.Gen.Ops. No. 22:

The Attorney General concluded that if a county auditor establishes a schedule of specified dates for paying advances of real property taxes to each board of education that submits a resolution requesting advances pursuant to the schedule, and if the county auditor fails to advance funds as required by the schedule, then the county must pay interest in accordance with R.C. 135.351(C).

2004 Ohio Atty.Gen.Ops. No. 25:

A person may serve simultaneously as a member of the board of education of an exempted village school district and clerk-treasurer of a noncharter village located within the school district, provided that as a board member he/she does not participate in any deliberations, discussions, negotiations, or votes concerning contracts with the village, tax exemptions granted by the village, or tax levies or bond issues for additional funding when the village has placed such a levy or bond issue on the ballot. As village clerk-treasurer, he/she may not prepare or present the village's tax budget to the county budget commission.

2004 Ohio Atty.Gen.Ops. No. 27:

The Attorney General concluded that where changes in boundaries rendered four out of five members nonresidents of the district, the one remaining board member does not constitute the board and can not fill the vacancies.

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Parent/Guardian Written Authorization for Notification

Child's name: _____ Date of Birth: _____

I give consent
I do not give consent

For a _____ School's Physical Therapist to inform my child's (circle one) physician, chiropractor, dentist, podiatrist, certified registered nurse anesthetist, clinical nurse specialist, certified nurse-midwife, or certified nurse practitioner, of a physical therapy evaluation, to be used for the purpose of determining educational programming needs.

I understand that I have the right to revoke this authorization, in writing, at any time by sending such written notification to the physical therapist listed below. I also understand that my revocation is not effective to the extent that the persons I have authorized to use and/or disclose that my child will have a physical therapy evaluation may have acted in reliance upon this authorization.

I understand that I do not have to sign this authorization and that _____ School District may not condition treatment on whether I sign this authorization.

I understand that information used or disclosed pursuant to this authorization may be subject to re-disclosure by the recipient and no longer protected by federal laws and regulations regarding the privacy of my child's physical therapy evaluation information.

This authorization expires on [please list a specific date or event].

I certify that I have received a copy of this authorization.

Print Name of above professional: _____

Phone Number: _____

Signature: _____ Date: _____

Parent or Guardian

Notification of Physical Therapy Evaluation

_____ (Child's Name) has been evaluated by _____, on _____, at _____.

(School or Location)

Date of Notification: _____

Method of Notification: _____ (Phone, Fax, etc.)

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Grandparent/Caretaker Checklist

- ✓ The student is under 18 years of age.
- ✓ The student resides with the grandparent/caretaker (GC).
- ✓ The GC resides in your school district.
- ✓ The GC produces a power of attorney/caretaker authorization affidavit that is **identical in form and content** to R.C. 3109.53/R.C. 3109.66.
- ✓ The power of attorney/caretaker authorization affidavit is signed by the parent/guardian/custodian (PGC) **and** the GC.
- ✓ All signatures on the power of attorney/caretaker authorization affidavit are notarized.
- ✓ The power of attorney/caretaker authorization affidavit is signed and notarized by **both** parents unless a court order states otherwise or the other parent cannot be located with reasonable efforts.
- ✓ The power of attorney/caretaker authorization affidavit is created for the best interest of the student as determined by the PGC. This cannot be for academic or interscholastic purposes.
- ✓ The power of attorney/caretaker authorization affidavit was filed in your juvenile court **no later than five days** after it was executed.
- ✓ The school requested filing verification from the court. This is not required, but is highly recommended.
- ✓ The school is unaware of:
 - any guardianship/adoption proceedings;
 - any temporary/permanent/legal custody proceedings;
 - any planned permanent living request;
 - any ex parte emergency custody order;
 - any divorce/dissolution/legal separation/annulment/allocation of parental rights and responsibilities proceedings;
 - any revocation of the power of attorney/caretaker authorization affidavit by PGC; or
 - any termination of the power of attorney/caretaker authorization affidavit by court.

A power of attorney/caretaker authorization affidavit lasts for one year and places the GC in the shoes of the PGC with respect to all school related matters.

For students with disabilities, invitations to meetings should be sent to the parents if possible.

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