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Administering Medication at School: Recent Developments

by Maureen Anichini Lemon and JaneAnn Monson

In June 2018, the Illinois State Board of Education (ISBE) issued the first updated Guidance Document on the Administration of Medication in Illinois Schools (Guidance) in 18 years. Unlike its predecessor, the new Guidance provides a Question and Answer Format (summarized below) to the four principles found in the School Code (105 ILCS 5/10-22.21b).

(1) Administration of medications at school and school-related activities should be discouraged unless necessary for the critical health of the student.

The use of the word "medication" in a school district's policy on the administration of medication to students is broader than the common term may suggest. The word includes any product that contains 'drugs,' as that term is defined in the Illinois Pharmacy Act. This includes herbal medicines, aromatherapy, and essential oils. Although a dietary supplement is not, by definition, a 'drug,' the Guidance indicates that a dietary supplement may be treated as medication if the school is being asked to give the dietary supplement to a student. Additionally, according to the Guidance, insect repellants and sunscreen should also be treated as medication, requiring a medical order and parent request before being administered to students, because they contain ingredients regulated by the FDA and may result in adverse consequences when in contact with children. The Guidance offers restrictions that school nurses and school administrators are advised to follow regarding what medications should not be administered by school staff, including drugs that carry an FDA-issued "black box warning".

The term 'administration of medication' does not solely mean physically giving the medication to a student; it also means directing a student to swallow or otherwise absorb a medication, and selecting medication for the student. The law covers all school-related activities including field trips and school-sanctioned sports, club events, competitions and other activities for which a school or district sponsors, chaperones or otherwise bears some responsibility. The law does not include child care or other activities for which a school may lease or provide space for an entity for which the school does not maintain any school sponsorship.

Satisfying the "absolutely necessary" requirement means there is no suitable non-medication treatment and the student would not be able to function during the school day without it. According to the Guidance, the occasional minor pain or discomfort (headache, menstrual cramps, constipation, stomachache, etc.) can be treated with non-medical measures, such as increased fluids, health snack, short-term rest, use of heating pad or cold pack, relaxation exercises or bathroom break. From this statement, it is fair to deduce that the Guidance was written by an individual who has never experienced menstrual cramps.

(2) Teachers and other non-administrative school employees, except certified school nurses and non-certificated registered professional nurses, may not be required to administer medications to students.

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Can we enforce this? Limits on public employment contracts and termination

by Robert W. Steele Jr.

Two recent decisions by the United Stated Court of Appeals for the Seventh Circuit provide additional guidance to school districts on when public employers must provide public employees with a pre-termination hearing prior to dismissal. In the first case, *Breuder v. Board of Trustees of Community College District No. 502, et al.*, 888 F.3d 266 (7th Cir. 2018), the Appellate Court recognized a public employee's federal right to a name-clearing hearing when accusations of misconduct accompany termination.

The College of DuPage hired Robert Breuder as president in 2008. Breuder's contract was extended several times over the years, with the last extension approved by the Board in late 2014, extending Breuder's term of employment with the College through 2019. In early 2015, the Board approved an addendum to Breuder's contract that provided for early termination "in exchange for certain retirement benefits," with his tenure to conclude in March 2016. This contract provided Breuder with the right to appear before the Board, and required a supermajority vote of five of the seven members prior to termination for cause.

In April 2015, three new board members were elected to the Board. The newly elected board members released a joint statement claiming they had a "mandate to clean up" the college and "stop the waste, fraud, and abuse." According to Breuder, individual board -members made allegedly defamatory

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NLRB establishes new analysis for workplace rules

by John E. Motylinski

On December 14, 2017, the National Labor Relations Board ("NLRB") dramatically changed the way it handles complaints regarding workplace rules in its decision in *The Boeing Company*. Given that Illinois Courts and administrative agencies often look to the NLRB for guidance in interpreting the Illinois Educational Labor Relations Act, the impact of the *Boeing* decision will likely be felt by Illinois educators, as well.

Previously, the NLRB had adopted the view that a neutral work rule that does not explicitly restrict employees' rights to engage in union or protected concerted activity could nevertheless be unlawful if employees would "reasonably construe" the rule to prevent them from exercising their rights under the National Labor Relations Act ("NLRA"). This decree's reach was gradually expanded to shoot down certain benign-looking rules concerning confidentiality, employee interactions with third parties, employee use of logos and trademarks, and recording and photography in the workplace.

However, in its recent *Boeing* decision, the NLRB reversed course and implemented a new test governing the legality of workplace rules. In *Boeing*, the employer was an aerospace company that implemented a "no camera" policy, which prohibited the use of items, including cell phones and laptops, capable of capturing images without a permit. Boeing asserted this rule was necessary because it often performed classified work for the federal government, and information security was paramount.

A union representing one of Boeing's bargaining units filed an unfair labor practice charge against Boeing. The charge alleged, in part, that the no-camera rule interfered with the employees' ability to exercise their rights under the NLRA to form and participate in a union. The charge was initially sustained because, under the NLRB's previous rule, employees would "reasonably construe" the no-camera rule to prevent them from exercising their rights to organize under the NLRA.

Upon reaching the full NLRB, however, the Board demolished the old regime and replaced it with a two-pronged test. Now, in evaluating whether a facially neutral policy would potentially interfere with the exercise of NLRA rights, the NLRB will weigh: (1) the nature and extent of the potential impact on NLRA rights, and (2) the legitimate justifications associated with the rule. Perhaps foreseeing that this test is not especially helpful to observers and employers, the NLRB explained its ruling by creating three categories of workplace rules:

Category 1 – Rules that are generally lawful to maintain: These rules are generally lawful, either because the rule does not prohibit or interfere with the exercise of rights guaranteed by the NRLA, or because the potential adverse impact on NLRA rights is outweighed by the business justifications associated with the rule. This category includes (1) civility rules governing conduct between fellow employees (*e.g.*, a rule prohibiting "behavior that is rude, condescending or otherwise socially unacceptable"); (2) no photography and no recording rules; (3) rules against insubordination, non-cooperation, or on-the-job conduct that adversely affects operations; (4) disruptive behavior rules; (5) rules protecting confidential, proprietary, and customer information or documents; (6) rules against defamation or misrepresentation; (7) rules against using employer logos or intellectual property; (8) rules requiring authorization to speak for the company; and (9) rules banning disloyalty, nepotism, or self-enrichment. According to the NLRB's General Counsel, unfair labor practice charges "alleging that rules in this category are facially unlawful should be dismissed."

Category 2 – Rules warranting individualized scrutiny: Rules in this category must be closely analyzed by the NRLB and challenges to these types of rules will not automatically be dismissed. Further, these types of rules must be individually scrutinized to see whether they would prohibit or interfere with NLRA rights, and whether any adverse impact on NLRA-protected conduct is outweighed by legitimate business justifications. Such rules could include: (1) broad conflict of interest rules that are not tailored to fraud or self-enrichment; (2) excessively broad confidentiality rules that restrict the ability to talk about employee wages, terms of employment, or working conditions; (3) rules prohibiting disparagement or criticism of the employer (as opposed to other employees); (4) rules regulating the use of the employer's name alone; (5) policies prohibiting employees from speaking to the media or third parties in their personal capacities; and (6) rules banning off-duty conduct that might harm the employer (as opposed to proscribing on-duty disruptive conduct).

Category 3 – Rules that are always unlawful: Rules in this category are *per se* unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. These include (but are not limited to) confidentiality rules that restrict talking about wages, benefits, or working conditions, and rules banning employees from joining a union or taking collective action.

Applying its new test, the Board found that Boeing's rule fell under Category 1, as the Company's business justifications—including national security—outweighed the potential impact on employees' NLRA rights.

Taken as a whole, private sector employers have more leeway to maintain workplace rules that might tangentially implicate employee NLRA rights.

While it may take some time before the *Boeing* decision is fully implemented by the Illinois Educational Labor Relations Board, the *Boeing* decision is undoubtedly an indication that certain workplace rules will now withstand scrutiny where they perhaps could not before. Illinois school districts are encouraged to conduct a workplace rule review with their attorneys to determine if there is room for improvement in light of *Boeing*. ■

Administering medication

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Pursuant to recent revisions to the Illinois Nurse Practice Act, 225 ILCS 65, a Registered Nurse may, but is not required to, delegate medication administration to a willing non-nurse staff member with the approval of the non-nurse staff member's supervisor. Such delegation can occur only if the medication is taken by mouth, or applied to the skin whether topically, transdermally, or subcutaneously. The administration of medication given to a student through any other portal (nasal, rectal, injection into a muscle or vein or other access) may not be delegated to a non-nurse. While an administrator may administer medication, the Guidance notes that administrators may not delegate this authority to any other staff member. The Guidance recognizes, however, that non-nurses and non-administrators may voluntarily assist a student with medications pursuant to the Care of Students with Diabetes Act or in the case of an emergency.

(3) A school district may choose to adopt guidelines for student self-administration of medication.

State law requires schools to allow students to self-carry and self-administer certain drugs used to treat diabetes, asthma, and severe allergies. Besides these specific medications, a school district may choose which, if any, other medications students are allowed to self-carry and self-administer.

(4) Any school employee may provide emergency assistance to students.

Emergency assistance by any staff member may be used to address a student's bona fide *emergency* need for medication. However, a school district should not rely on this principle as cover simply because an RN or administrator is unavailable to administer *routine* medications. A licensed health care provider (the Guidance recommends the school's Registered Nurse) may educate any staff member on procedures to follow in the event of an emergency. This training may be general (CPR/AED training) or related to a student's specific health condition that may require medication to save the student's life.

Medical Cannabis Infused Products

Since the June Guidance, two new laws have been enacted by the Illinois General Assembly that address the administration of medication to students. First, Governor Rauner signed Ashley's Law on August 1, 2018, requiring school districts to permit the administration of cannabis infused products. The law went into effect immediately.

Prior to Ashley's Law, individuals who were otherwise permitted access to cannabis products under the Compassionate Use of Medical Cannabis Pilot Program Act (Act) were prohibited from possessing cannabis on school property or in a school bus. Under Ashley's Law, a school district shall authorize a parent/guardian to administer a medical cannabis infused product to a student at school or on the child's school bus if both the student and the parent/guardian have registry identification cards under the Act. After administering the product, the parent/guardian must remove the product from the school premises or school bus. Ashley's Law does not allow a student to smoke cannabis on school grounds.

Ashley's Law requires school districts to implement a policy regarding the administration of cannabis infused products (such as foods, oils or ointments) and includes the following restrictions: (1) administration of the product may not cause a disruption to the school's educational environment or cause exposure to other students; (2) no member of the school staff is required to administer the product; (3) a student may not be disciplined or denied access to school because of their receipt of the product; and (4) a school may not authorize the use of the product if the school district or school would lose federal funding as a result of the authorization.

Undesignated Asthma Medication

Second, effective January 1, 2019, Illinois school districts will be authorized to maintain a prescription of undesignated asthma medication. Currently, Section 22-30 of the Illinois School Code (105 ILCS 5/22-30) authorizes school districts to maintain a standing protocol for undesignated epinephrine auto-injectors (EpiPens) and opioid antagonists. Public Act 100-726 has added undesignated asthma medication to the types of medications that may be housed.

"Asthma medication" is defined as quick-relief asthma medication, including albuterol or other short-acting bronchodilators, approved by the FDA for the treatment of respiratory distress. It includes medication delivered through a device, including a metered dose inhaler with a reusable or disposable spacer or a nebulizer with a mouthpiece or mask. The school district may maintain a supply of asthma medication in any secure location that is accessible before, during or after school where a person is most at risk, including but not limited to a classroom or the nurse's office. As with undesignated EpiPens and opioid antagonists, a school nurse or trained personnel may carry undesignated asthma medication and may administer the medication to anybody (not only students) who the school nurse or trained personnel in good faith believes is experiencing respiratory distress.

The District's policy on the administration of medication in schools and its implementing procedures should be reviewed and updated to reflect the updated Guidance, the requirements of Ashley's Law, and the ability to maintain and use undesignated asthma medication. If you have any questions regarding your policy or its implementation, please call one of the Ottosen Britz attorneys for assistance. ■

Can we enforce this?

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remarks against him at Board meetings and to media outlets over the next six months. In September 2015, the Board declared Breuder's contract void *ab initio* (or "from the beginning"), sent Breuder notice of charges alleging misconduct, and, in October 2015, voted to terminate Breuder without a hearing.

Breuder filed suit in the United States District Court of Illinois, Northern District, asserting several federal and state claims such as breach of contract and defamation. In a federal §1983 claim, Breuder argued that defamatory and stigmatizing remarks made by board members, coupled with his termination, had deprived him of a "liberty interest" in violation of his Due Process rights under the United States Constitution. Namely, Breuder was provided neither a pre- nor post-termination hearing concerning defamatory remarks and cause for discharge.

The Board moved to dismiss all claims, asserting among several arguments that Breuder's contract was void *ab initio*. Citing a "norm" of Illinois law—the *Millikin* rule—the defendants argued that Breuder's contract was void from the beginning because its extension (in 2014 and prior years) went beyond the terms of the elected board members at the time. After the trial court ruled in Breuder's favor, the Board appealed to the Seventh Circuit.

The Appellate Court held that the *Milikin* rule had been superseded by legislation. Under the applicable Public Community College Act (PCCA), community college boards are authorized to establish policies governing the employment and dismissal of employees. Later amendments to the PCCA, which limit employment contracts to four years, did not apply to the current circumstances. The Court further reasoned that an Illinois college would have "considerable difficulty in hiring a quality president" if it were handcuffed to offering employment contracts that could not exceed two years due to staggered board member terms.

The Court also rejected the Board members' argument that, as public officials, they should receive "qualified immunity" from damages under §1983. The Board members' downfall was their issuance of a statement declaring that Breuder committed misconduct. The Board members asserted that, because they believed the contract was void *ab initio*, Breuder had no property right in continued employment and could be dismissed as an at-will employee. Yet, because the Board members maligned his character with their statements supporting his termination, Breuder was entitled to a hearing *before* "being defamed as part of discharge, or at a minimum to a name clearing hearing after the discharge." Whether Breuder had a property interest in continued employment or was an 'at will' employee was irrelevant. To the Court, the contract was valid and Breuder was entitled to a constitutional opportunity for a hearing.

Notably, the same day that it released the *Breuder* decision, the Court released a second decision on a public employee who asserted a right to a hearing before discharge. *Lafayette Linear v. Village of University Park*, 887 F.3d 842 (7th Cir. 2018). In *Linear*, the Seventh Circuit upheld the trial court's ruling that a village manager's contract extension was *void* and *ultra vires* because it extended beyond the term of the mayor. Under the Illinois Municipal Code, a municipality is prohibited from entering into a contract with an employee for a "term of office [that exceeds] . . . the mayor or president of the municipality." Because Linear's extension contract was void and not enforceable, the trial court held that Linear had no protectable property interest in continued employment with the Village. Without a protectable property interest, Linear could not invoke the requirement to provide him with due process under the United States Constitution.

In upholding the trial court's ruling, the Seventh Circuit distinguished *Linear* from *Breuder*. The Court noted that Breuder - unlike Linear - had a contractual right to "keep his job unless he committed misconduct," that the "accusations of misconduct" accompanying Breuder's termination gave him a right to a name-clearing hearing, and that his right was based in federal law.

Breuder serves as a reminder to school boards of the following lessons: even an employee who is at-will is entitled to due process prior to termination if they are accused of misconduct. School boards must enter employment contracts with care, and might be able to exit such contracts before their expiration date, but only with the same degree of care. Ever-changing legislation and constitutional issues may impact a school board's powers to set the length of an employment contract and the need to provide due process when terminating the contract. Long before a school board considers terminating a public employee, it should consult legal counsel to ensure that the board's proposed actions are lawful and constitutional. ■

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