TUCKER | ARENSBERG Attorneys

# EDUCATION LAW REPORT

Published in cooperation with the University of Pittsburgh's Tri-State Area School Study Council

Fall 2019 Edition

In This Issue

Dazed and Confused: What School Districts Should Know About Legalized Medical Marijuana

Court of Common Pleas Denies Challenge to School District's Policy of Providing Charter School Students with Bus Passes

Commonwealth Court Grants Over Four Years of Additional Back Pay to a Teacher, Overturning Pennsylvania Secretary of Education on Mitigation of Damages Issue

**Tucker Arensberg PC**

1500 One PPG Place
Pittsburgh, PA 15222
412.566.1212

2 Lemoyne Drive
Lemoyne, PA 17043

**tuckerlaw.com**



## DAZED AND CONFUSED: WHAT SCHOOL DISTRICTS SHOULD KNOW ABOUT LEGALIZED MEDICAL MARIJUANA

Under Pennsylvania's Medical Marijuana Act ("MMA"), 35 Pa. C.S.A. §10231.101, *et seq.*, individuals with certain serious medical conditions can apply for a medical marijuana card from the Pennsylvania Department of Health. (Minors cannot obtain a medical marijuana card, but their parent or guardian may be able to obtain it for them). If approved and issued a medical marijuana card by the Pennsylvania Department of Health, these individuals can obtain medical marijuana at a licensed dispensary.

The MMA provides access to medical marijuana to individuals with the following serious medical conditions: Amyotrophic lateral sclerosis; Autism; Cancer, including remission therapy; Crohn's disease; Damage to the nervous tissue of the central nervous system (brain-spinal cord) with objective neurological indication of intractable spasticity, and other associated neuropathies; Dyskinetic and spastic movement disorders; Epilepsy; Glaucoma; HIV / AIDS; Huntington's disease; Inflammatory bowel disease; Intractable seizures; Multiple sclerosis; Neurodegenerative diseases; Neuropathies; Opioid use disorder for which conventional therapeutic interventions are contraindicated or ineffective, or for which adjunctive therapy is indicated in combination with primary therapeutic interventions; Parkinson's disease; Post-traumatic stress disorder; Severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain; Sickle cell anemia; and Terminal illness.

The MMA restricts an employee's use of medical marijuana in the workplace and provides employers with certain rights as follows:

- Employees are not permitted to use medical marijuana in the workplace;
- Employees are not permitted to report to work "under the influence" of medical marijuana;
- An employer can discipline an employee for working while "under the influence" of medical marijuana, including when the employee's conduct falls below the standard of care normally accepted for the position; and
- An employer can prohibit an employee from performing the following duties while "under the influence" of marijuana:

*continued*

- Operating or controlling government- controlled chemicals or high-voltage electricity;
- Performing duties at heights or in confined spaces;
- Performing any tasks that threaten the life of the employee or his/her coworkers;
- Performing any task which the employer deems life-threatening, to either the employee or any of the employees of the employer;
- Performing any duty which could result in a public health or safety risk while under the influence of medical marijuana.

School districts should consider revising their Drug and Substance Abuse policies to address these specific employment provisions under the MMA.

While not directly addressed in the MMA, school districts likely can prohibit an employee from bringing medical marijuana onto its premises because marijuana is still considered a federally illicit substance. Also, employers may require employees to disclose if they are currently taking any medication (including medical marijuana) that would affect or inhibit their ability to safely perform their job duties.

## DRUG TESTING UNDER THE MMA

Because employees who habitually use medical marijuana can test positive for several days (or even weeks) after they last used marijuana, employers cannot rely solely on a positive drug test to establish that an employee reported to work "under the influence" of medical marijuana. To show that an employee who has a medical marijuana card reported to work under the influence, in addition to a positive drug test, an employer should be able to establish that the employee's *conduct also fell below the applicable standards for his/her position*. For example, did the employee have slurred speech or blood shot eyes? Did the employee smell of marijuana, stumble when walking or fall asleep during class?

When taking any disciplinary action against an employee for reporting to work under the influence of medical marijuana, it is recommended that the school district be able to 1) show that the employee tested positive for marijuana; and 2) describe how the employee's conduct fell below the standards required for the employee's position.

A school district should not rescind a contingent job offer based only upon an applicant's positive drug test for medical marijuana. There are at least two cases from other states that have held that rescinding a job offer for an applicant who holds a medical marijuana card would violate the anti-discrimination provisions of those states' laws. See, *Callaghan v. Darlington Fabrics Corp.*, 2017 WL 2321181 (R.I. Super. May 23, 2017); *Noffsinger v. SSC Niantic Operating Co., LLC*, 2017 WL 3401260 (D. Conn. Aug. 8, 2017). Those courts held that rescinding a job offer based upon an applicant's positive drug test for medical marijuana was akin to discrimination "on the basis of" the applicant's status as a medical marijuana card holder because an applicant would never have reported to work under the influence.

## EMPLOYEES WORKING IN SAFETY SENSITIVE POSITIONS

School employers should engage in the "interactive process" with an employee who has a medical marijuana card and is working in one of the above listed safety sensitive positions. It should determine if the employee can perform his/her safety sensitive job duties without being under the influence of medical marijuana. The employer can consult with

a Medical Review Officer or other occupational professional to determine if the employee's then-regimen of use would result in the employee reporting to work under the influence of medical marijuana. A school employer cannot preemptively remove an employee from working in the above listed safety sensitive positions simply because he/she has a medical marijuana card.

## FEDERAL LAW REGARDING MARIJUANA

The above employment protections under the MMA (a state law) do not apply to certain employees who are subject to federal laws or regulations because medical marijuana is still illegal under federal law. Specifically, school bus drivers (and any other employee that needs a Commercial Driver's License to perform his/her job duties) are subject to the U.S. Department of Transportation's ("DOT") Drug and Alcohol Testing Regulations. These DOT regulations state that Medical Review Officers will not verify a drug test as negative based upon information that a physician recommended that the employee use medical marijuana. The DOT's regulation states:

> **§ 40.151** "As an MRO, you are prohibited from doing the following as part of the verification process:
>
> (e) You must not verify a test negative based on information that a physician recommended that the employee use a drug listed in Schedule I of the Controlled Substances Act. (e.g., under a state law that purports to authorize such recommendations, such as the "medical marijuana" laws that some states have adopted.)

Therefore, a school district is not required to allow individuals, like school bus drivers, who hold a Commercial Drivers' License to use medical marijuana and can take adverse employment action if the employee (or applicant) fails a drug test.

## STUDENTS USING MEDICAL MARIJUANA IN SCHOOLS

Pennsylvania school districts face a unique challenge that other employers do not; mainly, how to deal with students who seek to use medical marijuana on school grounds. The MMA does not directly address this issue, but the Pennsylvania Department of Health has provided the following guidance:

- The student's parent or guardian must provide the school principal with a copy of the "Safe Harbor Letter," which allows a parent or caregiver to obtain medical marijuana on behalf of a minor;
    - The student's parent or guardian should notify the school principal, in advance, of each instance in which the parent or caregiver will administer the medical marijuana to the student;
    - The school principal shall provide notice to the school nurse for each instance in which a parent or caregiver will be administering medical marijuana to the student;
    - The parent or caregiver shall follow all applicable protocols to enter the school as a visitor;
    - The school shall provide a secure and private location for the parent or caregiver to administer the medical marijuana to the student.
    - The parent or caregiver can administer the medical marijuana to the student, as long as

*continued*

> it does not create a distraction and all excess medical marijuana and related materials are promptly removed from the school premises.

The Department of Health has stated that its recommended guidance will remain in effect until the Pennsylvania Department of Education promulgates regulations regarding the possession and use of medical marijuana in the commonwealth's schools.

## COURT OF COMMON PLEAS DENIES CHALLENGE TO SCHOOL DISTRICT'S POLICY OF PROVIDING CHARTER SCHOOL STUDENTS WITH BUS PASSES

*Bell et al. v. Wilkinsburg School District*, GD No. 18-012950 (Allegheny Cty. June 27, 2019). The Court of Common Pleas of Allegheny County ruled that a school district's provision of public transit bus passes to elementary students attending charter schools fulfills the Charter School Law transportation requirements.

### BACKGROUND

For the 2018-2019 school year, the Wilkinsburg School District ("District") began providing student transportation to and from charter schools, including those attending various charter schools operated by Propel Schools (collectively, "Propel"), via the provision of passes upon a common carrier, specifically, Port Authority of Allegheny County ("PAT") buses. In prior years, such charter school students were transported via school buses.

Propel and an individual whose child attends the Propel schools ("Plaintiffs") challenged this arrangement by filing a lawsuit in the Court of Common Pleas of Allegheny County and arguing, among other things, that the provision of PAT bus passes to elementary students in grades K through 5 attending Propel Schools does not comply with the District's obligation to provide "free transportation" to charter school students. (Plaintiffs did not challenge the provision of bus passes to older students).

At the conclusion of a non-jury trial, the Court of Common Pleas of Allegheny County issued a decision stating that Plaintiff's failed to establish that the District violated the law by not providing private bus transportation to resident elementary students attending Propel schools. The decision has been appealed to the Commonwealth Court.

### DISCUSSION

Section 1726-A of the Charter School Law provides that certain students who attend charter schools "shall be provided *free transportation* to the charter school by their school district of residence…" 24 P.S. § 17–1726–A(a) (emphasis added). Section 1362 of the School Code, in turn, provides, in relevant part:

> *free transportation of pupils*, as required or authorized by this act, or any other act, *may be furnished by using either school conveyances, private conveyances, or electric railways, or other common carriers*, when the total distance which any pupil must travel by the public highway to or from school, in addition to such transportation, does not exceed one

> and one-half (1 1/2) miles, and when stations or other proper shelters are provided for the use of such pupils where needed, and when the highway, road, or traffic conditions are not such that walking constitutes a hazard to the safety of the child, as so certified by the Department of Transportation.

24 P.S. § 13–1362 (emphasis added).

The Commonwealth Court has held that because both of these statutory provisions address the subject of student transportation, "*they are in pari materia* and are to be construed accordingly." *Hoffman v. Steel Valley Sch. Dist.*, 107 A.3d 288, 295 (Pa. Cmmw. 2015).

Accordingly, school districts have the discretion to provide free transportation "by utilizing **any** of the four methods listed therein [school conveyances, private conveyances, electric railways or common carriers], as long as the total distance which any pupil must travel by public highway to or from school, in addition to such transportation method, does not exceed one and one half (1 ½) miles; there are…shelters for the use of such pupils where needed; and there is not a safety hazard to the pupil, as so certified by the Department of Transportation." *Hoffman v. Steel Valley Sch. Dist.*, GD 14-2899 (Trial Court Opinion, p. 7); *quoted in Hoffman v. Steel Valley Sch. Dist.*, 107 A.3d 288, 292 (Pa.Commw. 2015).

The court's ruling in favor of the school district indicates that the District's provision of PAT bus passes to charter school students fulfilled the District's obligation under the Charter School Law to provide transportation to such students. In reaching this decision, the court rejected other, non-statutory factors raised by the Plaintiffs, including the age of the students, the duration of the bus ride, whether the transportation routes required transfers between buses, whether the transportation provided to charter school students is identical to that provided District students, whether the Department of Education "approved" the transportation in advance and whether PAT bus driver training is identical to school bus driver training.

## CONCLUSION

The *Bell* decision is important because the Court of Common Pleas of Allegheny County has confirmed that school districts may provide free transportation to resident students attending charter schools if they comply with the requirements set forth in Section 1362 of the Pennsylvania School Code. Critically, the court's decision confirms that other, non-statutory factors are irrelevant in determining whether the District is complying with the requirements of the Charter School Law and School Code.

Districts providing transportation to resident students attending charter schools should review this case and any subsequent appellate court decisions carefully so that they can make informed decisions when determining the best method to provide free transportation to charter school students.

*continued*

## COMMONWEALTH COURT GRANTS OVER FOUR YEARS OF ADDITIONAL BACK PAY TO A TEACHER, OVERTURNING PENNSYLVANIA SECRETARY OF EDUCATION ON MITIGATION OF DAMAGES ISSUE

*Vladimirsky v. School Dist. of Phila.*, 206 A. 3d 1224 (Pa. Commw. Ct. 2019). The Pennsylvania Commonwealth Court overturned a finding of the Pennsylvania Department of Education that teacher did not exercise reasonable due diligence to seek new employment.

### BACKGROUND AND DISCUSSION

On July 20, 2011 the School District of Philadelphia's School Reform Commission ("SRC") terminated social studies teacher Serge Vladimirsky for "aggressive and agitated classroom behavior." The teacher appealed the termination to the Pennsylvania Secretary of Education ("Secretary") and to the Pennsylvania Commonwealth Court ("Commonwealth Court"). Five years later, on August 3, 2016, the Commonwealth Court determined that the District failed to comply with the mandatory termination provisions under the Pennsylvania School Code, and ordered the teacher be reinstated with back pay.

The District offered to reinstate the teacher on November 4, 2016, and the parties proceeded before the Secretary to determine the amount of back pay due to the teacher. After hearing evidence and argument from the parties, the Secretary found that between July, 2011 and March, 2012 Vladimisky made an "honest, good faith effort" to find new employment as a teacher, and awarded back pay during this time period only.

On appeal, the Commonwealth Court held that because Vladimirsky had made a reasonable effort to mitigate his damages, Vladimirsky was entitled to back pay for the entirety of the time between his termination in July, 2011 and the offer of reinstatement on November 4, 2016.

The dispute centered around whether the teacher adequately mitigated the amount of back pay he was due, by searching for new employment. Vladimirsky testified that he searched for a new job as a teacher from the date of his termination in July, 2011 until the end of 2012, but was unable to secure employment as a teacher. Toward the end of 2012 Mr. Vladimirsky took a job as a security guard, at a lower rate of pay than he had enjoyed as a teacher.

The District argued that it was unreasonable for Vladimirsky to abandon his search for employment as a teacher, citing thousands of jobs available to him throughout the Commonwealth of Pennsylvania. Vladimirsky argued that his search for a teaching job had become futile, and that he took the job as a security guard in order to support his family.

Vladimirsky testified that between July, 2011 and the end of 2012 he applied for teaching jobs at between 24 and 36 different school districts, but received no job offers and no interviews for teacher positions. Vladimirsky testified that he believed his termination from the Philadelphia School District "polluted" his ability to secure a new teaching position.

During the proceedings before the Secretary, Vladimirsky offered an expert witness, who had served on hiring committees within the Philadelphia School District, who testified that a teacher who had been terminated for cause at a prior school district would have "zero" chance at securing a new teaching position.

In an attempt to show that Vladimirsky had not made an adequate effort to secure a new teaching position, the District provided a 1400-page list of

advertisements for social studies teacher positions, and other related non-teaching positions, within the Commonwealth of Pennsylvania. The District also testified that, based on information gained through Right-to-Know Law requests to Pennsylvania school districts, there were "between 100 and 250 openings per year within [subjects that a social studies teacher could teach]." The Secretary accepted this testimony and job opening information in support of its decision to limit back pay. However, on appeal the Commonwealth Court rejected this testimony, and characterized it as "misleading." The Commonwealth Court pointed out that the list of positions compiled by the District "pertained to jobs across the Commonwealth and to jobs outside the relevant time period. Vladimirsky was not required to relocate for employment in order to mitigate back pay damages."

In ordering that back pay be extended to November 4, 2016, the Commonwealth Court pointed out that the District had the burden to prove that Vladimirsky had failed to mitigate his damages, but did not meet this burden. The Commonwealth Court explained, "The District failed to show that Vladimirsky's decision to accept the security guard position and cease searching for a teaching job given the aforementioned circumstances was unreasonable."

## CONCLUSION

When attempting to show that a reinstated employee did not mitigate his or her damages during the period of termination, school districts should remember that the district has the burden of proving that the employee did not exercise reasonable due diligence to seek new employment. If the employee can show that he or she made a diligent, good faith (though unsuccessful) effort to obtain a similar position, then a court will likely award back pay during the period of termination. Evidence of available positions that are outside the employee's geographic area, or outside the relevant time period, will not support a mitigation of damages argument.

TUCKER ARENSBERG Attorneys MUNICIPAL AND SCHOOL LAW GROUP

**Matthew M. Hoffman** *Co-chair*
412.594.3910
mhoffman@tuckerlaw.com

**John T. Vogel** *Co-chair*
412.594.5622
jvogel@tuckerlaw.com

**Frederick J. Wolfe**
412.594.5573
fwolfe@tuckerlaw.com

**Robert L. McTiernan**
412.594.5528
rmctiernan@tuckerlaw.com

**William Campbell Ries**
412.594.5646
wries@tuckerlaw.com

**Christopher Voltz**
412.594.5580
cvoltz@tuckerlaw.com

**Irving S. Firman**
412.594.5557
ifirman@tuckerlaw.com

**Gavin A. Robb**
412.594.5654
grobb@tuckerlaw.com

**Steve R. Bovan**
412.594.5607
sbovan@tuckerlaw.com

**David Mongillo**
412.594.5598
dmongillo@tuckerlaw.com

**Thomas P. Peterson**
412.594.3914
tpeterson@tuckerlaw.com

**Richard B. Tucker, III**
412.594.5562
rtucker@tuckerlaw.com

**Kenneth G. Scholtz**
412.594.3903
kscholtz@tuckerlaw.com

**Katherine A. Janocsko**
412.594.5564
kjanocsko@tuckerlaw.com

**Daniel C. Conlon**
412.594.3951
dconlon@tuckerlaw.com

TUCKER ARENSBERG Attorneys

MUNICIPAL AND SCHOOL LAW GROUP

Tucker Arensberg, P.C. 1500 One PPG Place Pittsburgh, PA 15222 412.566.1212

**tuckerlaw.com**

**Tucker Arensberg's Municipal and School Law Group** represents local school districts and municipalities in a variety of legal matters. Our attorneys are solicitors or special counsel for several school districts/jointures and municipalities in Western Pennsylvania. In addition, our attorneys serve as special labor counsel to numerous school districts and municipalities in Western Pennsylvania and have held appointments as special counsel to school boards, zoning boards, civil service commissions and other municipal sub-entities.

The range of services called for in our representation of public bodies is quite broad. Included in that range are: public and school financing, including the issuance of bonded indebtedness; labor, employment and personnel issues; public bidding and contracting; school construction and renovation; taxation, including real estate, earned income and Act 511; pupil services and discipline; zoning and land use and litigation and appellate court work.

**The Tri-State Area School Study Council** at the University of Pittsburgh was established in 1948 as a continuing partnership between school districts and the University. We are the third oldest and second largest Study Council in the country. We seek to work with you to address the issues of practice we all face as we lead educational organizations to improve focus and build organizational capacity. Priorities established by the membership include: 1) timely information dissemination on current research and exemplary practices; 2) research and development technical assistance on projects to meet district needs; 3) professional development programs and workshops on current topics; 4) participation in District clinical experiences to prepare future school leaders and; 5) practitioner participation in academic preparation programs. For more information, please contact Dr. Diane Kirk, Director, 412.648.1716.