



Ennis Britton Co., L.P.A.
Attorneys at Law

Cincinnati • Cleveland • Columbus

Ohio School Boards Association

BOARD LEADERSHIP
INSTITUTE

April 22, 2017

STAFF DISCIPLINE: Accountability is Hard Work – Do It Anyway!

John E. Britton
jbritton@ennisbritton.com

Scholars in Education Law



Ennis Britton Co., L.P.A.
Attorneys at Law

Scholars in Education Law

Cincinnati • Cleveland • Columbus

FUNDAMENTAL FOCUS: ARE THE KIDS ALRIGHT?



**Leadership in education is
about learning** – *the learning
of others has to be at heart of
the decision-making of any
educational leader.*

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

Scholars in Education Law

GOALS FOR OUR SESSION:

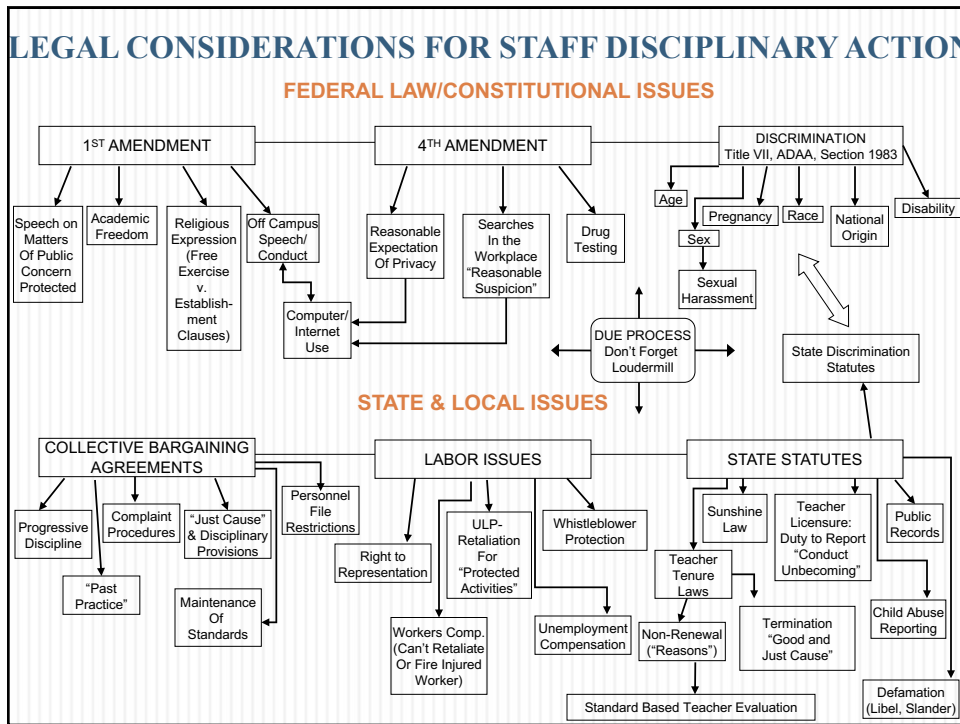
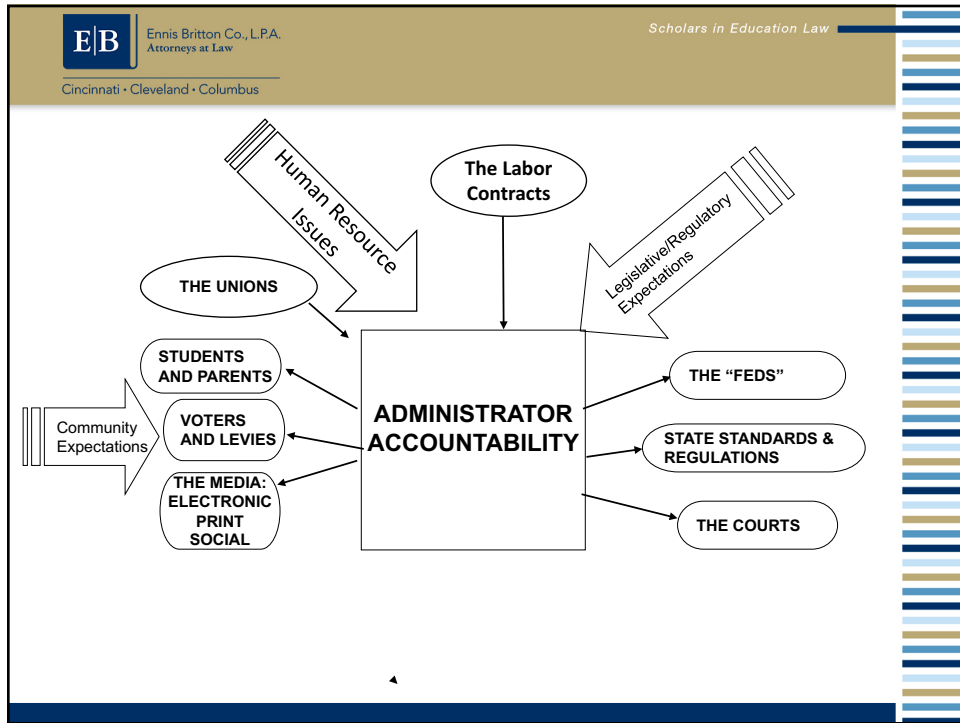
1. To generate a dialogue on the **hard work and leadership skills** necessary to encourage employees to perform up to expectations – and how to respond when they don't.
2. To identify all of the **obstacles** to effective staff discipline, including administrative “paralysis” and restrictive contract language.
3. To discuss strategies on overcoming these obstacles in the implementation of **best practices for disciplinary responses.**
4. To provide a framework for **issue identification** and a proactive paradigm with the goal of (a) reducing or preventing litigation; and (b) enhancing the chances for positive outcomes for disciplinary action.
5. **To consider some practical steps for boards of education in supporting a district-wide commitment to accountability and effective staff discipline.**
6. To have a little fun in the process!

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

Scholars in Education Law

WHY ARE YOU HERE?

- My guess is that you have a strong commitment to your role as an elected official and a desire to get better at what you do for children.
- As for coming to this particular session, I will go out on a limb and suggest that you want to know **how** to better support the administration in efforts to enforce and maintain high standards of professionalism for all staff members.
- If so, the most important thing we can do together today is to drill down on the **actual dynamics** that are in play and which shape your district's effectiveness at addressing employee misconduct and/or poor performance.
- Let's start with a candid view of the **unique** nature of those things which influence the lives of educational leaders:



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

Scholars in Education Law

STAFF DISCIPLINE AND 21ST CENTURY ADMINISTRATIVE LEADERSHIP: THE DYNAMICS

- **CAN'T vs. WON'T** – What is the Difference?
- Fundamental inquiry – do we have the **tools** to respond effectively?
 - Do we use them?
- Staff discipline equals accountability which is **“risky business” and hard work do it anyway!**
 - Did I mention stressful?
- Changing the confrontational paradigm – how?
 - Are we (all the stakeholders) truly in this together?

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

Scholars in Education Law

SELF-ASSESSMENT: WHERE ARE WE ON STAFF DISCIPLINE?

- How well **and how consistently** do we **investigate** allegations of misconduct by staff?
- Are job expectations known and **consistently supported** by the stakeholders?
- When performance or conduct falls below expectations what is our **“response ability”** in helping staff to improve?
- Do we document? Is the **documentation** focused and effective?
- Do we recognize and work to address the **obstacles** that impede accountability?
- What obstacles? *Glad you asked!*

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

Scholars in Education Law

IDENTIFYING THE MAJOR OBSTACLES TO HOLDING EMPLOYEES ACCOUNTABLE

- **No consensus** among stakeholders on a shared vision.
- **Lack of commitment** by administrators.
- An **absence of agreed-upon expectations** for employee performance/conduct.
- **Inconsistent responses** to misconduct and poor performance.
- **Fear of costly litigation** and the hassles and hard work of holding people accountable.
- **Unwieldy contract language.**
- Anxiety over **potential labor backlash.**
- Constant leadership **“turnover.”**

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

Scholars in Education Law

ADMINISTRATIVE “PARALYSIS” AT THE MOMENT OF TRUTH – WHY IT HAPPENS

- **Inheriting** an environment that lacks accountability.
- A **history of alternate and inconsistent disciplinary responses** across the district.
- Did I mention that holding employees accountable is **hard work?** (Do it anyway!)
- **“We have never done that before”** or “that’s the way we’ve always done it.”
- Fear of **straining labor relations** or work environment (*a/k/a*, the need to be well liked).
- **No safety net** for administrators who “engage” in disciplinary actions.
- Lack of reference points – where is the human resource training/background for this? (**“I got into this business to educate children, not to fire people!”**)

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

Scholars in Education Law

ADMINISTRATIVE “PARALYSIS”

- **Complexities** of legal issues – it’s hard to keep track without a program! (Remember the chart?)
- The prospect of losing valuable time away from education **dealing with lawyers**, judges, arbitrators, etc.
- **“I am this close to retirement and you want me to do what?”**

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

Scholars in Education Law

“LOW TIDE” DISTRICT – Ineffective Staff Discipline

- Superficial approach to accountability in general.
- “Reactive” vs. proactive personnel decision making.
- Inconsistent responses to poor performance or misconduct:
 - Little or no appropriate follow-up with troubled employees; and/or
 - Poorly conceived improvement plans/plans of assistance for those who are disciplined;
 - no monitoring of progress (paper it and forget it).

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

Scholars in Education Law

“LOW TIDE” DISTRICT

- A culture of limited feedback (adversarial mode).
- No stakeholder consensus about accountability.
- An overall environment of distrust and instability.
- Ineffective investigations of employee misconduct.
- Traditional “confrontational” labor relations premised upon power and position.
- High absenteeism -- attendance perceived as “optional.”

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

Scholars in Education Law

POTENTIAL OUTCOMES IN LOW TIDE DISTRICTS

- Employees rarely effectively held accountable for non-performance or misconduct (we can’t make it stick).
- Somebody has to pay – the Administration is held accountable for employee misconduct or non-performance.
- Administrators look to “Abandon Ship!” (especially the good ones).
- Increased “win/lose” confrontations with employees (ULPs, grievances, arbitrations, lawyers, \$).
- Litigation of all shapes and sizes (\$\$\$).

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

Scholars in Education Law

THE “RISING TIDE” DISTRICT: Characteristics of Effective Staff Discipline

- A positive and “across the board” commitment to accountability and enhancing employee performance and professionalism.
- Leaders here fully recognize the obstacles and work to address and overcome them.

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

Scholars in Education Law

MODEL “RISING TIDE” DISTRICT

- Stakeholder consensus on accountability and performance expectations – a shared vision!
- Effective supervision (consistently utilizing a collaborative professional model).
- Unswerving, district-wide approach to staff discipline, best practices, and addressing poor performance.

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

Scholars in Education Law

MODEL “RISING TIDE” DISTRICT

- Well-developed and understood expectations for all staff.
- Definitive job descriptions for all positions with a logical correlation to employee evaluations.
- Disciplinary responses are seamlessly “tied in” to employee evaluations.

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

Scholars in Education Law

MODEL “RISING TIDE” DISTRICT

- Leaders here consistently provide appropriate and **meaningful feedback** to staff through:
 - Mutually-developed written evaluation process with **agreed-upon criteria and expectations.**
 - Appropriate and **focused documentation** of non-performance and/or misconduct.
 - Reliable **follow-up and monitoring** of progress on well-conceived plans of assistance/improvement.
 - Embracing and **consistently** applying the OTES/OPES/OSCES criteria and rubrics.

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

Scholars in Education Law

MODEL “RISING TIDE” DISTRICT

- These districts **prioritize professional development** and embrace efforts to improve the work force on all levels.
- Robust monitoring of employee performance and a commitment to follow through and follow up.
- Appropriate investigations of alleged misconduct (Always a “***Dignified Search for the Truth.***”)
- Collaborative labor relations utilizing an interest-based approach to problem solving.
- People come to work because that is the norm for this culture (and, they want to!).

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

Scholars in Education Law

POTENTIAL OUTCOMES IN RISING TIDE DISTRICTS

- Employees perform at or above expectations –
 - **The Bar is Raised: Kids Win!**
- But what happens when there is employee misconduct or poor performance – despite these commitments to accountability, and
 - We find **NO EFFECTIVE RESPONSE** from the Administration?
 - Even though the employee has demonstrated either an inability or unwillingness to meet our reasonable expectations (can’t or won’t) – still, there is no action taken.
 - **WHY?**
 - ✓ **The inability to overcome the obstacles** (real or imagined) preventing administrators and boards from responding to employee non-performance.

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

Scholars in Education Law

WHAT HAPPENS WHEN MISCONDUCT OCCURS?

Employee misconduct or poor performance despite a culture of accountability and a commitment to making employees better at what they do for kids:

THIS HIGH FUNCTIONING DISTRICT RESPONDS EFFECTIVELY BY:

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

Scholars in Education Law

MOVING TO PLAN “B”

- Employment action is pursued based upon documented adherence to accountability (Plan “A”), *i.e.*,

➤ **Play back the video!**

- A measured and defensible personnel response is implemented, supported by:

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

Scholars in Education Law

MOVING TO PLAN “B”

- Accurate documentation of events.
- Strict adherence to contract and/or legal parameters and time frames.
- Demonstrated “nexus” between disciplinary conclusions and defined expectations.
- **Consistent** process and responses district-wide.
- Thorough and fair investigations.

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

Scholars in Education Law

MOVING TO PLAN “B”

- Elimination of unacceptable behavior.
- Enhancement of employee performance.
- **Removal of unsuitable employees** (“*set the table, sink the hook, pull the trigger and close the book*”).
- Avoidance of litigation, liability and losing!
- The bar is raised: *Kids Win!*

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

Scholars in Education Law

BUT WAIT ... THERE'S MORE!

- The culture is **transformed** due to employee perception of systemic:
 - ✓ Fairness
 - ✓ Consistency
 - ✓ No "Surprises"
 - ✓ Trust
 - ✓ High Morale and, yes, Attendance!!!
- The result is that this culture also routinely attracts high quality applicants – the cycle of excellence continues.
- Valuable time and resources are **not** spent on unnecessary litigation.

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

Scholars in Education Law

PLAN "A" – ACCOUNTABILTY – IN REVIEW

- Consistently provide appropriate and meaningful feedback – **people want and need to know what is expected of them.**
- Follow-up and monitor performance to facilitate positive employee outcomes – **stay the course!**
- Generate and **effectively document** measured and defensible personnel responses.
- Resolve the personnel issue to finality – **act!**
- **Assess the aftermath and sharpen the saw** – what did we get right? What do we need to do better?

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

Scholars in Education Law

PART TWO: INVESTIGATING AND DOCUMENTING MISCONDUCT

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

Scholars in Education Law

PART TWO: INVESTIGATING MISCONDUCT

- Leadership at the point of impact.
- Issue identification – understanding the basic legal parameters (that “chart” thing, again!):
 - ❖ 1st amendment considerations.
 - ❖ 4th amendment “searches.”
 - ❖ Criminal and child abuse reporting.
 - ❖ Labor law and collective bargaining issues.
 - ❖ Unlawful discrimination (sex, race, age, disability, etc.).
 - ❖ Sexual harassment.
 - ❖ The involvement of children.

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

Scholars in Education Law

WHO, WHAT, WHERE, WHEN AND HOW – CONDUCTING A DIGNIFIED SEARCH FOR THE TRUTH

- Assessing the claim at the outset – a critical moment.
- Issue identification (where is that chart?).
- Who will conduct the investigation? **Will we provide them with the time and resources necessary to do the job right?**
- Plan the investigation and investigate according to the plan, unless.....
- Collection of all documents and physical evidence.
- Witness interviews – art and science.
- Addressing the target employee.
- Reaching a factual determination and implementing a measured response.....

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

Scholars in Education Law

FOCUSED DOCUMENTATION: THE “ART” OF THE WRITTEN RESPONSE

- When to paper?
- Think about the legal issues (preventive legal maintenance – consider review by board counsel).
- Read the contract carefully.
- Specific and concise summary of the incident.
- Include factual observations.
- Delineate, clearly, your concerns about the behavior.
- Show how conduct relates to the job.
- What did the employee admit? – record it!
- Consequence – be decisive (but avoid personal attacks).
- Tie in any prior discipline.
- Remember to migrate this into the evaluation.
- Obtain an acknowledgment of receipt by the employee.

E|B Ennis Britton Co., L.P.A.
Attorneys at Law

Scholars in Education Law

Cincinnati • Cleveland • Columbus

SOME THOUGHTS ON EMPLOYEE EVALUATIONS AND STAFF DISCIPLINE

- Collective bargaining language – make it work for district goals and student outcomes.
- Procedural compliance with state statutes and/or labor contracts is essential.
- Be specific, be critical, be fair and be consistent.
- Avoid falsely inflated or overly negative remarks – maintain an appropriate level of objectivity.
- **Tie in prior directives, reprimands, documented problems.**
- Objectively record strengths and weaknesses.
- Make sure there is a logical nexus between goals, suggestions for improvement, remediation and final conclusions.
- Keep your eye on the prize – the impact on positive student outcomes.

E|B Ennis Britton Co., L.P.A.
Attorneys at Law

Scholars in Education Law

Cincinnati • Cleveland • Columbus

COLLECTIVE BARGAINING AND STAFF DISCIPLINE – AVOIDING THE HANDCUFFS

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

Scholars in Education Law

BARGAINING PREPARATION

- Begins the moment the ink dries on your tentative agreement.
- Progress is incremental – what didn't we get and why?
- Dog ears, post-it notes and highlighter.
- Monitor legislative changes and case law outcomes – are we up to date?
- **Look carefully at how your ability to effectively discipline employees and hold them accountable has been hindered by restrictive language in the contract.**

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

Scholars in Education Law

COLLECTIVE BARGAINING AND STAFF DISCIPLINE

- The decision to terminate or non-renew an employee is too important to place in the hands of an arbitrator.
 - ❖ Why?
 - ❖ How do arbitrators keep their day jobs?
- Be careful in your approach to “just cause” provisions.
- Progressive discipline is a legitimate concept; however, make sure that you retain the right to respond proportionate to any offense.
- Are written reprimands an appropriate subject for a grievance?
- Watch for landmines in “complaint” provisions which restrict timelines for employee notification, etc.

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

Scholars in Education Law

SEVEN TESTS OF JUST CAUSE

In the absence of specific contract language and/or a true common-law definition of just cause, one well-known interpretation has been offered by arbitrator Carroll R. Daugherty in his "Seven Tests" of just cause:

1. **Notice:** Did employer give employee forewarning/foreknowledge of possible/probable consequences of the employee's disciplinary conduct?
2. **Reasonable Rule or Order:** Was the employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the employer's business, and (b) the performance that the employer might properly expect of the employee?
3. **Investigation:** Did the employer, before administering the discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

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

Scholars in Education Law

SEVEN TESTS OF JUST CAUSE (CONT'D)

4. **Fair Investigation:** Was the employer's investigation conducted fairly and objectively?
5. **Proof:** At the investigation, did the "judge" obtain substantial evidence or proof the employee was guilty?
6. **Equal Treatment:** Has the employer applied rules, orders, and penalties even-handedly, without discrimination to all employees?
7. **Penalty:** Was the degree of discipline administered by the employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense, and (b) the record of the employee in his service with the employer?

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

Scholars in Education Law

SEVEN TESTS OF JUST CAUSE (CONT'D)

- An answer of No to one or more of the test questions means that “just cause” may or may not have been satisfied or at least seriously jeopardized and that some arbitrary, capricious, or discriminatory element may be present.
- Arbitrators are more likely to uphold immediate discharge (with no prior progressive discipline) in cases of grossly unacceptable behavior such as dishonesty, theft, assault, violence, or willful falsification of a material mission of an employee. Other infractions that may support immediate discharge include inappropriate and/or sexual relations with students, possession of illegal drugs, security violations, possession of weapons, gross insubordination, coming to work under the influence of alcohol.
- Conversely

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

Scholars in Education Law

SOME CLOSING THOUGHTS

- Armed with an understanding of the unique dynamics of employment in public education, engage your board and administration in a **conversation** about how we are doing with staff discipline and how we can support doing it better.
- Try to focus on the “**how**” rather than the “**who**” when it comes to staff discipline.
- Since “human resource management” is often a second language – provide time and resources for ongoing **professional development and training for our administrators.**
- **Celebrate** the fruits of enhanced accountability (then analyze what went right and what could have been better).

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

Scholars in Education Law

SOME CLOSING THOUGHTS

Remember – Accountability is hard work.


Do it anyway!

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

Scholars in Education Law

FINAL THOUGHTS

- Have these important conversations!
- Keep sharpening the saw!
- Thanks for what you do for kids!



Cincinnati Office
1714 West Galbraith
Road
Cincinnati, Ohio 45239
P: 513.421.2540

Columbus Office
300 Marconi Boulevard,
Suite 205
Columbus, Ohio 43215
P: 614.705.1333

Cleveland Office
6000 Lombardo
Center, Suite 120
Cleveland, Ohio 44131
P: 216.487.6672

Mahoning County ESC Office
7320 N. Palmyra Road
Canfield, Ohio 44406
P: 330.533.8755