Ennis Britton Co., L.P.A.
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School Law Review

Introducing Ennis Britton Co., L.P.A.

April 2015

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We are excited to share with you that effective March 1, 2015, Ennis Roberts & Fischer will be partnering with education law attorney John Britton from Cleveland to create the firm of Ennis Britton Co., LPA. Ennis Britton will be a "first of its kind" in Ohio - a firm dedicated to the practice of school law with offices in three of the State's major metropolitan areas: Cincinnati, Columbus, and Cleveland.

John Britton, a former founding director of a Cleveland school law firm, is a recognized legal advocate for Ohio schools and has been advising school leaders since 1981. John brings with him two other school law attorneys, Megan Bair Zidian and Giselle Spencer. Ennis Roberts & Fischer was one of the first school law firms of its kind in the state and has been meeting the needs of Ohio public schools since its founding in 1972. This new partnership will create an exceptional team of experienced education attorneys, all of whom have focused their practice on meeting the legal needs of Ohio's public schools.

Our new firm will be uniquely positioned to offer you the type of ideas, advice and solutions to help you navigate your most challenging issues - all while maintaining the same billable rate, responsiveness and level of value you have come to expect from us. We look forward to sharing with you the plans and vision for this new firm of school law advocates. Our vision is to transform the way legal services are delivered to schools in Ohio.

***As part of this transition, our email addresses have changed from erflegal.com to ennisbritton.com.**

On page 11 you will find an updated directory of our attorneys with their contact information.

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ODE Issues New Guidance on Read Aloud Accommodations

The Ohio Department of Education issued a "Clarification on Accessibility and Accommodations for New State Tests" ("Clarification") on February 18, 2015. The clarification was posted on ODE's website at:

https://education.ohio.gov/Topics/Testing/News/Clarification-on-Accessibility-and-Accommodations.

We received a significant number of responses to and follow-up from our February 9th Read Aloud Accommodations Webinar. Of primary concern to many of our clients was whether ODE would invalidate student test scores if districts used the accommodation on the literacy section of the PARCC assessments with more than 6-10% of their special education population. ODE's initial position appeared to be in the affirmative - any student scores above the stated threshold would be invalidated. However, in what appears to be a reverse of that position, the recent guidance included the following statement:

To be clear, there is no cap or percent of students with disabilities who can have a read-aloud accommodation—it is an IEP team decision. If the IEP team determines that the student qualifies for the read-aloud accommodation, it is a valid test and the student's score counts.

This new position aligns with our conclusion that there is no legal basis for an arbitrary accommodation "cap," and further the law empowers IEP teams to determine what allowable accommodations are required based on a child's individual needs. In other words, decisions about whether read-aloud is listed in a child's IEP or 504 plan must be made based on the child's needs without regard to any state-mandated cap restrictions.

It should be noted that Ohio's administrative rules do place limits on when IEP teams should and should not consider use of accommodations such as read-aloud. For example, the Administrative Code prohibits accommodations that change the type of knowledge or skill a test is meant to measure. This has been the basis for the past practice of offering read-aloud for questions and answers on reading tests, but not for the actual reading passages. The Administrative Code also prohibits accommodations that change or enhance a response in relation to the skill that is being tested. Perhaps this is the basis for ODE's guidance explaining that read-aloud of reading passages on the PARCC literacy assessment is limited to students who are "severely" limited in their decoding skills (or have other vision or language impairments that impact reading).

While there is not currently clear guidance for IEP and 504 teams to consider in determining whether a child is "severely" limited in decoding skills, it is important for schools to understand that read-aloud is being overused. It should be reserved for a limited group of students whose individual needs require the accommodation. According to ODE's guidance, approximately 70% of Ohio students on IEPs received read-aloud on the current OAA and OGT in reading. It is apparent that many of these students do not have individual needs that require the accommodation. Therefore, as IEP teams begin to meet this Spring and Summer, it is certainly a good idea to critically assess whether the accommodation is truly warranted before placing it in a future IEP.

In attempting to comply with the "required" guidelines in ODE's Memorandum 2014-1 (12/17/14) and the related FAQ document, a number of districts quickly amended IEPs to remove the read-aloud accommodation entirely. They took these steps in order to meet the 10% (or 1.5% of the entire student population) "cap" listed in the FAQ document. To the extent these amendments removed accommodations that were not necessitated by a child's individual needs, they were appropriate and should be retained.

On the other hand, if the IEP team believes the accommodation is appropriate and only removed it to be in compliance, the team must reconsider adding the accommodation back in to the IEP. The decision on whether a child requires read-aloud services is to be made by the IEP or 504 team based on a child's individual needs. A district should be prepared to explain the basis for making this determination, which presumably will relate to a child having significant decoding, vision, or language needs. The new guidance offers some useful ideas about what factors might be considered.

Unfortunately, the last-minute timing of the guidance, combined with widespread school cancellations due to inclement weather, put districts in a position where there may not have been sufficient time to reconsider the removal of read-aloud services prior to the PARCC literacy assessments. Ohio Administrative Code only allows the use of accommodations that are set forth in a valid IEP or 504 plan before a student takes a test. Therefore, unless a valid amendment to reinstate read-aloud can be made prior to any future PARCC assessments, or unless it already appears in a child's most recent IEP, a child should not be provided read-aloud services for the literacy section of the test.

Helpfully, the guidance restated other points addressed in our Read-Aloud Webinar. These include the fact that the read-aloud restrictions apply only to the PARCC literacy assessments -- not to any other PARCC assessments or to the OAAs and OGTs. In fact, text-to-speech is considered an accessibility feature for the mathematics section of PARCC and may be turned on in advance for all students without penalty. It is ODE's expectation that districts will make an individual determination, however, before enabling the feature for each student in mathematics.

Ohio Supreme Court Rules Subsequent Approval of Medical Treatment Does Not Automatically Render an Opinion of Maximum Medical Improvement Premature

The Ohio Supreme Court recently addressed the issue of whether a doctor's opinion finding that an employee reached maximum medical improvement (MMI) is premature when there is a subsequent request and approval of additional medical treatment. Under Workers' Compensation laws, temporary total disability (TTD) payments are terminated when an injured employee reaches MMI. MMI is "a treatment plateau (the condition is static or well-stabilized) at which no fundamental functional or physiological change can be expected within reasonable medical probability in spite of continuing medical or rehabilitative procedures." An employee may be declared MMI despite the fact that supportive treatment may be needed for the employee to maintain his or her current level of functioning.

In this case, a McDonald's worker was injured in a slip and fall accident at work in 2002. She was approved by the Bureau of Workers' Compensation ("Bureau") for several conditions. She received treatment until 2006. After a lapse, she resumed treatment with a chiropractor in 2008. In 2010, the Bureau requested an independent medical evaluation ("IME"). The physician conducting the IME concluded that the employee had reached MMI, was able to return to her previous position without restrictions, and did not require further medical treatment for the allowed conditions of the claim. A few days later, the employee's treating physician requested authorization for additional medical treatment (steroid injections), which was approved by the employer's managed-care organization. Additionally, the employee's treating chiropractor opined that the employee would likely need an additional three months of treatment before reaching MMI. Despite these additional treatment recommendations, the Bureau terminated TTD based on the IME finding that the employee had already reached MMI.

On appeal, the Court addressed the issue of whether the IME physician's finding of MMI and the Bureau's subsequent decision to terminate TTD based on that finding was appropriate. The Court analyzed prior cases cited by the employee in which findings of MMI occurred contemporaneously with the Bureau's approval of a medical treatment program recommended by the treating physician. In one such case, the physician declaring MMI was unaware that the Bureau had contemporaneously approved treatment for a psychiatric condition based on the recommendations of the employee's treating physician. In a similar case, a physician relied on an erroneous belief that the Bureau had denied a proposed treatment and reached the conclusion that the employee had achieved MMI. The Supreme Court clarified that the facts of these prior cases were distinguishable because the physicians' reports lacked information regarding the Bureau's decisions to authorize continuing treatment. In other words, the physicians' findings of MMI in those cases were premature, because the physicians did not have all of the relevant facts. In this case, however, the employee's physician and chiropractor provided information only after (even if only a few days after) the IME physician conducted his examination. The Court stated that prior case law "does not render premature a doctor's opinion on [MMI] when there is a subsequent request for and approval of a treatment plan."

State ex rel. McCormick v. McDonald's, Slip Opinion No. 2015-Ohio-123.

How this Affects your District:

Although these types of decisions rest largely in the hands of the Bureau, it is helpful to understand the circumstances under which MMI occurs, even if an employee continues to submit requests for additional treatment. In this case, the Court refused to broadly apply prior case law. The Court made clear that a finding of MMI is not necessarily premature or invalid just because additional evidence is presented after the physician's opinion is rendered, even if approved.

Failure to Provide Parent with RTI Data Results in a Denial of FAPE

The Ninth Circuit recently determined that an elementary student was denied FAPE when the school district failed to provide his parents with a copy of his response to intervention (RTI) data, thereby preventing them from meaningfully participating in his IEP team meetings and from providing informed consent for identification and initial provision of services. This case involved the identification of a student, C.M., with a specific learning disability (SLD). While in first grade, C.M.'s parents requested an evaluation under the Individuals with Disabilities Education Act (IDEA) due to his continued reading difficulties.

Prior to obtaining consent for an evaluation, the district held two team meetings with the parents to discuss C.M.'s progress. Although the district provided C.M.'s parents with a couple of C.M.'s progress monitoring scores during these meetings, C.M.'s parents were not provided with his overall progress monitoring data graphs.

In addition to these two meetings with C.M's parents, the district also conducted internal meetings under its RTI model to monitor C.M.'s progress. As a part of its general education RTI process, school personnel held meetings three times yearly to discuss universal screening assessment results for all students in the school. Thus, since kindergarten, the school team had been monitoring C.M.'s progress monitoring data at least three times per year. Despite the fact that the district used C.M.'s progress monitoring data to make educational decisions for him, C.M.'s parents never received a copy of this data.

At the end of C.M.'s 1st grade school year, the district completed an initial evaluation to determine whether C.M. met the criteria for a student with an SLD under IDEA. For SLD evaluations, IDEA allows districts to use either a severe discrepancy model or a RTI model to determine eligibility. The district in this case used a discrepancy model to determine eligibility. In addition to using a variety of assessment tools to determine whether there was a severe discrepancy between C.M.'s ability and achievement, the district also used C.M.'s RTI data to "corroborate" the standardized assessment results. Use of C.M.'s RTI data is consistent with IDEA's provision stating that an IEP team should, "as appropriate," review existing evaluation data, including classroom-based assessments. Thus, there were no problems with the district's choice of evaluation tools, including review of the RTI data.

The district's error was in failing to provide the RTI progress monitoring data to C.M.'s parents. IDEA requires that evaluation data "from all these sources" be "documented and carefully considered." 34 C.F.R. § 300.306(c)(1). Although IEP team members from the school were aware of the data, the district failed to attach the data to C.M.'s evaluation or otherwise incorporate the data into the evaluation report. This prevented the entire IEP team from considering the RTI data.

Additionally, if a student participated in a RTI process, IDEA required a description of the "instructional strategies used and the student-centered data collected" to be included with the child's determination of eligibility. 34 C.F.R. § 300.311(a)(7). The district argued that this statement was only required if the team used an RTI model for determining eligibility, but the court rejected this argument. The court held that this provision of IDEA did not differentiate between the type of model used to determine eligibility, but instead, was only determined by whether the student participated in a RTI model. The fact that "C.M. participated in RTI assessments and the severe discrepancy model was corroborated by C.M.'s RTI data" was enough to fall under the provisions of the statute. Additional provisions of IDEA required that the team ensure that underachievement was not due to lack of appropriate instruction by considering the student's progress monitoring data. This provision also supported the argument that RTI data should be considered when determining eligibility under both a discrepancy model and an RTI model.

Because C.M.'s parents were lacking information from C.M.'s progress monitoring data, they were unable to provide informed consent for his evaluation and his special education services provided through his IEP. The Court pointed to several discrepancies between C.M.'s progress monitoring data and other assessment data used to determine eligibility. Because C.M.'s parents lacked information regarding these discrepancies and C.M.'s deficits and progress (even after an IEP was put in place), they were unable to meaningfully participate in the IEP process.

M.M. v. Lafayette School Dist., 767 F.3d 842 (9th Cir. 2014).

How this Affects your District:

It should been noted that there was a dissenting opinion in this case. The dissenting judge argued that the RTI process was primarily used for general education purposes and was not used in the evaluation process for determining whether C.M. had a specific learning disability. Therefore, the district was not required to provide C.M.'s parents with a copy of the RTI progress monitoring data under IDEA regulations.

Although, it is possible that another court may take the dissenting judge's approach on this issue, it is best practice to provide the parents of a student with a disability all the assessment data available to the school team, even it is not the determining factor used in an evaluation. This helps ensure that all parties have a full picture of the student's strengths and weaknesses. Additionally, as stated by the dissenting judge, "Cases brought under IDEA are complicated, and emotions sometimes run high. It is completely understandable that the parents of a child with a disability would leave no stone unturned in their effort to ensure that their child's legal rights are fully protected." To avoid this type of situation, you can help promote a relationship of trust by keeping parents informed.

Terminated Employees Fail to Prove State Law has a Racially Discriminatory Impact

In 2007 and 2008, the Ohio Legislature enacted two house bills that amended Ohio Revised Code §3319.39 and created §3319.391. Ohio Revised Code §3319.391 required that all public school districts obtain criminal background checks from all current school district employees, both licensed and non-licensed, by September 5, 2008. Based on those criminal background checks, school districts were required to "release" employees who had been convicted of a number of listed offenses.

Due to the changes in the law, Cincinnati Public Schools released ten employees, nine of whom were African-American. Plaintiffs brought claims in federal court for racial discrimination in violation of state and federal law, stating that their releases from employment were based on a state law that had a racially discriminatory impact. Cincinnati Public Schools defended on the grounds that they acted in accordance with a state law and that plaintiffs had failed to show statistical proof of a racially discriminatory impact at the state level.

One plaintiff, Gregory Waldon, was convicted of felonious assault in 1977, while an employee of the defendant, Cincinnati Public Schools. Upon his parole in 1980, and with full knowledge of the felonious assault conviction, Cincinnati Public Schools rehired Mr. Waldon. Mr. Waldon's employment continued until the required criminal background check under ORC §3319.391. In late 2008, Cincinnati Public Schools officials told Mr. Waldon of their plan to release him under the new law. Shortly thereafter, Mr. Waldon chose to retire.

The other plaintiff, Eartha Britton, was convicted of drug trafficking in 1983. Cincinnati Public Schools hired Ms. Britton with full knowledge of this conviction and continued to employ her for the next 18 years. In 2008, Cincinnati Public Schools released Ms. Britton from employment based on her 1983 drug trafficking offense pursuant to Ohio Revised Code §§ 3319.39 and 3319.391.

The U.S. District Court for the Southern District of Ohio, Western Division framed the case as a Title VII issue of disparate impact discrimination. The Court used the United States Supreme Court decision in *Griggs v. Duke Power Company* to explain disparate impact as a type of discrimination in which the practices are fair in form, but discriminatory in operation.

The Sixth Circuit has explained disparate impact cases as those involving practices that seem to treat different groups the same, but actually treat one group more harshly than the others and that treatment cannot be justified by business necessity.

In order to establish a prima facie disparate impact case, the plaintiff must identify a specific employment practice to be challenged and then, through relevant statistical analysis, show that the challenged practice has an adverse impact on a protected group.

At the outset, the Court decided the plaintiffs' argument was correct in that Title VII trumps state law if state law purports to authorize a discriminatory employment practice due to either disparate treatment or disparate impact. Additionally, the plaintiffs identified and challenged a specific employment practice, the release of employees with certain criminal convictions, which satisfied the first prong of their prima facie disparate impact case.

The second prong of a disparate impact case must show, through statistical analysis, that the challenged practice disproportionately impacts a protected group. Plaintiffs contended that African-Americans comprised 100% of the non-licensed employees who were released by the defendant, Cincinnati Public Schools. The defendant's view, and the stance taken by the court, was that because this was a policy implemented by state law, the relevant statistical analysis must show this disproportionate impact occurred state-wide. The relevant analysis was not what happened in a specific district, but rather on the total group, the state of Ohio.

For example, if 90% of a district's employees were African-American, it would be more likely that more African-Americans would be released than any other race. If, however, 30% of a district's employees were African-American, it would be less likely that a high percentage of African-American employees would be released; therefore, the law could be called into question if more African-Americans were released than any other race. The Court decided that the relevant analysis should take place at the state level to take into account these differences in the racial compositions of Ohio school districts. Although the plaintiffs had done some research of discrimination at the state level, they did not offer any evidence showing a state-wide disparate impact of the background check policy. Thus, plaintiffs' claims failed because they could not establish a prima facie disparate impact case.

Waldon v. Cincinnati Public Schools, 2015 WL 452229 (S.D. Ohio Feb. 03, 2015).

How this Affects your District:

This federal court decision is just the latest in various challenges to the school employee background check laws. While this case centered on allegations of discrimination, a prior challenge questioned whether the revised background check laws violated the Ohio Constitution's prohibition on retroactive laws. In both cases, the background check laws were upheld. School districts are required to comply with the background check laws, and can do so with some assurances that the courts are not prepared to invalidate the laws. However, it should be noted that the decision described in this article left the door open to a challenge if a plaintiff could prove that statewide data shows a disparate impact. Absent such a future challenge, districts should continue to conduct background checks and make employment decisions accordingly.

FMLA Spouse Definition Change

On February 25, 2015, the U.S. Department of Labor issued a Final Rule changing the Family and Medical Leave Act of 1993 ("FMLA") definition of "spouse." Effective March 27, 2015, spouses in same-sex marriages shall have the same opportunity as spouses of heterosexual marriages to exercise FMLA rights regardless of where they live. Therefore, even though Ohio prohibits same-sex marriage, if a couple was legally married outside of Ohio in a state that recognizes same-sex marriage, the same-sex spouse(s) must receive the protections of FMLA.

The U.S. Department of Labor issued this new rule in the wake of the United States Supreme Court decision in *U.S. v. Windsor* where the Court deemed the federal Defense of Marriage Act's definition of spouse and marriage, which was limited to heterosexual marriages, unconstitutional.

The Final Rule modifies the definition of "spouse" in several ways.

- The definition of "spouse" will use a "place of celebration" rule rather than a "state of residence" rule. This means that the same-sex spouses who reside in a state that does not recognize same-sex marriage, but were legally married in a state that does, will be considered spouses under FMLA.
- The definition of "spouse" will expressly include persons in lawfully recognized same-sex and common law marriages, as well as marriages that were validly entered into outside of the United States, so long as those marriages could have been entered into in at least one state.

This change is intended to create a consistent application of FMLA rights across the country, even when different states have different laws regarding the underlying marriages. Further, this definitional change means that eligible employees, including those in a same-sex marriage, regardless of where they live, will be able to: take FMLA leave to care for their spouse with a serious health condition; take qualifying exigency leave due to their spouse's covered military service; or take military caregiver leave for their spouse so long as the couple was legally married in a state that recognized the marriage.

Another change within this Final Rule entitles eligible employees to take FMLA leave to care for their stepchild (child of employee's same-sex spouse) regardless of whether the in loco parentis requirement of providing day-to-day care or financial support for the child is met. This Final Rule also entitles eligible employees to take FMLA leave to care for a stepparent who is a same-sex spouse of the employee's parent, regardless of whether the stepparent ever stood in loco parentis to the employee.

How this Affects your District:

Effective March 27, 2015, employers covered by FMLA must follow the Final Rule changes promulgated by the U.S. Department of Labor, including this new definition of "spouse." Currently, this change will only have FMLA implications, and will not impact other employment aspects for Ohio school districts (i.e. sick leave policies, benefits, etc.). However, by the end of June 2015, the U.S. Supreme Court should decide on whether state same-sex marriage bans are constitutional. If the U.S. Supreme Court decides that state same-sex marriage bans are unconstitutional, same-sex married couples will be entitled to all benefits received by heterosexual married couples.

Upcoming Deadlines

As your school district prepares for the next couple of months, please keep in mind the following upcoming deadlines. For questions about these requirements, please contact an Ennis Britton attorney.

- April 1 - Deadline for public high schools to publish or provide information regarding the online education and career planning tool (RC 3313.89)
- April 1 - Deadline for National Board Certified teachers to submit applications for the grant program to the superintendent of public instruction (RC 3319.55)
- April 15—Deadline for applicable board members and administrators to file annual financial disclosure statement with Ethics Commission (RC 102.02)
- April 27—Deadline to submit certification for August income tax levy to Ohio Department of Taxation (RC 5748.02)
- April 30 - For districts who submitted a staffing plan due to an inability to provide the number of teachers needed pursuant to the Third Grade Reading Guarantee: Deadline to submit requests for extensions of staffing plans for the 2015-2016 school year with the Department of Education (RC 3313.608)
- May 1—Deadline to complete teacher evaluations (RC 3319.111)
    - In year contract expires: At least 3 observation cycles plus periodic walkthroughts
    - In year contract does not expire: At least two observation cycles plus periodic walkthroughs
- May 1—Deadline to submit August emergency levy or current operating expenses levy to the county auditor (RC 5705.194, 5705.195, 5705.213)
- May 6—Deadline to file or submit the following with the board of elections for August election: resolution of necessity, resolution to proceed, auditor's certification for bond levy, continuing replacement levy, permanent improvement levy, operating levy, emergency levy, phased-in levy, current operating expenses levy (RC 133.18, 5705.192, 5709.195, 5705.21, 5705.25, 5705.251
- May 6—Deadline to certify resolution for August income tax levy with the board of elections (RC 5748.02)
- May 10—Deadline to provide teachers with a copy of the report of their evaluation results (RC 3319.111)
- May 31—Deadline to provide notice of nonrenewal for administrators (RC 3319.02)
- June 1—Deadline to provide notice of nonrenewal for teachers (RC 3319.11)

Upcoming Presentations

SAVE THE DATE! 2014-2015 Administrator's Academy Seminar Series

Seminars will take place at the Great Oaks Instructional Resource Center or via live webinar from 9:00 a.m. to 11:30 a.m. unless otherwise noted. Additional registration information will be provided in the near future!

April 23 – Special Education Legal Update
July 16 – 2014-2015 School Law Year in Review (webinar only!)

Other Upcoming Presentations:

April 15—RIFs, Forecasts, & Merit Pay under New Evaluation System, OASBO Spring Conference
Presented by: Bronston McCord

April 18—Employee Discipline & Legal Updates, Ashland Leadership Academy Seminars
Presented by: Bronston McCord, Bill Deters, & Hollie Reedy

May 1—Student Discipline: Panel Discussion, Ohio State Bar Association
Moderator: Bill Deters
Board Representative: John Britton

May 2—Board Members and the Issues Facing Them, 2015 OSBA Board Leadership Institute
Presented by: John Britton

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Want to stay up-to-date about important topics in school law? Check out Ennis Britton's Education Law Blog at www.ennisbritton.com/education-law-blog.

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, send your request to Pam Leist at pleist@ennisbritton.com or 513-421-2540. Archived topics include:

- Managing Workplace Injuries & Leaves of Absence
- Special Education: Challenging Students, Challenging Parents
- Fostering Effective Working Relationships with Boosters
- Effective IEP Teams
- Cyberlaw
- FMLA, ADA and Other Types of Leave
- Levies & Bonds
- OTES & OPES Trends & Hot Topics
- Tax Incentives
- Prior Written Notice
- Advanced Topics in School Finance
- Student Residency, Custody and Homeless Students
- Student Discipline
- Media and Public Relations
- Gearing Up for Negotiations

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Workers' Compensation

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Ryan LaFlamme
Pam Leist
Giselle Spencer
Erin Wessendorf-Wortman

Special Education

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