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School Law Review

November 2015

Legislative Reminders and Updates

Changes to Property Disposal Process for School Districts

This summer, House Bill 64 enacted Section 3313.413 of the Ohio Revised Code which significantly changes the property disposal process for school districts. Any school district seeking to dispose of real property must first offer the property to "high-performing" community schools. If no community school notifies the treasurer of its intent to purchase the property with 60 days, the school district must follow the procedures in RC 3313.411 to dispose of the property.

A "high-performing" community school is determined by the Ohio Department of Education to have a track record of high quality academic performance and falls into one of four "high-performing" categories:

1. The community school serves only grades K-3 and has received a grade of A or B for making progress in improving literacy measures on its most recent report card;
2. The community school serves students enrolled in a dropout prevention and recovery program and has received ratings of "exceeds" on its most recent report card;
3. The community school has received an A or B on value-added progress dimension on its most recent report card and has received an A, B, or C for performance score index during the three previous years of operation; or
4. The community school has received an A or B on value-added progress dimension on its most recent report card and has improved its performance index score in the three previous years of operation.

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Changes to School Board Member Compensation

House Bill 2 ("HB 2") was passed by both the House and Senate on October 7, 2015. The bill was signed into law on November 1, 2015. While HB 2 primarily addressed community school operations, a few changes were made concerning school board member compensation as well. The changes are the same for both members of an educational service center and members of school district boards of education. Under RC 3313.12, members may receive compensation of up to $125 per day plus mileage to and from board meetings based on a rate determined by the governing board's resolution. Total yearly compensation may not exceed $5,000.

Members may also be compensated for attending approved training programs. For programs less than three hours long, members can be compensated up to $60 per day. For programs lasting longer than three hours, members can be compensated up to $125 per day. HB 2 will become effective at the end of January 2016.

FMLA Forms Updated to Include GINA Safe Harbor Language

New Family and Medical Leave Act (FMLA) notice and certification forms were issued by the Department of Labor to replace forms expiring earlier this year. The newly issued FMLA forms are valid until May 31, 2018. The new forms are nearly identical to the previous forms with one significant change: incorporation of language meant to address confidentiality and non-disclosure requirements set forth in the Genetic Information Nondiscrimination Act (GINA). GINA prohibits employers from gathering certain genetic information from their employees and employee's family members. GINA also specifies "safe harbor" language to use when discussing medical information with physicians to prevent disclosure of genetic information. Information received inadvertently from an employee will not result in a violation of GINA. Although employers are not required to use these forms and can instead choose to create their own notices and certifications, those using their own forms must ensure that the notices and certifications convey the same information as FMLA forms and are limited to the same inquires on FMLA forms.

The new FMLA forms include a warning about provision of protected information. However, the warning is terse and lacks specifics:

> "Do not provide information about genetic tests, as defined in 29 C.F.R. § 1635.3(f), genetic services, as defined in 29 C.F.R. § 1635.3(e), or the manifestation of disease or disorder in the employee's family members, 29 C.F.R. § 1632.3(b)."

Please do not hesitate to contact an attorney at Ennis Britton Co., L.P.A., with your questions regarding FMLA notice and certification forms.

Ohio Supreme Court Rules that Board of Revision Does Not Have Authority to Dismiss Valuation Complaints for Failure to Prosecute

In 2013, the Ginters filed a complaint with their county Board of Revision (BOR) seeking to lower the value of their property. A hearing was scheduled but neither the complainants nor counsel appeared on their behalf. The BOR dismissed their valuation complaint for failure to prosecute because they did not show at their scheduled hearing. The complainants appealed the dismissal to the Board of Tax Appeals (BTA).

The BTA held that the BOR does have discretion to dismiss a complaint when the complainant fails to show with certain limitations. The BTA ruled that the BOR did not have the discretion to dismiss the complaint for this particular case and that the BOR must make a determination of property value whenever a complaint properly invokes its jurisdiction. The BTA directed the BOR to value the property in accordance with the sale amount, which favored the Ginters. The BOR appealed the BTA's decision.

The Ohio Supreme court affirmed the BTA's decision that the BOR cannot dismiss the case and must determine property value. However, the court held that the BTA erred in directing the BOR to value the property in accordance with the sale amount, since only the BOR has jurisdiction to decide property value.

In its decision, the court admitted that in the past, it had improperly interpreted statutes regarding the powers of boards of revision. In fact, twenty years ago in *LCL Income Properties v. Rhodes*, the court ruled that the BTA could dismiss complaints for failure to prosecute because it would be unreasonable for the BOR to revalue every property complained of, even if the complainant does not show at the scheduled hearing.

However, the court in *Ginter* noted that *LCL Properties* concerned a jurisdictional issue, whereas there was no question that the BOR had jurisdiction to hear the *Ginter* complaint. Accordingly, it would be unfair to apply the standards from *LCL Properties* to *Ginter* as the two cases did not involve the same issue. The Supreme Court used *Ginter* to remedy their error and held that the BOR must hear and decide complaints by determining property value. Boards of revision are creatures of statute which means that all of their powers come from statutory law. The Supreme Court noted that there is no statute conferring the power to dismiss for failure to prosecute to boards of revision. Therefore, the BOR does not have the authority to dismiss a complaint for failure to prosecute.

Ginter v. Auglaize Cty. Bd. of Revision, 143 Ohio St.3d 340, 2015-Ohio-2571.

LCL Income Properties v. Rhodes, 71 Ohio St.3d 562, 646 N.E.2d 1108 (1995).

How this affects your district:

The former standard applied to BOR cases allowed complaints to be dismissed for failure to appear at a scheduled hearing. The ruling in *Ginter* marks a return to statutory standards requiring boards of revision to determine property value whenever a complaint properly invokes jurisdiction. The Supreme Court is effectively enforcing the duty of the BOR to hear and decide complaints by determining property value with this decision.

Taxpayers are likely to benefit from this decision as a complainant will be assured of obtaining a determination of property value simply by filing an objection to the proposed valuation.

Recent Developments Involving Transgender Employees and Students

The Depart of Labor recently issued guidance related to transgender employees and access to restrooms, and a Virginia trial court recently decided a case concerning transgender students and restroom access.

OSHA Guidance on Transgender Restroom Usage by Employees

The Department of Labor's Occupational Safety and Health Administration (OSHA) recently released guidance concerning restroom access for transgender workers. OSHA's Sanitation standard (1910.141) requires employers to provide their employees with toilet facilities, and has consistently interpreted this standard to require prompt access to restroom facilities. Further, employees should not be limited to facilities that are an unreasonable distance or travel time from the employee's worksite and the employer cannot impose unreasonable restrictions on restroom use.

The OSHA's guidance document states that: "All employees, including transgender employees, should have access to restrooms that correspond to their gender identity." [Transgender refers to a person whose gender identity differs from their birth gender.] Transgender individuals may transition to live their everyday lives as the gender with which they identify. This may include social, medical or legal changes.

OSHA's proposed best model practices for restroom access for transgender employers ensures prompt access to appropriate restroom facilities. Each employee should be able to choose the most appropriate and safest option for him- or herself. Employees should not be asked to provide any medical or legal documentation of their gender identity in order to access a gender-appropriate restroom facility. No employee should be required to use a segregated facility apart from other employees either because of their transgender or non-transgender status.

Best practices may also include additional restroom facility options such as single-occupancy, unisex facilities and multiple-occupant, unisex restroom facilities with lockable single-occupant stalls. OSHA advises that all employers need to find solutions that are safe and convenient for their employees regardless of workplace layout.

The Equal Employment Opportunity Commission (EEOC), the Department of Justice, the Department of Labor, and other federal agencies have interpreted prohibitions on sex discrimination to prohibit employment discrimination based on gender identity or transgender status. The EEOC ruled in April 2015, that transgender employees cannot be denied access to common restroom facilities used by other employees with the same gender identity. Such denial is considered sex discrimination under Title VII regardless of whether the employee has had any medical procedures related to their gender identity or whether other employees have negative reactions to transgender individuals choosing to use the restroom associated with their gender identity.

Likewise, several states have implemented rules requiring employers to allow transgender employees to use restrooms consistent with their gender identity. *See, e.g.,* Colorado's 3 CCR 708-1-81.9; Delaware's Guidance from Department of Human Resources Management; D.C. Municipal Regulations 4-802; Iowa's Civil Rights Commission; Vermont's Human Rights Commission; and Washington's Human Rights Commission.

Department of Labor, Occupational Safety and Health Administration, 2015. *"Best Practices: A Guide to Restroom Access for Transgender Workers."*

Virginia Court Ruling on Transgender Restroom Usage by Students

In April 2014, G.G. was diagnosed with Gender Dysphoria and notified his school of his transgender status in August. School officials changed his records to reflect his new name and teachers were

advised to use male pronouns when referring to G.G. At school, G.G. used a separate bathroom in the nurse's office until the principal gave him permission to use the boys' restroom.

Several members of the community asked that the school prohibit G.G. from using the boys' restroom. They claimed that allowing G.G. to use the boys' restroom was a violation of privacy of the other students and might lead to sexual assaults. In response the Board of Education made several structural changes to the school restrooms and proposed a new resolution regarding use of school restrooms and locker rooms. The resolution limited the use of school restrooms and locker rooms to corresponding biological gender ("sex"). Students with gender identity issues would be provided alternative, appropriate, and private facilities. The resolution was approved in December.

G.G. began hormone treatment in December of 2014. He claimed that due to his masculine appearance, girls would react negatively and ask him to leave the girls' restroom. He refused to use the unisex restrooms as they were not close to his classes and he felt that it would further stigmatize and isolate him.

G.G. filed a complaint against the school board alleging the resolution violated the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments of 1972. He also filed a Motion for Preliminary Injunction requesting permission to use the boys' restrooms at school while the case is being decided. The Board filed a Motion to Dismiss.

The trial court ultimately granted the Motion to Dismiss on the Title IX claim, and denied the restraining order. The court reasoned that G.G. did not prove that the Board's resolution (1) excludes him from participation in an educational program; (2) that the Board receives federal assistance; and (3) that the exclusion is on the basis of sex. The main issue according to the court was whether discrimination based on gender identity is barred under Title IX regulations.

The court cited to 20 U.S.C. § 1686 and 34 C.F.R. § 106.33 ("Section 106.33") in their analysis. Section 1686 includes exceptions to Title IX regulations that prohibit federally assisted schools from denying educational services to a student based on sex. One such exception states that "nothing… shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes."

Section 106.33 regulations allow a school to "provide separate toilet, locker room, and shower facilities on the basis of sex" as long as the facilities are comparable for both genders. The court reasoned that Section 106.33 clearly allows separate restrooms on the basis of sex even if the regulations do not provide governance for gender identity.

The court granted the Board's Motion to Dismiss the Title IX claim as Section 106.33 is clear that schools can separate restrooms on the basis of sex so long as they are comparable. The court ruled that G.G. failed to state a valid claim under Title IX as he did not assert that the sex-separated restroom facilities are not comparable.

The trial court denied the Motion for Preliminary Injunction in conjunction with granting the motion to dismiss. In order to be granted the injunction, G.G. had to prove that he was (1) likely to succeed on the merits of the case; (2) he was likely to suffer irreparable harm absent an injunction; (3) the balance of hardships weighed in his favor; and (4) the injunction was in the public interest. The motion was denied as G.G. failed to submit adequate evidence to establish that the balance of hardships weighed in his favor.

Note that the student's Equal Protection claim is pending. G.G. has appealed this decision.

G.G. ex rel. Grimm v. Gloucester County School Board, --- F.Supp.3d --- (2015).

How this affects your district:

It is important to note that the guidelines published by OSHA only apply to employees. Further, the OSHA document is not binding legislation; it merely contains guidelines for compliance with OSHA standards.

Further, Ohio schools are not obligated to follow the decision in *G.G. ex rel. Grimm*, although Ohio courts may look to this case for guidance in similar Ohio cases. Since the Virginia case is not binding in Ohio, school districts should continue to follow current procedures and should seek the advice of legal counsel when determining whether or what type of accommodations may be appropriate for transgender students and employees on a case by case basis. The Equal Protection claim in the G.G. case is still pending and the most recent decision has been appealed.

Ennis Britton will keep you updated on any further developments with regard to this emerging issue.

Tips for Implementing Effective Emergency Plans

It is especially important to reiterate the importance of emergency planning this month due to the numerous bomb threats being made recently to Ohio schools. Responses in emergency situations must be prompt and orderly. Proactive preparation can facilitate emergency procedures during an actual emergency situation.

Communication and practice drills are critical steps in implementing effective emergency plans at school. An effective emergency plan ensures that all students and staff members are prepared for any emergency, seeks input from staff and parents, and regularly practices drills to determine if there are any issues with emergency preparation.

All emergency plans are by nature reactive. But they also should be proactive. Precautions must be taken to ensure that special education children are able to understand and practice emergency drills, drills are not traumatizing to students and are effective in teaching children how to act during an emergency.

It is recommended that schools work with local law enforcement and fire departments to implement safe and effective emergency plans. Additionally, participation in such drills can alleviate fear caused by the presence of fire fighters or police officers in full uniform in a real emergency. Communication to parents is also important for effective emergency plans. Parents should be aware of how the school will handle emergencies prior to the start of the school year. Parents may have appropriate advice for teaching emergency drills to their children and may be willing to practice emergency drills at home to further enforce the proper response to an emergency situation. Teachers must also be aware of the school's emergency procedures. Online training on topics such as bullying awareness and intruders may be helpful for teachers and other school staff. Staff in charge of young children may need to be prepared to offer activities for their students to help keep them focused and hold their attention.

In order to help avoid intruder emergencies, doors should remain locked at all times. A doorbell system and camera at the main entrance can help monitor who has access to school facilities. All visitors should sign in and out of the buildings and should wear a visitor's badge. School staff should be trained how to stop and question anyone without a visitor's badge. Staff should not be afraid of practicing internal lockdowns. Schools are generally the most vulnerable locations for an attack. Prepared staff can help minimize any harm that may arise during an intruder emergency. Ennis Britton will keep you updated on any further developments with regard to this emerging issue.

Court Sides with Unemployment Compensation Review Commission's Decision on Scope of Appeals

The Sixth Appellate District (Williams County) has reversed a trial court ruling which overturned the unemployment Commission's (ODJFS) grant of benefits to a truck driver who quit his job. At the initial hearing, the truck driver claimed to have quit because his truck broke down and his employer refused to assist.

The truck driver specifically alleged that the employer-provided debit card he received did not have enough funds to make the repairs, the employer was drunk at the time and refused to assist him, and he had to summon his son-in-law to the scene for assistance, who had to drive eighty miles in the middle of the night to help. This was the basis for the driver's decision to quit.

The employer countered that its understanding at the time of hire was that the employee was able to make minor repairs, that there were in fact sufficient funds on the card provided, that the employer recommended he call his son-in-law because he was employed as a road services tech and that the trip was only thirty miles.

At the first hearing, ODJFS found in favor of the employer denying the benefits and finding that the employee quit without just cause. The employee appealed. At the appeal hearing, the truck driver claimed for the first time that he quit because his employer asked him to violate federal regulations regarding down time for truck drivers who have driven a certain number of hours. The employee claimed that the employer insisted that he drive a route in violation of law. This caused an argument to ensue and the employee quit. The employer did not participate in the hearing at this level and the initial decision was reversed, finding that the employee had just cause to quit and was therefore entitled to benefits.

The employer unsuccessfully appealed to the Review Commission and then to the trial court. Before the court, the employer challenged the employee's credibility by questioning why the employee set forth his most recent justification for the first time on appeal. The trial court agreed, finding that the employee had really quit because of the roadside breakdown incident and found in favor of the employer.

ODJFS appealed to the Sixth Appellate District. The appeals court reviewed the standard on appeal. Courts reviewing decisions of the Unemployment Commission must limit their inquiry as to whether the decision by unemployment is "unlawful, unreasonable, or against the manifest weight of the evidence." This is a high standard. That reasonable minds might disagree is not enough for a court to

overturn the unemployment decision so long as there is "some competent, credible evidence in the record" to support it. The Appellate Court found that the Trial Court had improperly considered the credibility arguments on appeal because there is no rule providing that a claim or defense is waived if not made in the initial application or hearing.

Accordingly there are lessons to be learned from this case:

1. **Do not rest until the fight is finished.** Here, the employer did not participate in the appeal where the employee's ultimately successful argument was made. Credibility could have been attacked at this time, rather than improperly for the first time before the court. Therefore, make sure you are represented and are participating at all levels of the appeal.

2. **The standard on appeal to a court of common pleas is difficult to reach.** Courts are generally limited to the record provided by ODJFS. The scope of the review by the court is limited as to whether the hearing officer's decision was "unlawful, unreasonable, or against the manifest weight of the evidence."

Friedel v. Quota, 2015-Ohio-4060

Please do not hesitate to contact an attorney at Ennis Britton Co., L.P.A., with your questions regarding unemployment.

Appeals Court Affirms Political Subdivision Immunity in Slip and Fall

The Ninth Appellate District Court of Appeals has reaffirmed political subdivision immunity for public school districts in a slip and fall case. The Copley Fairlawn School District was sued after a student slipped and fell. The student worked in the office during her study hall. While working in the office, the student was directed by a vice principal to go and change the letters on a marquee. The student did so and reentered the building. Forty five minutes after re-entering the building, the student slipped as she began to descend a stair case. The student fell backwards and hit her head on concrete. The student did not recollect any water being present on the floor at the time of her fall.

The school moved for summary judgment on the basis that it was immune from suit under Ohio law. The trial court denied summary judgment, finding that there were genuine issues of fact in dispute for the jury to decide as to whether an exception to immunity applied.

There are five exceptions to political subdivision immunity provided by Revised Code Chapter 2744. If one of these exceptions applies, the school district is ***not*** protected by immunity. The exceptions for which political subdivisions (including school districts) are liable for injury, death, or loss to person or property are as follows:

1. The negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority.

2. The negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

3. Negligent failure to keep public roads in repair to remove obstructions from public roads.

4. Injury, death, or loss to person or property that is caused by the negligence of employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function (e.g., a school building).

5. Civil liability is expressly imposed upon the political subdivision by a section of the Revised Code

The student here argued that the buildings and grounds exception (number 4 above) applied. However, the Court of Appeals found that the student had not set forth sufficient evidence that there was a defect in the building where she fell or that the school employees were negligent. Particularly here, the defect would have been that the staff permitted a wet substance to remain on the floor causing a safety hazard. The court found that there was not sufficient information to determine if the floor was even wet at the time she fell, let alone whether a hazard had negligently been permitted to remain. Accordingly the school district was entitled to immunity and the case was dismissed.

Districts should keep in mind that while they may be protected by the immunity grants of Chapter 2744, immunity is not automatic as there are exceptions to the rule.

Stetz v. Copley Fairlawn School Dist., 2015-Ohio-4358

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.

- **November 1** – Last day for classroom teachers to develop online classroom lessons in order to make up hours for which it was necessary to close schools (RC 3313.482); Last day to complete reading skills assessments for kindergarteners (RC 3313.608); Last day to screen first-time pupils (kindergarten or first grade) for hearing, vision, speech and communications, and health or medical problems (3313.673); Last day for superintendent to notify project school district of number of initial scholarships to be awarded for grades K-12 (RC 3313.978)
- **November 3** – General Election Day (RC 3501.01)
- **November 15** – Auxiliary services final expenditure report due (RC 3317.06); Last day to determine district's effective real property value (RC 3317.0211)
- **December 8** – Last day to submit resolution to community school and resident district transportation flags in order for transportation record to be funded
- **December 15** – Tuition Certification for Private Treatment Facility available (RC 3313.64)
- **December 31** – School Board member terms expire in applicable years (RC 3319.09); Last day for treasurer to canvass board to establish date of January board meeting (RC 3313.14)

Upcoming Presentations

2015-2016 Administrator's Academy Seminar Series

January 7, 2016 – Ohio Sunshine Laws

Joyce E. Brooks Conference Center, Mahoning County Career and Technical Center, Youngstown, Ohio

April 7, 2016 – Special Education Legal Update

Great Oaks Instructional Resource Center, Cincinnati, Ohio

July 14, 2016 – 2015-2016 Education Law Year in Review

Webinar or Archive ONLY!

Participants must be registered to attend each event. Each seminar will be accompanied by a live online webinar. The webinar will be archived for those who wish to access the event at a later time. You can register on our website at www.ennisbritton.com/client-resources/erf-administrators-academy/, contact Sarah Hawkins at 513.421.2540, or send an email to shawkins@ennisbritton.com.

Other Upcoming Presentations:

November 5 – Ashland Next Generation Student Discipline

Presented by: Jeremy Neff

November 8-11 – OSBA Capital Conference

November 9: Coaches, Athletes and Boundaries – John Britton

November 9: OSBA Monday Luncheon - John Britton, Bronston McCord & Gary Stedronsky

November 10: When Passion Becomes a Problem – Bill Deters

November 11: Confessions of a Superintendent – Gary Stedronsky & Chad Hilliker

December 3 – Ashland Next Generation Staff Evaluations

Presented by: Pam Leist

December 8 –Special Education, NBI

Presented by: Giselle S. Spencer

January 20, 2016 – OASPA Winter Camp: Collective Bargaining and Negotiations

Presented by: Bronston McCord & Bill Deters

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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 Sarah Hawkins at shawkins@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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