



# Ennis Roberts Fischer SCHOOL LAW REVIEW



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## ODE Issues Third Grade Reading Guarantee Guidance

The Ohio Department of Education (ODE) recently published additional guidance to certain provisions of the Third Grade Reading Guarantee. ODE's guidance addresses minimum achievement levels for promotion to fourth grade, summer and midyear promotion of students to the fourth grade, and a description of the Ohio Achievement Assessment (OAA) alternatives.

### Promotion Requirements

For the 2013-2014 school year, a student must obtain a minimum score of 392 on the 3rd grade OAA to be promoted to the 4th grade, unless the student is exempted under one of the following exceptions:

- A limited English proficient student who has been enrolled in U.S. schools for less than three full school years and has received less than three years of instruction in an ESL program;
- A special education student whose IEP specifically exempts him/her from retention under the Third Grade Reading Guarantee;
- Any student who has received intensive remediation for two years and was previously retained in kindergarten through the third grade; or
- A student who demonstrates reading competency on a Reading OAA Alternative approved by ODE.

### OAA Alternative

OAA alternative assessments will be aligned to the end of the year 3rd grade reading standards. The required score on these OAA alternate assessments will be comparable to, or more rigorous than, the OAA proficient score. ODE will release a list of available OAA alternative assessments in February 2014. All districts must OAA administer alternative assessments upon parental request for any student who scores below the required score on the Spring OAA. In addition, districts may continue to administer OAA alternative assessments through the summer.

### Summer Promotion

If a student fails to meet the required score on the Fall OAA, Spring OAA, and OAA alternative assessment, the student should continue to receive intensive reading intervention during the summer. ODE will provide a Summer OAA for districts to administer to students who have failed to meet the required score for promotion to the fourth grade. If a student can achieve the minimum required score (392), the student shall be promoted to the fourth grade but should continue to receive intensive reading intervention.

### Midyear Promotion

Districts are required to develop procedures for mid-

year promotion to fourth grade for any student who is retained in third grade, but who later demonstrates required grade-level reading proficiency. In addition, the law mandates districts to provide instruction commensurate with student achievement levels in a specific academic ability field, if a student who has been retained demonstrates proficiency in that field. However, ODE suggests that if a district believes a student may be eligible for midyear promotion, the district should provide instruction at the fourth grade level in all subject areas. ODE recommends that districts include in their procedures a process of assessment to determine a student's proficiency in academic content to meet the requirements listed above. The district should also include specific procedures for provision of academic supports when a student is promoted to fourth grade midyear.

### Reference:

A full version of ODE's guidance on "Student Promotion and the Third Grade Reading Guarantee" can be accessed by clicking the following link.

<http://education.ohio.gov/Topics/Early-Learning/Third-Grade-Reading-Guarantee/Third-Grade-Reading-Guarantee-District-Resources/Student-Promotion-and-the-Third-Grade-Reading-Guar>

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Ennis, Roberts & Fischer's School Law Review has been developed for use by clients of the firm. However, the review is not intended to represent legal advice or opinion. If you have questions about the application of an issue raised to your situation, please contact an attorney at Ennis, Roberts, & Fischer for consultation

## Bus Driver Who Fails to Intervene in a Fight Does Not Face Charges

School buses have a longstanding reputation of providing great service to families by transporting students to and from school. Unfortunately, in Gulfport, Florida, the question of whether adequate safety precautions were employed once inside the bus was brought to light when a driver refused to interfere with a vicious attack amongst students being transported under his care.

On July 9 in the Pinellas County School District, three student passengers turned on a single student during his bus ride from school, after the victim notified an administrator that one of the attackers had attempted to sell him drugs in the school bathroom that day. The aggressors began to punch and stomp the victim between two bus seats. As the beating continued, and the victim screamed for help, the bus driver made no effort to physically break up the fight.

As provided by the school, bus drivers go through training to learn how to both properly operate the bus and abide by road regulations in order to provide a safe source to and from school for students. This training clearly trains drivers on how to react to threats of child safety while on the road. Yet, what rules and obligations must bus drivers follow when faced with threats to child safety inside the bus?

In the current situation, the bus driver radioed for assistance. The call

showcases the driver saying "get somebody out here quick, quick, quick! They're about to beat this boy to death! There's nothing I can do... please send somebody!" The driver also stopped the bus and told the boys to stop and to leave the victim alone. Again, no efforts were made by the driver to physically break up the fight.

The victim was punched and stomped over 27 times and suffered two black eyes, a broken arm, and various other injuries due to the attack.

Despite the substantial injury to the boy, the police did not press child neglect charges against the bus driver. Pursuant to the District's bus safety policy, the bus driver was not obligated to physically intervene and break up the fight unless he felt it was safe to do so. The police discussed the driver's safety responsibilities in response to events happening within the bus as limited. Whereas driver training may serve to ensure that bus operation and general safety road regulations are complied with, the handbook merely requires a driver to alert dispatch in the case of a fight on the bus. Then, it is up to dispatch to call 911 if necessary.

The reasoning behind the policy is not meritless. The driver is able to call dispatch right away while they maintain safe operations driving the bus. It may not always be safe or reasonable for a driver to stop the bus while in route. In addition, splitting up

the fight might cause further damage to other students. The driver needed to determine what the reasonable measures were to take in the circumstances in order to keep the safety of all students on the bus a priority.

### How this Affects your District:

Bullying, harassment, and violence are growing issues on school grounds. Therefore, it is important to have proper policies in place so that each member of the school operation team, including bus drivers, knows how to properly react when faced with an issue. Although not binding, this situation showcases how a bus driver followed the District's policy correctly, leaving prosecutors with no grounds to bring charges. While the situation was very disheartening for the victim and his family, the driver was responsive, and properly complied with district policy. Therefore, whereas policies vary among counties, it is important to be aware of the obligations that apply in your district so you can properly assess if adequate measures were taken.

In addition, extra safeguards could have been employed to avoid the fight in the first place. School administrators should be conscience of sending two students home on the same bus after any discrepancy that has occurred previously in the day so that future bus drivers do not have to be caught in the cross-fire.

## No Excuse to Delay Section 504 Evaluations

**South Monterey County (CA) Joint Union High Sch. Dist., 112 LRP 28705 (OCR 04/18/12).**

**Torrington (CT) Bd. of Educ., 60 IDELR 295 (OCRI, Boston (CT) 2012).**

Two OCR cases demonstrate the need for districts to evaluate students suspected of a disability under Section 504.

The first case involved an OCR complaint for *South Monterey County (CA) Joint Union High Sch. Dist.* When a parent referred her 9<sup>th</sup> grade son for a

504 plan because he was struggling academically in school as a result of his ADHD, the district required the parent to provide medical documentation for her son's disability prior to completing a Section 504 plan. Although the district and parent met repeatedly regarding the parent's request for a 504 plan, Section 504 procedures were not initiated until the parent provided an outdated medical diagnosis almost a year and a half later. Using the approximately 6-year-old medical diagnosis, the district implemented a Section 504 plan but did not complete an evaluation. When the student contin-

ued to receive D's and F's at school over a year after the Section 504 plan was put into place, the parent filed a complaint with OCR that the district had denied the student FAPE by failing to evaluate him.

Although a district may require a medical evaluation as part of its evaluation component, it cannot deny or delay an evaluation because a parent does not provide a medical diagnosis. Moreover, if a district requires a medical diagnosis, it must be at no cost to the parent. In addition to unreasonably delaying the student's evaluation, this

## No Excuse to Delay Section 504 Evaluations, Cont.

district also failed to provide an updated evaluation, instead relying on an outdated medical statement; therefore, the district denied the student of FAPE. In conclusion, the district denied a student of FAPE when it delayed an evaluation for a student due to the parent's failure to provide a medical diagnosis.

In the second case, *Torrington (CT) Bd. of Educ.*, a health plan was provided to a student who had a life-threatening shellfish allergy. Despite the fact that the district knew the student had a life-threatening allergy, the district failed to evaluate the student for a Section 504 plan until the parent requested an evaluation over a year later. The parent filed an OCR complaint arguing that the district should have evaluated the student earlier. The OCR complaint indicated that the district had violated Section 504 because it failed to provide an otherwise eligible student a Section 504 plan solely because a health plan was already in place. In this case, the pres-

ence of the health plan was not sufficient.

A district must "evaluate any student who needs or is believed to need special education or related aids and services because of a disability." 34 CFR 104.35(a). When a medical condition is life-threatening, the district cannot argue that it thought the disability did not impact a major life activity. By evaluating students for Section 504, districts remain in compliance with procedural requirements of the law, such as providing parents with notice of their due process rights.

### How this Affects your District:

1. If your district requires medical documentation for students suspected of a disability, the district must provide the evaluation at no cost to the parent if the parent does not volunteer to provide that information or volunteer to provide the evaluation.
2. Lack of a medical evaluation cannot

be used as an excuse for delaying an evaluation. If there is reason to suspect a disability, an evaluation must be initiated.

3. Although outdated medical statements can be used as a component of an evaluation for Section 504, current evaluation results must be used in developing a Section 504 plan.

4. Districts should review their procedures for developing health plans for students. Districts should put procedures in place to ensure they are evaluating any student suspected of a disability.

*Remember: It is possible for a student to qualify as a student with a disability under Section 504 and not need an accommodation plan. Despite the fact that no accommodations are needed at the time, these students must be identified so that procedural protections, such as providing parents with notice of their due process rights, have been fulfilled.*

## Teacher's Allergies Prompt the Transfer of Autistic Student

This Fall in Columbus, a first-grader using a service dog was not permitted to attend a particular school as planned. The mother of the student was notified that the school's special education teacher was severely allergic to dogs and, to accommodate the teacher, the student and canine must transfer to a different school in the district where an allergy-free special education teacher was available to instruct the student. The new, fully competent, special education teacher would conduct instruction based on the same customized learning plan developed for the student at the previous school.

The mother was not pleased with the news. To attend the new school, a 30 to 40 minute bus ride would be required. Since the student's autism consisted of being overwhelmed by sensory issues as well as coping issues when it came to change, the mother worried that the increased bus ride would exacerbate both. Finding it unacceptable, the mother asked why a different teacher could not be assigned instead of making her daughter change schools.

Service dogs and classroom allergies have been addressed nation-

ally; however, there are no other cases in Ohio to date. Federally, the law specifies that no student may be turned away from attending school based on the allergies of a teacher or another student. The logical solution noted by the Ohio School Boards Association is to separate the student with the service dog and the person with the allergy into different classrooms. However, there is no legal obligation to accommodate both parties within the same building.

The student here attends a district where 20% of students have an identified disability. Addressing the issue, the superintendent of the district noted that it was not that the dog was not welcome in the district; however, he also discussed how the accommodations for the student and her dog must be balanced against the rights of the classroom teacher, who also had a genetically imposed disposition. He noted that moving the student to a different school seemed like a reasonable solution that should not create a great burden for the student, emphasizing that the schools are only 5 miles apart so the student would not spend a significantly longer amount of time on the

bus.

Currently, resolution has not been reached in this matter. Displeased by the superintendent's decision, the student's parents have decided to home school the student while they present the issue to the school board.

### How this Affects your District:

It is important to note that if similar situations arise in your district, no student may be turned away from attending school solely based on another party's allergy. Where the problem can be combated by separating the parties into separate classrooms, it is not always sufficient when it will result in the student receiving inadequate classroom assistance. In smaller districts, a different special education might not be available within the same building. As seen in the situation above, there is no legal obligation to accommodate both within the same building, and when a transfer would not be a substantial burden, it can be warranted.

## Title IX and Gender Equality Remain at Issue in Ohio Contact Sports

**Williams v. Sch. Dist. of Bethlehem, Pa., 998 F.2d 168 (3d Cir. 1993).**

Title IX mandates equal opportunity regarding the promotion and expansion of extracurricular sports for female students by requiring public funding received by schools to be allocated equally between male and female programs, including sports.

Recently a 7<sup>th</sup> grade female was denied the opportunity to try-out for the middle school football team in Baltimore, Ohio. The policy at the Liberty Union-Thurston School District, where the student attends prohibits girls from participating in contact sports.

The Superintendent argued that no violation of Title IX occurred, and justified his position by stating that there were other “opportunities” afforded to girls that satisfy Title IX’s goal of equal opportunity between sex-

es. The District claimed that nothing in Title IX promised girls the right to play contact sports, such as football, regardless of the fact that more than 100 girls play on school football teams throughout Ohio.

The American Civil Liberties Union of Ohio (ACLU) and the Ohio High School Athletic Association (OHSAA) disagreed. An ACLU lawyer replied that “federal courts in Ohio have made it clear since the 1970s that if a girl wants to play football, and there is not an equivalent team for girls, she must be allowed to try out for the boys’ team.”

Currently, the question remains as to whether the Liberty Union-Thurston School Board of Education’s policy violated Title IX standards. The Superintendent released a news release announcing that the District still believed it had the right to deny the girl the right to play the contact sport;

however, it would not waste tax dollars fighting the potential lawsuit.

### **How this Affects your District:**

It remains clear that the controversy surrounding public school gender equality and the debate regarding Title IX is still ongoing. It is true that Title IX has a “contact sports exception” that implies that schools are able to exclude girls from competing against boys in high contact activities. However, in current times, the exception has been increasingly viewed as outdated.

One consistency remains from year to year when schools attempt to exclude girls from boys’ sports, especially when no equivalent activity is provided: the schools lose. Therefore, it is important to give adequate consideration in the upcoming sports season to whether Title IX requirements are met within your district.

## Firm News

### **Bill Deters Appointed OSBA Education Law Committee Chair**

Bill Deters is very excited to have been selected to serve as chair of the Ohio State Bar Association (OSBA) Law Committee for the 2013-2014 year. As chair, he held his first Fall Committee and Section Meeting on Friday, September 27th.

Bill provided those in attendance with a brief overview of the Ohio Teacher Evaluation System (OTES) as well as a legal update from the previous year. Pam Leist accompanied Bill as a distinguished speaker and addressed the changes the Budget Bill (HB 59) made to the minimum school year measurement, JVSD boards, and extracurricular participation.

Bill’s next OSBA meeting will take place in January.

### **Pam Leist Elected to Board of Trustees**

Pam Leist was recently elected to serve on the board of trustees for North College Hill Community Seniors Inc., effective this October.

## 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@erfllegal.com](mailto:pleist@erfllegal.com) or 513-421-2540. Archived topics include:

- Education Law Legal Update - Including SB 316
- Effective IEP Teams
- Cyberlaw
- FMLA, ADA and Other Types of Leave
- Tax Incentives
- Prior Written Notice
- Advanced Topics in School Finance
- Student Residency, Custody and Homeless Students
- Ohio Budget Bill/House Bill 153
- Student Discipline
- Media and Public Relations
- Gearing Up for Negotiations

## Education Law Speeches/Seminars

### **SAVE THE DATE! 2013-2014 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!*

**Levies and Bonds – December 5<sup>th</sup>, 2013**

**Presented by Gary Stedronsky and Brad Ruwe, Partner at Peck Shaffer & Willams LLP**

**Special Education Legal Update – March 6<sup>th</sup>, 2014**

**Presented by Bill Deters, Jeremy Neff and Erin Wessendorf-Wortman**

**OTES and OPES Trends and Hot Topics – June 12<sup>th</sup>, 2014**

**Presented by Bill Deters and Bronston McCord**

**Education Law Legal Updates 2013-2014 – July 10<sup>th</sup>, 2014 (Webinar ONLY, from 8:00 a.m. to 12:00 p.m.)**

### **Other Upcoming Presentations**

Jeremy Neff

October 18, 2013

OSBA Treasurer's Workshop

Jeremy Neff and Pam Leist

October 18, 2013

Butler County ESC-Counselor's Consortium

Bill Deters and Erin Wessendorf-Wortman

October 21, 2013

Brown County ESC Employment Law & Legal Update

Bronston McCord

October 23, 2013

OSBA—Negotiating Superintendent's Contracts

Bill Deters and Pam Leist

October 29, 30, & 31, 2013

OPES Seminars (Cleveland, Columbus, and Cincinnati)

Bill Deters

November 1, 2013

Xavier University—Nurse Workshop

Erin Wessendorf-Wortman

November, 11, 2013

OSBA Capital Conference—Making Booster Groups Work For You

Bill Deters

November, 11, 2013

OSBA Capital Conference—504 & Diabetes

Erin Wessendorf-Wortman

November 21, 2013

Lakota Local School District Legal Updates for Administrators

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## ERF Practice Teams

### Construction/Real Estate

*Construction Contracts, Easements, Land Purchases  
and Sales, Liens, Mediations, and Litigation*

**Team Members:**  
 Bronston McCord  
 Ryan LaFlamme  
 Gary Stedronsky

### Workers' Compensation

*Administrative Hearings, Court Appeals, Collaboration  
with TPA's, General Advice*

**Team Members:**  
 Ryan LaFlamme  
 Pam Leist  
 Erin Wessendorf-Wortman

### Special Education

*Due Process Claims, IEP's, Change of Placement,  
FAPE, IDEA, Section 504, and any other topic related  
to Special Education*

**Team Members:**  
 Bill Deters  
 Pam Leist  
 Jeremy Neff  
 Erin Wessendorf-Wortman  
 Michael Fischer

### School Finance

*Taxes, School Levies, Bonds, Board of Revision*

**Team Members:**  
 Bill Deters  
 Bronston McCord  
 Gary Stedronsky  
 Jeremy Neff