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School Law Review

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U.S. Supreme Court to Determine Level of Educational Benefit for Students with Disabilities

On January 11, the U.S. Supreme Court heard arguments in one of the most significant special education cases in past three decades. In the 1982 case *Board of Education v. Rowley*, the Supreme Court determined that an individualized education program (IEP) must be "reasonably calculated to enable the child to receive educational benefits." Since then, federal courts have weighed in on educational benefits, some determining that a minimum standard, *de minimis*, is enough, while others, including the Sixth Circuit (*Deal v. Hamilton Bd. of Ed.*, No. 03-5396, 6th Cir. 2004), have held that a *meaningful* educational benefit is needed. With federal circuits divided on this federal issue, the Supreme Court agreed to hear the case at hand. The question before the Court is as follows:

What level of educational benefit must school districts confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act (IDEA)?

Endrew F., who goes by the name Drew, is a student with autism in Colorado. He was placed on an IEP from preschool through fourth grade. His proposed IEP for fifth grade contained goals that his parents say too closely resembled the goals from previous years. Dissatisfied with the progress Drew was making in public school, his parents withdrew him and enrolled him in private school.

Drew's parents filed a complaint with Colorado's Department of Education, claiming that Drew had been deprived of a free appropriate public education (FAPE). The parents also claimed that Drew had made academic, social, and behavioral progress in private school. They asked to be reimbursed for the cost of his private schooling, per IDEA, which provides for reimbursement of private school tuition and related expenses if a public school cannot meet the educational needs of a student with a

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disability. Drew's parents and the school district argued their case in an administrative hearing, then in a federal district court, and finally on appeal in the Tenth Circuit Court. All of the rulings were in favor of the school district, finding that the public school had provided Drew with FAPE, that he had made "some academic progress" which was "more than *de minimis*," and that his IEP was "substantively adequate."

IDEA grants students with disabilities with the right to receive "appropriate" special education and related services at public expense. The IEP must be designed to provide for this "appropriate public education" under IDEA. However, IDEA does not define the term "appropriate," nor does it define the required level of educational benefit.

Clearly, the law requires that special education be designed to each child's individual needs and that schools provide services to benefit special education students. How far schools must go to benefit students, however, remains unclear.

The 1982 *Rowley* case involved a deaf student who was an excellent lip reader. Her parents asked for an interpreter, but the school said she was doing well enough that she didn't need one. Her parents contended that she was not reaching her full potential, but the Supreme Court held that a school is not required to maximize each student's potential. After the Rowley decision in 1982, many federal courts used the analogy that schools provide the educational equivalent of "a serviceable Chevrolet" but not a "Cadillac."

The level of educational benefit therefore remains unclear and undefined, which results in inconsistent federal court decisions. The standards in federal court range from merely more than a minimum benefit, to some benefit, to a meaningful benefit. The *Endrew v. Douglas* case currently in the Supreme Court goes beyond the two extremes of minimum benefit and maximum potential and focuses specifically on the level of educational benefit required of schools under IDEA.

The Supreme Court requested input from the federal government, which urged the Court to reverse the Tenth Circuit's ruling, noting that it "is not consistent with the text, structure, or purpose of the IDEA … and it has the effect of depriving children with disabilities of the benefits Congress has granted them by law."

The U.S. Department of Education proposed a standard that school districts offer a program "aimed at significant educational progress in light of the child's circumstances," which the justices seemed to regard as most consistent with existing law.

A report summarizing the January 11 Supreme Court arguments notes that one thing was relatively clear: "The justices were dissatisfied with the U.S. Court of Appeals for the 10th Circuit's ruling that school districts can satisfy federal education law as long as they offer a student with a disability an educational program that provides him or her with a benefit that is more than merely *de minimis*, or non-trivial." The justices were also concerned with imposing additional costs on school districts by requiring them to provide increased services and creating educational standards without being educational experts. They considered the idea of flexibility in IDEA, possibly tailoring special education to the student rather than to the grade level.

Counsel for the U.S. Solicitor General argued that IDEA requires a program "aimed at significant educational progress in light of the child's circumstances," which led to discussion among the justices about the right words and adjectives to describe the standard. While Justice Sotomayer thought that IDEA "provides enough to set a clear standard," Justice Roberts concluded the law has "really nothing concrete" for courts to review.

Neal Katyal, the attorney for the school district, argued that the level of "some benefit" is the same as "more than merely *de minimis*," and this is the level he was advocating. Justice Breyer noted that IDEA has been amended so that an IEP is designed for students to "make progress in general education" and concluded that "some benefit" along with "make progress" equals more than a minimum standard. Katyal noted that the more-than-minimum

standard has worked for many years, and Justice Ginsburg hinted that this standard had no precedent for the Court and could be replaced with something more stringent.

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Drew has garnered support from organizations such as the National Center for Learning Disabilities and the Parents Education Network in addition to more than a hundred members of Congress. Without taking sides, the National Association of State Directors of Special Education filed a legal brief saying that schools already provide a "meaningful benefit"through IEPs.

What This Means for Your District

Although a decision is not expected until this spring or summer, this case is likely to have significant impact on special education programs throughout the country. Depending on the outcome of this case, schools may face a higher standard for the provision of FAPE, which will likely increase the cost of educating disabled students and trigger additional litigation. We will monitor the case closely and keep districts apprised of the outcome.

– *Endrew F. v. Douglas County School District*, -- U.S. --, No. 15-827

Changes to Truancy Laws per House Bill 410

Ohio House Bill 410, which was signed by the governor on January 4, 2017, implements significant changes to truancy laws in Ohio. The bill takes effect on April 6, 2017. Despite its effective date, school districts are not required to implement many of the truancy provisions until the start of the 2017–2018 school year, the majority of which are codified in section 3321.191 of the Revised Code. To assist school districts in the implementation of the new truancy laws, the Ohio Department of Education (ODE) is expected to develop a model truancy policy to be completed in early July.

In response to this legislation, several school districts have asked for additional information on the details of the bill in order to comply with R.C. § 3321.191, including a timeline to implement absence intervention plans. The following is a summary of the bill.

Definitions

- *Chronic truant* will no longer be used.
- *Habitual truant* refers to a child of compulsory school age who is absent from school without legitimate excuse for the following number of hours (RC 2151.011):
    - 30 or more consecutive hours; or
    - 42 or more hours in one school month; or
    - 72 or more hours in a school year.
- *Unruly child* refers to a habitual truant who has not previously been adjudicated for being a habitual truant (RC 2151.022), but if based solely on being a habitual truant, court shall consider alternatives to adjudication to divert the child from the juvenile court system.
- *Delinquent* child applies to a child who violates a court order regarding the child's prior adjudication as an unruly child for habitual truancy, but no longer includes habitual (or chronic) truant. (RC 2152.02)

Suspensions

Beginning July 1, 2017, districts may not suspend, expel, or remove a student solely on the basis of absence without legitimate excuse. (RC 3313.668)

Districts *may not* carry over suspensions from one year to the next for any type of student misconduct. However, for an *out-of-school* suspension, participation in a community service program or an alternative consequence may be imposed during summer break for the number of hours equal to the remaining suspension. The community service or other consequence must begin during the first full weekday of summer break. Each district has the discretion to develop "an appropriate list of alternative consequences." If the student fails to complete the community service or alternative consequence, the district may determine the next course of action; however, it may not include imposing out-of-school suspension when the next school year begins. (RC 3313.66)

Districts have discretion to allow make-up homework during suspensions. (RC 3313.66)

Excessive absences may not be punished by suspension, expulsion, or other means of prohibiting a student from attending school. (RC 3313.668, RC 3321.191)

Attendance Officers

Attendance officers shall file a complaint in juvenile court on the 61st day after implementation of an absence intervention plan if all of the following apply (RC 3321.16):

- The student has unexcused absences of 30+ consecutive hours, 42+ hours in one month, or 72+ hours in a school year;
- The district has made meaningful attempts to reengage the student through the absence intervention plan or other intervention strategies and alternatives to adjudication; and
- The student has refused to participate in or failed to make satisfactory progress on the plan, strategies, or alternatives.

If the student has absences as noted above, but the absence intervention team determines that the student has made "substantial progress" according to the plan, the attendance officer shall not file a complaint in juvenile court.

If the 61st day after implementation of an absence intervention plan falls during the summer months, the district has the discretion to allow the absence intervention team or attendance officer to extend the implementation of the plan and delay the filing of the complaint for an additional 30 days from the first day of school the next year.

Juvenile Courts

Extensive changes were made to juvenile court procedures (RC 2151, 2152), including notifying the school district and the school of attendance within 10 days if a student is adjudicated an unruly child for habitual truancy (RC 2151.354, 2152.19). This is important to school districts because districts will be required to notify ODE when a child has violated a court order regarding prior adjudication as an unruly child for habitual truancy.

Student Travel

Absences for a student who travels out of state for enrichment activities or extracurricular activities may be excused up to 24 hours maximum for the school year. If the student will be absent for 24 or more consecutive hours for these activities, a classroom teacher employed by the district shall accompany the student for instructional assistance. (RC 3321.041)

Driver's Licenses

For purposes of driver's license suspension, a board of education may notify a superintendent of a student's unexcused absence of 60 or more consecutive hours or 90 or more hours in a school year. (RC 3321.13)

If a board of education has adopted a resolution stating such, the superintendent shall notify the registrar of motor vehicles and the county juvenile judge of a student's unexcused absences of more than 60 consecutive hours in a single month or at least 90 hours in a school year. The superintendent shall also provide the parents with written notice that the student's driver's license, temporary permit, or opportunity to obtain such permit has been suspended and that the student and parents may have a hearing with the superintendent as scheduled. (RC 3321.13)

Absence Intervention Teams

Individual schools may establish their own absence intervention teams. District superintendents shall establish an absence intervention team for the district to be used by any schools that do not establish their own absence intervention teams. Membership of the absence intervention team may vary based on the needs of each student but *shall* include:

- a district or school representative,
- another district or school representative who knows the student, and
- the child's parent (or guardian, custodian, etc.), and *may* include
- a school psychologist, counselor, social worker, or public agency representative. (RC 3321.191)

If a student becomes habitually truant within 21 days of the end of the school year, a district may assign one school official to work with the child's parent to develop an absence intervention plan during the summer, which shall be implemented no later than 7 days before the next school year begins. Alternatively, the district may toll the summer time period and reconvene the absence intervention process on the first day of the next school year. (RC 3321.191)

ODE will develop a format for parental permission regarding absence intervention teams to ensure compliance with FERPA. (RC 3321.191)

Districts with a truancy rate of less than 5 percent are exempt from assigning habitually absent students to absence intervention teams and may develop their own district strategies; however, if their strategies fail, the attendance officer shall file a complaint within 61 days of implementation. (RC 3321.19)

Absence Intervention Plans

Each plan shall vary based on the needs of the student, but all plans shall notify the student of the attendance officer's obligation to file a complaint 61 days after implementation of the plan if the student has refused to participate in or failed to make satisfactory progress on the plan or other alternative to adjudication. (RC 3321.191)

As part of the absence intervention plan, the district may contact juvenile court and ask to have the student informally enrolled in an alternative to adjudication. If a district chooses to do this, the district must develop a policy regarding use of and selection process for offering alternatives to adjudication. (RC 3321.191)

Districts or schools may consult or partner with public and nonprofit agencies for assistance to students and families to reduce absences. (RC 3321.191)

Timeline for Absence Intervention Teams

1. **Triggering event** – Student surpasses the threshold for unexcused absences for habitual truancy. Districts are required to report to ODE when a student has exceeded this threshold.

2. **Within 7 days of the triggering event** – The school or district shall *select the members* of an absence intervention team and shall make at least three good-faith attempts to *secure parent participation* on the team. (RC 3321.191) If the parent responds but is unable to participate, the district shall inform the parent of the right to appear by designee. If the parent fails to respond, the district shall: (1) investigate whether the failure to respond triggers mandatory reporting to children's services; *and* (2) instruct the absence intervention team to develop a plan notwithstanding the absence of the parent.
3. **Within 10 days of the triggering event** – The board of education shall *assign a student* who is considered a habitual truant to an absence intervention team. (RC 3321.19)
4. **Within 14 days after assigning a student to an absence intervention team** – The team shall *develop an intervention plan*. (RC 3321.191)
5. **Within 7 days after development of the intervention plan** – the district shall *notify the student's parents* of the plan. (RC 3321.191)

Note: Districts are required to notify ODE when an absence intervention plan has been implemented. The statute is not clear on exactly when implementation begins; however, a logical approach is when the parents receive notification of the plan, which is the same time an individualized education plan for students with disabilities is considered to begin.

Board Policy

Beginning 2017–2018, board policy shall include notifying parents of absences *with or without legitimate excuse* of 38+ hours in a month or 65+ hours in a year, within 7 days of the absence that triggered the notice (RC 3321.191). Districts are required to report this to ODE as well.

Zero-tolerance policies should no longer include "excessive truancy."

Excessive truancy is no longer a reason for Big 8 schools to send students to alternative schools. (RC 3313.534)

Reporting to ODE

Beginning 2017–2018, districts shall report the following occurrences to ODE. (RC 3321.191)

- When notification is provided to a parent of student's absences with or without excuse of 38+ hours in one school month or 65+ hours in a school year;
- When a student is designated as a habitual truant;
- When a student who has been adjudicated unruly for habitual truancy violates a court order regarding that adjudication; and
- When an absence intervention plan has been implemented.

Ohio's Draft Plan for ESSA

On December 10, 2015, President Obama signed the reauthorization of the Every Student Succeeds Act (ESSA). In doing so, the president overturned many provisions included in the previous version of the law, No Child Left Behind Act (NCLB).

The strict accountability requirements in particular under the NCLB were often criticized by the education industry, and the ESSA took significant steps to provide more state and local control over accountability. As a result, states

received authorization to adopt their own plans for accountability, for identification of students with special education needs, and for ensuring that children of all income levels and ethnicities have access to educational opportunities.

The Ohio Department of Education (ODE) has drafted a preliminary plan for compliance with ESSA, which will be posted on ODE's website on February 2, 2017. In January ODE released an overview of the draft plan. The following text includes the highlights of the testing and accountability measures that ODE plans to submit to the U.S. Department of Education as the state plan. However, these measures are not yet finalized. Comments may be submitted to ODE through early March, 2017.

Timeline for Ohio's Final Plan

- January 19: Overview of state plan posted on ODE website
- February 2: Full draft of state plan to be posted on ODE website
- February (TBD): ODE webinar to explain state plan
- March 6: End of review and comment period
- April 3: ODE to submit final plan to U.S. Department of Education

Testing

Under ESSA, the federal government cannot mandate or even incentivize states to adhere to a certain set of academic standards, giving the states more control and autonomy. However, ESSA does have certain requirements, including challenging English language arts and math standards and aligning career-tech standards and college-readiness standards.

ODE's survey indicated that communities want less testing but also want more stability in testing, as Ohio has changed the majority of its tests twince in three years. From this, ODE's key takeaway is that the state testing system needs stability; therefore, Ohio's draft plan proposes no changes to the state assessment system. Nevertheless, ODE plans to work with the governor and with lawmakers to re-evaluate several state tests that are not required under ESSA.

School Report Cards

The Overall School and District Summative Rating will continue to use the A-F rating system, but ODE plans to clarify the definitions of each grade/rating. The Academic Achievement area of the report card will include an additional indicator – School Quality - that is intended to measure nonacademic aspects of the school, such as student absenteeism and student discipline, which will likely to affect student achievement. The Graduation Rate component will include both a four-year and a five-year graduation rate.

Subgroups in the Gap Closing measure will now reflect groups of 15 instead of groups of 30 for the purpose of measuring progress more accurately. Communities, parents, and educators have indicated confusion about the K-3 Literacy rating. As a result, the draft plan states that this indicator relates to reading proficiency, which is part of Ohio's Third Grade Reading Guarantee, and ODE plans to look further into aligning the Third Grade Reading Guarantee with K-3 Literacy.

Educator Evaluations and Professional Development

ODE's plan is to base evaluations on elements currently in Ohio's state law and the Educator Equity Plan, but to define "equity" with a new quality measure under OTES and OPES. The Educator Standards Board is reviewing ways to improve OTES. A 3 percent Title II set-aside will be dedicated to support principal and teacher leadership development, particularly in schools with large numbers of poor and minority students and students with disabilities.

Firm News
Ennis Britton Attorneys Volunteer in Mock Trials

It has been another exciting year for Ennis Britton attorneys who participated in the 34th Annual Ohio Mock Trial Competition! Ennis Britton shareholder Jeremy Neff volunteered as a mock trial judge, and attorneys Ryan LaFlamme and Pamela Leist served as legal coaches for the statewide high school mock trial competition. Organized by the Ohio Center for Law-Related Education (OCLRE), the annual mock trials help students to develop an understanding of our democratic system and learn how the U.S. Constitution applies in their lives. OCLRE assists schools with establishing mock trial teams and provides statewide resources to engage students in this important civic activity.

It's amazing to see how poised high school students are and how well they can handle complex legal issues.

On January 19 and 20, Ohio high school students held mock trial competitions in courtrooms across the state to try the fictitious case *Pat Justice v. CAT News et al.*, a defamation lawsuit brought by the governor against a news agency for allegedly running a false story that impacted his reelection.

More than a thousand legal professionals volunteered as judges, competition coordinators, and advisors to the mock trial teams. Each team comprises up to eight students who take on roles of witnesses or attorneys in the fictitious case. Competing in two trials, each team has an opportunity to argue both sides of the case.

"It's amazing to see how poised high school students are and how well they can handle complex legal issues," said Ennis Britton attorney Pamela Leist.

The competitions are held at the district, regional, and state levels. The state champion moves on to compete at the national level in the National High School Mock Trial Championship, which will be held in May in Hartford, Connecticut.

Ryan and Pam's team won at the district level competition and will compete with other area districts advancing to the regional competition, which will be held on February 10. This is the second year that Pam and Ryan's team has qualified for regionals. They are very proud of their students and all of their hard work!

Ryan LaFlamme

Pamela Leist

Jeremy Neff

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.

- **February 1**: Deadline for school districts to file resolution of necessity, resolution to proceed, and auditor's certification for bond levy with board of elections for May election (RC 133.18(D))

  Deadline for county auditor to certify school district bond levy terms for May election (RC 133.18(C))

  Deadline to submit continuing replacement, permanent improvement, or operating levy for May election to board of elections (RC 5705.192, 5705.21, 5705.25)

  Deadline to certify resolution for school district income tax levy, conversion levy, or renewal of conversion levy for May election to board of elections (RC 5748.02(C), 5705.219(C) and (G))

  Deadline to submit emergency levy for May election to board of elections (RC 5705.195)

  Deadline to submit phased-in levy or current operating expenses levy for May election to board of elections (RC 5705.251(A))

- **March 1**: Deadline to take action and deliver written notice of nonrenewal of superintendent's contract (RC 3319.01) and treasurer's contract (RC 3313.22)

  Deadline for secondary schools to provide information about College Credit Plus to all students enrolled in grades 6–11 (RC 3365.04(A))

- **March 31**: End of second ADM reporting period (RC 3317.03(A))

Upcoming Presentations

2016–2017 Administrator's Academy Seminar Series

Tackling Issues in Student Discipline – Archive Available
September 29, 2016

School Employee Leave and Benefits Update – Archive Available
January 26, 2017

Special Education Legal Update
April 20, 2017
Live seminars in Cincinnati and Cleveland

2016–2017 Education Law Year in Review
July 13, 2017
Live video webinar

Ennis Britton has listened to the valuable feedback from our clients! This year, we will offer the Administrator's Academy seminars in a different format from previous years. The September and April presentations will be provided at live seminar locations in both Cincinnati and Cleveland as well as in a live audio webinar option. The

other two presentations will be offered via a live video webinar professionally produced by the Ohio State Bar Association. As always, we will offer an archive for all presentations.

Participants must be registered to attend each event. All four webinars will be archived for those who wish to access the event at a later time. You can register on our website or contact Hannah via email or phone at 614-705-1333.

Other Upcoming Presentations

February 3 & 4: Ashland Leadership Academy Seminar
– John Britton, Giselle Spencer, and Megan Bair Zidian

February 7: Brown County ESC and Southern Ohio ESC
– Ryan LaFlamme and Hollie Reedy

February 16: Montgomery County ESC
– Bill Deters

March 3: OSBA Special Education Law Workshop
– Jeremy Neff and Melissa Marsh, "Transition Planning: What Is the Next Step?"

March 3 & 4: Ashland Leadership Academy Seminar
– John Britton, Giselle Spencer, and Megan Bair Zidian

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Want to stay up-to-date about important topics in school law?
Check out Ennis Britton's 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, contact Hannah via email or phone at 614-705-1333. Archived topics include the following:

- Managing Workplace Injuries and 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 and Bonds
- OTES & OPES Trends and 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

Ennis Britton Practice Teams

At Ennis Britton, we have assembled a team of attorneys whose collective expertise enables us to handle the wide variety of issues that currently challenge school districts and local municipalities. From sensitive labor negotiations to complex real estate transactions, our attorneys can provide sound legal guidance that will keep your organization in a secure position.

When you have questions in general areas of education law, our team of attorneys help you make competent decisions quickly and efficiently. These areas include:

Labor & Employment Law

Student Education & Discipline

Board Policy & Representation

There are times when you have a question in a more specialized area of education or public law. In order to help you obtain legal support quickly in one of these areas of law, we have created topic-specific practice teams. These teams comprise attorneys who already have experience in and currently practice in these specialized areas.

Construction/Real Estate
Construction Contracts • Easements • Land Purchases & Sales • Liens • Mediations • Litigation

Team Members:
Ryan LaFlamme
Bronston McCord
Gary Stedronsky

Workers' Compensation
Administrative Hearings • Court Appeals • Collaboration with TPAs • General Advice

Team Members:
Ryan LaFlamme
Pam Leist
Giselle Spencer
Erin Wessendorf-Wortman

Special Education
Due Process Claims • IEPs • Change of Placement • FAPE • IDEA • Section 504 • any other topic related to Special Education

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Bill Deters
Michael Fischer
Pam Leist
Jeremy Neff
Hollie Reedy
Giselle Spencer
Erin Wessendorf-Wortman
Megan Bair Zidian

School Finance
Taxes • School Levies • Bonds • Board of Revision

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