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School Law Review

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First Amendment Free Speech Rights: May Student Athletes #TakeTheKnee?

During a speech in Alabama on September 22, President Trump made some comments that provoked a number of professional athletes to kneel or sit – or even stay in the locker room – during the national anthem on Sunday's NFL games. In a nutshell, Trump said that NFL owners should fire players who disrespect the U.S. flag. This statement generated repercussions among professional athletes, who enjoy the same constitutional rights to freedom of speech that others in the country enjoy. Kneeling during the national anthem (which gained the hashtag #TakeTheKnee on Twitter), although not verbal speech, is a form of symbolic speech or expression that is protected under the First Amendment.

Whereas the U.S. Constitution provides the U.S. government with certain powers, the Bill of Rights restricts those governmental powers by providing people within the United States rights named therein, such as freedom of speech. Therefore, constitutional rights must be honored by governmental actors, including public school districts. Because the NFL is not a public employer, it does not have a constitutional obligation to allow these freedoms.

Public school districts, however, are governmental actors. Because the government must allow the expression of constitutionally guaranteed rights, our question then becomes, do student athletes have the same constitutional rights to freedom of speech? Or more simply, may student athletes #TakeTheKnee?

Participation in extracurricular activities is a privilege and not a right protected by law. Under Ohio law, boards of education are permitted to adopt a policy authorizing district employees who coach a pupil activity program to prohibit a student from participating in the program under conditions of the policy. Such conditions may include requirements such as maintaining a certain minimum grade point average or acting in a manner that does not bring discredit or dishonor upon the school. If a student violates the policy, he or she may be removed from the activity program without due process requirements.

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However, a school district may not impose a condition that violates a student's constitutional rights. Although students do not necessarily have the same constitutional rights in the school as they do in public, they do not lose their constitutional rights when they enter the school building.

The Third Circuit Court of Appeals once heard two separate court cases centered on free speech rights of the First Amendment. In both cases, students were disciplined for off-campus social media posts. The court issued two opposing opinions on the same day in these two similar cases. This led to the full court panel rehearing the two cases. The full panel held that the speech was protected by the First Amendment in both cases. The takeaway from these cases is the courts are willing to protect a student's free speech rights – even if the speech is offensive and hurtful – if a school cannot prove that the speech sufficiently disrupted the educational process.

In the 1969 landmark case *Tinker v. Des Moines Independent Community School District*, the U.S. Supreme Court heard a case regarding whether students' political actions would be protected under the free speech clause of the First Amendment. Several students wore black armbands in protest of the Vietnam War, despite the school's policy prohibiting students from wearing these armbands. The Court held that the students' wearing these armbands was considered protected speech under the First Amendment and declared the school's policy unconstitutional. The Court noted that this action led to no disruption of or interference with the educational environment.

Going back even further, the U.S. Supreme Court issued an opinion on Flag Day (June 14) in 1943 that a state may not compel unwilling school children to salute and pledge allegiance to the flag of the United States. Furthermore, any discipline brought on by "an act of disrespect, either by word or action" was also prohibited. Ohio even has a statute (R.C. 3313.602) that states that no student shall be required to participate in the pledge of allegiance. The bottom line is that schools may not require students to participate in acts of patriotism, such as recitation of the pledge of allegiance or participation in a certain manner during the national anthem.

What This Means to Your District

As a constitutional right, free speech includes numerous actions that are considered expressive as speech. Schools must be able to show that the educational process has been or will be significantly disrupted before violating a student's right to free speech. Of note, speech that condones illegal behavior (such as doing drugs or underage drinking) is not protected by the First Amendment. Political speech is one of the most important rights protected by the First Amendment. Some discussion with administration and your athletic staff should take place to ensure a shared understanding of the applicable law and a measured and appropriate response should this occur at a district event.

Court Finds That ESC Did Not Breach Contract Nor Discriminate

An Ohio appellate court affirmed that an Ohio educational service center (ESC) did not breach a contract or engage in age discrimination. The trial court had granted summary judgment in favor of the ESC, but the employee appealed.

The original case was filed in 2015 after the board of education voted to reduce the employee's workdays from 183 to 72 due to reduced demand from the schools for her services as an intervention specialist.

The first issue in the appeal was breach of contract, based on a statute in the Ohio Revised Code that authorizes boards of education to reduce the number of teachers under certain conditions. The employee argued that the ESC could not reduce her hours based on that statute, but the court disagreed, noting that reduced funding authorizes an ESC to reduce employee hours.

Additionally, the employee argued that she should have been awarded an open teaching position because she was qualified for it and had inquired about it. However, the employee's supervisor testified that after she told the

employee that the position paid less than her previous rate of pay as a teacher, the employee ceased inquiring about the position and never applied for it. The court found that because she did not apply for the position, the ESC was not obligated to hire her for it. Furthermore, the court held that the ESC was authorized to suspend its contract with the employee because the contract of employment stated that it could do so on the basis of reduced funding or enrollment.

For the second issue, a complaint of age discrimination must prove four elements: (1) the employee is a member of a protected class, (2) the employee was discharged, (3) the employee is qualified for the position, and (4) the employee was replaced by someone not in a protected class. If the employer offers a legitimate, nondiscriminatory reason for the discharge, the employee may overcome that by proving that it is really a pretext for the underlying discrimination.

In this case, the intervention specialist was not discharged, but resigned from her position. Her argument, however, was that she was "constructively discharged" by the drastic reduction in workdays. Constructive discharge means that an employer's actions are so intolerable that a reasonable person would be forced to resign rather than continue employment under the intolerable conditions. The court found that the reduced number of hours was not intolerable, plus the employee's supervisor was actively seeking ways to increase her hours. Therefore, since the employee was not constructively discharged but instead resigned, the court found no valid basis for the claim of age discrimination.

What This Decision Means to Your District

This case reaffirms the rights of school districts and ESCs to reduce the hours of employees as a result of reduced funding. It provides an important reminder that even though an employee is a member of a protected class, as long as the reduction in force or hours is undertaken for a legitimate business purpose and not for a discriminatory reason, the action may stand.

– *Ruez v. Lake Cty. Educational Serv. Ctr.*, 2017-Ohio-4125.

FAPE Issue Not Moot, District Denied Dismissal of Case

A district court in Michigan denied a school district's request to dismiss a lawsuit in which parents alleged that the district denied their son a free appropriate public education (FAPE) in his least restrictive environment, relying in part on the recent U.S. Supreme Court decision in *Fry v. Napoleon Community Schools*.

The case involved a student with Down syndrome and speech apraxia who began the school year in the general education classroom, which is where his parents wanted him to remain. The district wanted to place the student with other cognitively impaired (CI) children at a different school. The parents filed an administrative complaint with the state department of education. Later, the district filed for due process, seeking an administrative determination about the appropriate placement. The state department of education ordered that the student remain in the general education classroom until an administrative law judge (ALJ) issued a decision on the due process issue. The ALJ heard the case and determined that the appropriate placement was the CI classroom; however, with only 23 days remaining, she ordered the student to remain in the general education classroom for the rest of the school year. At the beginning of the next school year, the judge determined that the student had not received FAPE in the general education classroom and that the CI classroom at the different school was the appropriate placement. That same day, the parents revoked their consent for special education services.

Later, the parents filed a lawsuit alleging a denial of FAPE under the Individuals with Disabilities Education Act (IDEA) and additional complaints under the Americans with Disabilities Act (ADA) and Section 504. The district filed a motion to dismiss the case on two grounds: (1) that the issue was moot, as the parents had revoked their consent for special education services and had since enrolled their son in private school; and (2) that the parents had not exhausted their administrative remedies under IDEA to pursue the ADA and Section 504 claims.

On the issue of mootness, the district argued that the court was not able to compel the district to provide a special education placement because the parents had revoked their consent for special education services. The court disagreed on grounds that the parents may still seek special education services for their son in the future, and therefore the current controversies in the case were subject to repetition in the future and cannot be considered moot.

With regard to the second issue on exhaustion of administrative remedies, the court determined that the parents had in fact exhausted their administrative remedies, even though the *district* was the party who filed for due process – not the parents. The court relied in part on the Supreme Court's *Fry* decision and reaffirmed that if a party is seeking a remedy under the ADA and Section 504, and that remedy also is available under IDEA, the party must pursue all available administrative remedies (such as filing due process complaints) before filing suit in federal or state court. However, in this case the court determined that since the parents had lost during the due process that was initiated by the district, they had exhausted the administrative process and could subsequently file a court action.

What This Decision Means to Your District

Districts are not "off the hook" for special education services when a parent revokes consent for services. We are seeing the first cases following the important *Fry* decision. Be aware of issues of exhaustion of remedies where multiple laws may be at issue, and work with counsel to ensure those issues are addressed at the right time.

– *A.A. et al. v. Walled Lake Consolidated Schools*, E.D.Mich. No. 16-14214, 2017.

Unlawfully Holding a Grievance in Abeyance Constitutes Retaliation

In an employment discrimination and retaliation case, the Sixth Circuit Court of Appeals issued an opinion in September that concluded holding a grievance in abeyance due to a subsequent filing with the Equal Opportunity Employment Commission (EEOC) constitutes an adverse employment action and therefore is discriminatory.

Joyce Watford is an African American woman who was employed for 11 years as a teacher before she was terminated. In her termination letter, the superintendent cited "insubordination and conduct unbecoming a teacher" for actions that occurred during her final two years of employment. Watford believed her termination was instead due to her race, sex, and age. Therefore, she filed a grievance with the board of education to challenge the termination and subsequently filed a complaint with the EEOC.

The collective bargaining agreement (CBA) that governed her employment stated that if an employee believed they were discriminated against, the employee could file a grievance with the board of education. However, if the employee subsequently filed a charge with EEOC, the CBA required that the grievance proceedings be held in abeyance. Therefore, per the contract, her grievance with the board of education was held in abeyance. Watford then filed another EEOC charge against both the board of education and the teachers association, this time alleging that the grievance arbitration was held in abeyance in retaliation for filing an EEOC charge.

The issue on review for the Sixth Circuit Court of Appeals was whether requiring grievance proceedings to be held in abeyance upon the filing of an EEOC charge is a materially adverse action. The retaliation provisions in both Title VII and the Age Discrimination in Employment Act (ADEA) state that it is unlawful for an employer or a labor organization to discriminate against an employee who has opposed an unlawful labor practice. The court noted that it would have to find that terminating an in-house grievance proceeding because the employee filed an EEOC charge clearly constitutes retaliation in violation of Title VII and the ADEA. (*E.E.O.C. v. Sundance Rehabilitation Corp*. 466 F.3d 490.)

The court next considered whether there is a material difference between terminating a grievance and holding it in abeyance. The court held that there is no material difference between these two actions. The court stated that

both provisions make the availability of remedies under the contract contingent upon not filing an EEOC charge. The court held that this is unlawful under Title VII and the ADEA, finding that such CBA provisions and conduct discriminates against employees who filed an EEOC action because they opposed an unlawful employment practice.

What This Means to Your District

Districts should review CBA language with legal counsel to determine whether any provisions which hold grievances in abeyance during the pendency of any type of administrative complaint review are valid in light of this decision. The Sixth Circuit has essentially declared that such provisions may be considered retaliation against someone that files a discrimination complaint.

– *Watford v. Jefferson County Public Schools*, 6th Cir. No. 16-6183, 2017.

Case Law Update

Supreme Court Docket

The U.S. Supreme Court has taken two cases under consideration that will impact school districts: a fair-share fee case and a consolidated employment law case regarding arbitration.

The Court announced on September 28, 2017, that it will hear arguments in the fair-share fee case of *Janus v. American Federation of State, Municipal and County Employees*. The issue is whether fees paid by public-sector employees who are not members of the union are constitutional.

Illinois healthcare worker Mark Janus argues that being required to pay even a limited fee to cover the costs of contract negotiations violates his First Amendment rights. The Court determined in 1977 that public-sector employees may be required to pay fees to cover the contract negotiations, even if they may not be required to pay the entire fee, which would cover other activities, including political activities of the union. Last year, the Court heard arguments in a similar fair-share fee case, but Justice Antonin Scalia died before the Court issued an opinion, resulting in a deadlock among the remaining eight justices. Now, with Justice Neil Gorsuch on the bench, the full panel is expected to reach a decision on this issue.

The other case, *National Labor Relations Board v. Murphy Oil USA, Inc.,* may change how employer–employee disputes are resolved, as it stems from two federal laws with contradictory provisions. The Federal Arbitration Act provides that arbitration agreements “shall be valid, irrevocable, and enforceable”; yet under the National Labor Relations Act, employees have the right to engage in “concerted activities” for “mutual aid or protection,” such as filing a class action or collective action lawsuit. The Court has consolidated three cases, all of which came about after an employee who had entered into an arbitration agreement filed a class action or collective action lawsuit. The Court is expected to decide whether arbitration clauses and waivers of collective and class proceedings are prohibited as an unfair labor practice and therefore unenforceable. Oral arguments are scheduled for October 2.

FLSA Overtime Rule

In 2016, the U.S. Department of Labor issued an updated overtime rule to increase the salary level needed for executive, administrative, and professional employees to be deemed exempt from federal minimum wage and overtime pay requirements. Days before the effective date of the rule, however, several states filed a lawsuit against the Department of Labor. The U.S. District Court for the Eastern District of Texas, commonly known as the “Rocket Docket” for moving cases along very quickly, took immediate action by issuing an injunction to halt the rule from going into effect. This court has now struck down the overtime rule, which would have doubled the salary requirements that exempt certain employees from overtime pay.

Firm News: Announcing the Ennis Britton Consulting Group, LLC

Ennis Britton Co., LPA is pleased to announce the recent opening of the new Ennis Britton Consulting Group, LLC. The Ennis Britton Consulting Group (EBC) is a wholly owned subsidiary of Ennis Britton Co., LPA. EBC delivers comprehensive management and leadership solutions to further enhance the skills of education professionals. Drawing on more than 70 years of combined experience, EBC consultants design signature professional development programs that address your team's unique needs and maximize management potential for your organization.

At the heart of the Ennis Britton Consulting Group is the Making Great Leaders program. Making Great Leaders is not a one-size-fits-all approach to leadership development. Rather, our consultants use their expertise to customize this professional development program to meet the unique needs of each group and each individual. The program assists with:

- Leadership training and professional development
- Board development, team building and conflict resolution
- Organizational management and human resource consultation
- Administrative team building and conflict resolution
- Strategic planning
- Board and administrative retreats

Our Consultants

Dr. Nylajean McDaniel has more than 40 years of experience in public school service working collaboratively with students, staff, and school communities to ensure high-quality education and academic success. She has been a teacher, an administrator, an adjunct professor, and a district superintendent.

Nylajean McDaniel

Nylajean is certified as an organizational consultant by the Hay Group. She has participated in the Buckeye Association of School Administrators' Ohio School Leadership Institute, Ohio State University's National Academy for Superintendents, and Harvard University's Executive Leadership Program for Educators. She holds a bachelor's degree in education from Bowling Green State University, a master's degree in curriculum and instruction and reading from Cleveland State University, and a doctorate in educational leadership and organizational development and change from Kent State University.

Mr. Stephen Shergalis has more than 30 years of experience in public education, with a focus on business operations, human resources, and development of organizational leadership capabilities. Steve is dedicated to helping all public school employees enthusiastically contribute to, and feel responsible for, the achievement of educational excellence.

Stephen Shergalis

Steve is certified as an organizational consultant by the Hay Group. He has completed the Harvard University Executive Leadership Program for Educators and the Case Western Reserve University Leadership Deep Dive Program. He holds a Bachelor of Science degree and a Bachelor of Architecture degree from Kent State University and a master's degree in educational administration from Ashland University.

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****The services provided by the Ennis Britton Consulting Group are not law-related services and are separate and distinct from the legal services provided by Ennis Britton Co., LPA. The relationship between the client and EBC is not protected by the attorney–client privilege.**

Firm News: Special Education Seminars

Ennis Britton is excited to announce a unique professional development opportunity in October 2017! Our Special Education Team will host a seminar in four different locations across the state. Each seminar will consist of two general sessions where our Special Education Team will discuss practical tips to provide a functioning knowledge of the Ohio Operating Standards for the Education of Children with Disabilities. Additionally, two smaller breakout sessions will allow special education professionals to choose among hot topics based on their particular interest and need. Breakout session topics include student discipline, career-tech program compliance, due process complaints, and progress monitoring after *Endrew F.*

For this seminar, our Special Education Team has developed materials and practical tips that are designed to help your special education team members confidently and knowledgably tackle difficult compliance issues.

This full-day seminar will begin at 9:00 a.m. and conclude at 3:30 p.m. at four locations across Ohio:

October 19: **Mahoning Valley** @ Trumbull County ESC

October 20: **Cleveland** @ Cuyahoga County ESC

October 25: **Columbus** @ Indiana Wesleyan University

October 26: **Cincinnati** @ Princeton City School District Administration Center

The cost of the seminar is $95 per attendee. Each participant will receive a custom Ennis Britton binder with the Operating Standards divided into sections, with each section containing a list of practical tips and insight for the special education professional. These materials will transform the Operating Standards into a functional and indispensible tool for every IEP team meeting. Lunch and complimentary beverage service will be provided at all locations. This seminar is open to all special education directors and staff in Ohio, but space is limited. Participants must be registered to attend. To register, email Hannah or call 513-421-2540.

Firm News: Capital Conference Reception

You are cordially invited to attend Ennis Britton's reception at the OSBA Capital Conference to celebrate another successful year!

Monday, November 13, 2017
4:00 p.m. to 6:00 p.m.
Hyatt Regency Columbus
Franklin Rooms A & B

Please R.S.V.P. to Barbara A. Billow
bbillow@ennisbritton.com

All Capital Conference attendees are welcome to attend.

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.

- **October 1**: (Sunday) Deadline for board to adopt annual appropriation measure (RC 5705.38(B))
- **October 10**: Deadline for voter registration for November election (RC 3503.01, 3503.19(A))
- **October 15**: Deadline for certification of licensed employees to State Board of Education (RC 3317.061)
- **October 26**: Deadline for filing pre–general election campaign finance report for certain candidates, detailing contributions and expenditures from 4:01 p.m. on the last day reflected in the previous report through 4:00 p.m. on October 18, the 20th day before the election (RC 3517.10(A)(1))
- **October 31**: End of first ADM reporting period (RC 3317.03(A))
- **November 1**: Deadline for classroom teachers to develop online classroom lessons (blizzard bags) to make up hours for which it is necessary to close schools (RC 3313.482(A)(3)(a))
- **November 7**: General Election Day (RC 3501.01)

Upcoming Presentations

SAVE THE DATE!
2017–2018 ADMINISTRATOR'S ACADEMY SEMINAR SERIES

September 28, 2017: Low-Stress Solutions to High-Tech Troubles – Archive available

January 25, 2018: Take Hold on Public Relations
Live video webinar

April 5, 2018: Special Education Legal Update
Live seminar in Cincinnati and audio webinar

July 12, 2018: Education Law Year in Review
Live video webinar

The September and April Administrator's Academy presentations will be provided at live seminar locations as well as in a live audio webinar option. The January and July presentations will be offered via a live video webinar professionally produced by the Ohio State Bar Association. As always, an archive will be available 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 may register on our website or contact Hannah via email or phone at 614-705-1333.

OTHER UPCOMING PRESENTATIONS

October 2: OASPA Boot Camp
– John Britton and Bronston McCord

October 11: Cincinnati Paralegal Association
– Bill Deters

October 4: Northwest Ohio Association of School Board Officials
– Erin Wessendorf-Wortman

October 13: Brown County ESC at Georgetown
– Pamela Leist and Jeremy Neff

October 13: Southwest Ohio Personnel Administrators
– Jeremy Neff

November 9: Ohio Association of School Business Officials
– Bronston McCord

November 13 and 14: OSBA Capital Conference
– John Britton: Fair Share/Right to Work: What's Next?
– Gary Stedronsky and Erin Wessendorf-Wortman: Board Meetings: The Good, Bad and Ugly
– Pamela Leist and Hollie Reedy: OCSBA School Law Workshop—Investigations: Critical Skills Debriefing

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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:

- New Truancy and Discipline Laws
- Supreme Court Special Education Decisions
- Employee Licensure
- Transgender and Gender-Nonconforming Students
- Contract Nonrenewal
- Ohio Sunshine Laws
- Managing Workplace Injuries and Leaves of Absence
- Special Education: Challenging Students, Challenging Parents
- Fostering Effective Working Relationships with Boosters
- Requirements for Medicaid Claims
- 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

Team Members:
John Britton
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

Team Members:
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