



# School Law Review



## DECEMBER 2017

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## Ohio Supreme Court Decision: Substitute Custodian Is Not a Regular Employee

The Ohio Supreme Court recently decided that a substitute custodian was not a “regular nonteaching school employee,” a designation that would have entitled him to better wages and benefits. The employee, substitute custodian Kurt Singer, demanded that the Fairland Local School District recognize him as a regular nonteaching employee dating back to 2006 and pay him the additional back wages and benefits that he would have been qualified for under that designation.

Ohio law does not define “regular nonteaching school employee.” Under R.C. 3319.081, “regular nonteaching school employees” in school districts, including hourly and per diem employees, are under a one-year contract for their first year, then a two-year contract spanning their second and third years. If renewed, a subsequent contract is a continuing contract, which includes other benefits such as paid leave as well as termination only for just cause. Because Singer worked hours and performed job functions

similar to contractual custodians, he argued that he met the definition of a regular nonteaching school employee.

From 2006, when Singer was hired as a substitute custodian, to June 2016, every day that Singer worked for the district was recorded as “substituting.” Alleging that he had asked for a contract but was denied, he requested benefits and back wages to the 2009–2010 school year, which is when he would have received continuing contract benefits if the contract was granted. Singer asked the Supreme Court to compel Fairland Local to recognize him as a regular nonteaching employee and to provide a continuing contract.

The court found that Singer satisfied the requirements of working full-time and at least 120 days within a school year for the first seven years, but he did not satisfy the requirement of being a “regular” employee. In the absence of a statutory definition of “regular,” the court turned to *Black’s Law Dictionary*, which defines it as “steady or uniform in course, practice, or occurrence; not subject to unexplained or irrational variation.” The court examined Singer’s employment and found that it was not regular in terms of days of service, hours, and school-building assignments. Additionally, Singer worked anywhere from four to ten days in a pay period, and during many pay periods he worked even fewer than four days.

Additional facts leading to the court’s decision include that Singer had no regular location assignment but worked routinely in any of the district’s four buildings – sometimes in more than one building in the same day, and other times in the same building on a daily basis. Furthermore, Singer was able to turn down opportunities to substitute, and at times he did so.

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In consideration of these facts, the court issued a 6-1 decision holding that “we cannot conclude that Singer’s employment was in any meaningful way ‘regular’.”

### **What This Decision Means to Your District**

Because Ohio law does not specifically define a “regular nonteaching school employee,” districts should be aware of not just job titles but job *performance*, including functions and times/dates worked, of employees who are not in this category, i.e., those who substitute but are not considered permanent employees. The more variation in hours, locations, duties performed, and number of days worked in each pay period, the more likely that the employee would not be considered a regular nonteaching school employee. An additional factor is the ability of the employee/substitute to decide whether to accept or decline work, which regular employees generally may not do.

– *State ex rel. Singer v. Fairland Local School Dist. Bd. of Edn.*, Slip Opinion No. 2017-Ohio-8368.

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## **Ohio Teacher Violates Code of Professional Conduct**

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In 2013, a licensed professional intervention specialist and a teacher of disabled high school students was placed on paid administrative leave while the school investigated “professional conduct concerns.” The teacher, Langdon, then resigned her position for “personal reasons” prior to a formal decision or action by the school.

Based on an investigation from the Office of Professional Conduct, in 2014 the Ohio State Board of Education (SBOE) charged her with eight instances of conduct unbecoming a teacher. Specifically, Langdon “(1) made unprofessional and inappropriate comments about students, staff, and parents, (2) made unprofessional posts on social media pertaining to her workplace, (3) revealed details of a student’s individualized education program (‘IEP’) to other parents and students, (4) made inappropriate physical contact with students, (5) used marijuana and asked for marijuana to be delivered on school property, (6) created a hostile learning and working environment for students, staff, and parents, (7) failed to follow IEP instructions for students, and (8) referred to a private nurse working with a student within the school as a ‘big, gross, disgusting wildebeest’.”

During a hearing with the Ohio Department of Education (ODE), the hearing officer found that Langdon had engaged in conduct unbecoming a teacher in violation of R.C. 3319.31 on five grounds. The hearing officer also recommended that her pending application for a new license be denied and she not be permitted to reapply for a license for at least five years.

Langdon then filed objections to the hearing officer’s recommendations. In response, SBOE reduced her sanctions so that she could reapply for licensure on or after July 1, 2018, provided that she complete a fitness-to-teach evaluation and complete eight hours of anger management training. Langdon then appealed the SBOE’s decision to the Butler County Court of Common Pleas, arguing that she was prejudiced by a lack of due process and that the SBOE’s findings were not supported by “reliable, probative, and substantial evidence.” The court agreed with Langdon and reversed the SBOE’s decision.

Next, ODE appealed the court’s decision to the Twelfth District Court of Appeals. In addition to arguing a lack of evidence, Langdon also argued that the term “conduct unbecoming” was never defined and thus she was denied due process. This time, the court disagreed with Langdon. The court stated that the definition of “conduct unbecoming” is stated in the Ohio Administrative Code:

- (A) The state board of education shall consider, but not be limited to, the following factors when evaluating conduct unbecoming under division (B)(1) of section 3319.31 of the Revised Code:
  - (1) Crimes or misconduct involving minors;
  - (2) Crimes or misconduct involving school children;
  - (3) Crimes or misconduct involving academic fraud;

- (4) Making, or causing to make, any false or misleading statement, or concealing a material fact in a matter pertaining to facts concerning qualifications for professional practice and other educational matters, or providing false, inaccurate, or incomplete information about criminal history or prior disciplinary actions by the state board or another professional licensing board or entity;
- (5) Crimes or misconduct involving the school community, school funds, or school equipment/property, which may include, but are not limited to, unresolved findings for recovery by the state auditor;
- (6) A plea of guilty to, or finding of guilt, of a conviction, granting of treatment in lieu of conviction, or a pre-trial diversion program to any offense in violation of federal, state, or local laws and/or statutes regarding criminal activity;
- (7) A violation of the terms and conditions of a consent agreement; and
- (8) Any other crimes or misconduct that negatively reflect upon the teaching profession, including sanctions and/or disciplinary action by another state educational entity or another professional licensing board or entity.

The court stated that the definition in the OAC is the standard used in Ohio courts for determining “conduct unbecoming.” The court stated, “The eight factors listed above in the administrative code provide a specific standard for evaluating allegations of ‘conduct unbecoming’ a teacher, and represented specific standards promulgated by the Board. There is no indication in the record that Langdon was operating under any other definition of ‘conduct unbecoming,’ or that any of the parties were confused as to the controlling standards. Thus, Langdon was not denied due process based upon the ‘conduct unbecoming’ standard.”

Furthermore, the court disagreed with Langdon that evidence was insufficient to find that she had engaged in conduct unbecoming a teacher: “On at least three occasions, as previously pointed out, Langdon acknowledged her inappropriate conduct. The record demonstrates multiple ways Langdon’s actions constituted misconduct and reflected negatively on the teaching profession. This is especially true where Langdon taught developmentally disabled students, and often directed her misconduct toward her students, fellow staff members, and even the parents of her students. While not every single allegation was proven, the Department of Education presented ample evidence to support the Board’s ultimate determination that Langdon engaged in conduct unbecoming a teacher.”

The court then reinstated the SBOE decision, which allowed Langdon to reapply for her license on or after July 1, 2018, provided that she completes a fitness-to-teach evaluation and eight hours of anger management training.

### **What This Decision Means to Your District**

The Ohio Administrative Code, as well as ODE’s *Licensure Code of Professional Conduct for Ohio Educators*, defines “conduct unbecoming.” All licensed educators are responsible to know what conduct is considered unbecoming and to avoid it, or risk losing their license. Ennis Britton attorneys frequently present professional development seminars on this important material. If your district has questions regarding the *Licensure Code of Professional Conduct for Ohio Educators*, please contact an Ennis Britton attorney.

– *Langdon v. Ohio Department of Education*, 2017-Ohio-8356.

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## **Workers’ Compensation Legislation in the Works**

The General Assembly is currently considering three different Workers’ Compensation bills that may affect schools. These bills will most likely undergo changes during the deliberation process. The summary below describes the provisions and the status of these bills as of November 29, 2017. Stay tuned for updates on this and

other legislation. Contact an Ennis Britton attorney if you have any questions regarding how these may affect your school district.

### **HB 268**

**Requires the Administrator of Workers' Compensation to waive a requirement that an employer have sufficient assets located in Ohio to qualify for self-insuring status if the employer holds a rating of B3 or higher according to Moody's or a comparable rating from a similar agency.** An employer that is granted self-insuring status through the proposed waiver would be subject to the same requirements that self-insuring employers are subject to under current law. This includes requirements to pay assessments based on the amount of the employer's paid compensation as defined in continuing law and to provide a surety bond sufficient to pay claims, except that the employer must contribute to the Self-Insuring Employers' Guaranty B Fund created under the bill (discussed below) instead of the Self-Insuring Employers' Guaranty Fund (SIEGF) under current law.

**Allows all self-insuring employers to purchase private workers' compensation insurance to cover any workers' compensation claim from an insurer that has an A.M. Best Financial Strength Rating of A or higher.** Current law voids most contracts or agreements that indemnify or insure an employer against workers' compensation claims. A self-insuring employer may, however, purchase an insurance policy that indemnifies against all or part of the employer's loss in excess of \$50,000 from a single disaster or event arising out of the employer's workers' compensation liability. But the insurer cannot, directly or indirectly, represent the employer in any settlement, adjudication, determination, allowance, or payment of workers' compensation claims. The bill eliminates this prohibition.

**Creates the Self-Insuring Employers' Guaranty B Fund, which consists of contributions and other payments made by employers granted self-insuring status as a result of the waiver. The fund created under the bill secures compensation and benefits for employees of a self-insuring employer who is granted the waiver but who defaults on the obligation to make direct payments.** The Administrator of the Bureau of Workers' Compensation must establish a contribution amount each year and require every employer that is granted self-insuring status through the waiver to pay the established contribution to the fund. Contribution rates are to be as low as possible but must be sufficient to ensure enough money in the fund to guarantee the payment of any claims against the fund.

This bill has had two hearings in the House Insurance Committee.

### **HB 269**

**Requires employees who receive Temporary Total Disability (TTD) benefits to comply with a return-to-work plan.** TTD is a wage loss benefit designed to compensate employees who are temporarily unable to perform the functions of their jobs due to a workplace injury. Employees receiving TTD essentially get two-thirds of their wages tax-free. This bill would require the BWC administrator to develop a return-to-work plan for each employee receiving TTD. The plan will have the goal of returning the employee fully to the former position of employment, returning the employee to the former position of employment on a part-time basis or on a full-time basis with modified duties, or retraining the employee to work in another position. The employees' progress with the plan will be evaluated every 90 days. Evaluations will also determine whether the plan needs revision. If the administrator determines that the plan does not need to be revised and that the employee is not complying, TTD benefits may be suspended.

Employees in compliance with the plan will continue to receive TTD benefits until such benefits are terminated in accordance with law.

**Incentivizes employers' participation in safety consultations and loss prevention programs.** This provision will modify and enhance the incentives for employers to participate in safety and loss prevention training, including premium discounts and other measures.

**Makes changes to Permanent Total Disability (PTD) and death benefits.** PTD is a benefit designed to compensate employees who are totally disabled from working, on a permanent basis, due to a workplace injury. PTD benefits are paid for life to employees who cannot engage in any form of sustained remunerative employment using the employment skills that the employee has or may reasonably be expected to develop, and to employees who have lost multiple body parts or the use of multiple body parts.

Pursuant to the bill, employees who receive PTD benefits and who reach full retirement age will have their PTD replaced with Extended Benefit (EB) compensation. "Full retirement age" is defined as the age at which an employee is eligible for unreduced retirement benefit from a state retirement system (PERS, STRS, SERS, OPERS, etc.), or the age at which an employee reaches full retirement age for purposes of the Social Security Act. Employees who are at or within one year of full retirement age will receive PTD for two years before the benefit is converted to EB.

EB is paid as a percentage of the PTD benefit that the injured worker received prior to reaching full retirement age. For example, at least one year but less than two years of PTD will convert to an EB of 10 percent, whereas an employee with ten years or more of PTD will receive 100 percent. PTD is calculated by a formula that essentially works out to two-thirds of an employee's wages, subject to certain caps and other rules. Employees who receive EB compensation will receive an annual 2 percent increase.

Additional death benefits are provided by the bill. In addition to the benefits under current law, the bill adds a \$35,000 lump sum payment to be apportioned among dependents if there are more than one. The bill also provides for a \$5,000 scholarship payable to dependents annually for up to four years. Dependents cannot receive the scholarship until they receive a high school diploma or GED.

This bill has had two hearings in the House Insurance Committee.

## **HB 380**

**Prohibits illegal and unauthorized aliens from receiving compensation and certain benefits.** This bill adds to the definition of "employee" for purpose of workers' compensation law. Under current law, employee is defined broadly as "every person in the service of any person, firm, or private corporation, including any public service corporation, that employs one or more persons regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens." This bill qualifies that definition to include only aliens authorized to work by the U.S. Department of Homeland Security.

Under the bill, "illegal alien" means an alien who is deportable if apprehended because of one of the following: (1) the alien entered the United States illegally without the proper authorization and documents; (2) the alien once entered the United States legally and has since violated the terms of the status under which the alien entered the United States, making that alien an "out of status" alien; (3) the alien once entered the United States legally but has overstayed the time limits of the original legal status.

The bill defines “unauthorized alien” as an alien who is not authorized to be employed as determined in accordance with the Immigration Reform and Control Act.

On November 29, the House Insurance Committee adopted an omnibus amendment from the sponsor of HB 380 and then voted to accept the bill.

The amendment eases some of the policies that were controversial and contentious for opponents of the bill, such as employee advocates. One of the main provisions in the amendment allows a U.S. citizen who is a dependent of an undocumented worker to receive a death benefit in the event of the worker’s death, equal to the amount entitled to the dependent of a U.S. citizen.

The amendment also adds language that creates a rebuttable presumption that a worker was hired with legal working status.

Next, the bill will go before the full House for a vote and is expected to pass with ease.

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## Proposed Changes to the Ohio Administrative Code

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### **OAC 3301-69-02**

On November 16, the Joint Committee on Agency Rule Review (JCARR) heard from the Ohio Department of Education (ODE) regarding proposed changes to OAC 3301-69-02. This rule governs excuses for student absences. Changes were proposed to align with Ohio’s new truancy laws and with ESSA’s regulations regarding homeless students.

### **OAC 3301-13-03**

As part of the five-year rule review, ODE has recently reviewed [OAC 3301-13-03](#), entitled, “Establishing provisions for the participation of students with disabilities in required assessments administered at the designated grades.” The recommendations include changing “assessments” to “state tests,” removing redundant content on excusal from state tests, and removing examples of specific accommodations. The changes greatly reduce the content in this section of the administrative code. ODE is accepting comments regarding the changes through December 13, 2017, at [rulecomments@education.ohio.gov](mailto:rulecomments@education.ohio.gov).

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## Legislation in the Works

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### **HB 418**

HB 418 would require schools to transmit student records within five business days when a student transfers to another school.

### **HB 425**

This bill provides that specified portions of peace officers’ body camera recordings and the infrastructure record of a public school are not public records for purposes of Public Records Law.

### **HB 426**

HB 426 prohibits a school employee who is not in a position of authority from engaging in sexual conduct with certain students.

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## Upcoming Deadlines

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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.

- **December 15:** Deadline for filing post-general election campaign finance statement for certain candidates, detailing contributions and expenditures from 4:01 p.m. on the last day reflected in the previous statement through 4 p.m. on the seventh day before filing the statement (December 8) (RC 3517.10(A)(1))
- **December 31:** Deadline for treasurer to canvass the board to establish a date of the organizational meeting (RC 3313.14)
- **January 15:** Deadline for boards of education of city, exempted village, vocational and local school districts to meet and organize (RC 3313.14); deadline for boards of education of city, exempted village, vocational and local school districts to adopt tax budgets for the coming school fiscal year (RC 5705.28(A)(1))
- **January 20:** Deadline for boards of education to submit fiscal tax-year budget to county auditor (RC 5705.30)
- **January 23:** Deadline to submit certification for May conversion levy to tax commissioner (RC 5705.219(B))
- **January 29:** Deadline to submit certification for May income tax levy to Ohio Department of Taxation (RC 5748.02(A))
- **January 31:** Deadline for ESC governing boards to meet and organize (RC 3313.14)

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## Upcoming Presentations

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### 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

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**

### **December 6: Brown County ESC & Southern Ohio ESC @ Region 14 Hopewell**

– Bill Deters and Hollie Reedy

### **December 8: SWOPA**

– Ryan LaFlamme

### **January 19: OASPA Winter Camp**

– Bronston McCord and Gary Stedronsky

### **Ashland Leadership Academy Seminars: ALAS 2018**

**January 5 & 6, February 2 & 3, March 2 & 3**

– John Britton, Giselle Spencer, Megan Bair Zidian

### **February 8: Trumbull County All Schools Leadership Academy**

– John Britton

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## **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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