



## AUGUST 2018

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## OTES Changes Again in Senate Bill 216

Senate Bill 216 passed both houses on June 27 and was delivered to the governor for signature on July 24. The governor has 10 days to sign the bill. Any bills that are not signed after 10 days automatically become law. Barring any vetoes, the effective date of this bill will be the 91st day after the governor signs the bill.

Below is an update on the Ohio Teachers Evaluation System (OTES). Changes to OTES were first considered in 2016 and have now come full circle with the legislative enactments in SB 216.

### Revised Framework

The State Board of Education is charged to revise the OTES framework based on recommendations of the Educator Standards Board. The state board must hold at least one public hearing on the revised framework and

make the full text of the revised framework available. Below are important dates for the implementation of the new OTES framework:

- **May 1, 2020** – Deadline for state board to adopt revised framework
- **July 1, 2020** – Deadline for school boards to update OTES policy
- **2019–2020** – OTES Pilot Program. ODE will establish a pilot program to guide implementation of the new OTES framework, request and select districts to participate, and provide professional development and technical assistance to participating districts.

Note that the bill specifies the new policy will become operative at the expiration of a district’s current collective bargaining agreement that is in effect on the effective date of SB 216. However, the statute further provides that a board of education has until **no later than** July 1, 2020 to adopt a revised policy. Districts with CBAs that expire prior to July 1, 2020 may need to adopt a revised policy and begin implementation before 2020 as a result. This same issue of timing occurred when OTES was initially adopted into law in 2011. Even though the board was not required to adopt a policy until July 2013, some districts had to modify policies and implement OTES sooner because of this timing issue. Call legal counsel to discuss implementation if your CBA expires prior to 2020.

### Teacher Evaluations – R.C. 3319.111

SB 216 removes the student academic growth measure as a component of the final summative rating for teacher evaluations. It also removes the option for boards to adopt a resolution requiring only one formal observation of a teacher rated *accomplished* if the teacher completes a project demonstrating growth.

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The bill requires student performance measures to use “high-quality student data.” This may include data from ODE’s list of student assessments that measure mastery of course content for the appropriate grade level.

*Accomplished teachers* may be evaluated once every three years, so long as the teacher submits a self-directed professional growth plan focusing on specific areas in the observations and evaluation, and the evaluator determines the teacher is making progress on the plan.

*Skilled teachers* may be evaluated once every two years, so long as the teacher and evaluator jointly develop a professional growth plan focusing on specific areas in the observations and evaluation, and the evaluator determines the teacher is making progress on the plan

Off-years for both accomplished and skilled teachers must include at least one observation and one conference. The conference must include a discussion of progress on the teacher’s professional growth plan.

### **Standards-based Evaluation Framework – R.C. 3319.112**

This section of the Revised Code has been revised as follows:

- Removes student academic growth measure from the final summative rating and instead requires the data to be embedded as evidence in five of the ten domains (see, below)
- Prohibits shared attribution of student performance data and the use of student learning objectives
- Requires development of a professional growth or improvement plan based on evaluation results and aligned to district or building improvement plan under ESSA
- Repeals the alternative framework (R.C. 3319.114) but directs ODE to develop guidance on how information obtained from the approved alternative framework tools may be used as evidence in evaluations

*High-quality student data.* The state board shall define “high-quality student data.” Districts must use at least two measures as evidence. When applicable to the grade level or subject area taught, high-quality student data must include the value-added progress dimension and at least one other measure. High-quality student data may be used as evidence in any component of the evaluation related to the following domains:

- Knowledge of students
- Teacher’s use of differentiated instructional practices
- Assessment of student learning
- Teacher’s use of assessment data
- Professional responsibility and growth

*Guidance for districts.* ODE is directed to provide guidance to districts on how high-quality student data may be used as evidence of student learning attributable to a particular teacher, complete with examples of appropriate use of that data. ODE must also develop a list of student assessments that measure mastery of course content for each grade level; however, the clause that this is only when value-added data or academic growth do not apply has been removed from this section of the bill. Data from these student assessments may be used as high-quality student data.

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## **Arbitrator Decides Employment Decision Not Covered in CBA Is within School Board’s Authority**

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An arbitrator recently held that a school district acted within its managerial authority and did not violate a collective bargaining agreement (CBA) when it reduced an employee’s extended days under a supplemental contract.

The school district employed a K–6 and a 7–12 school counselor. Based on a review of their workload, the school district hired a third counselor. Due to this hiring, the school district reduced the extended days provided to the high school counselor from 25 to 12, decreased his workload from grades 7–12 to grades 9–12, and redistributed the extended days to the elementary counselor and the newly hired counselor. These extended days for the high school

counselor were provided solely through a one-year supplemental contract that specifically stated it expired at the end of the school year. In response, the counselor filed a grievance with his union. Two factors worth mentioning are that the grievant is the former union president and that the CBA did not contain any provisions related to extended days.

The school district's position at the arbitration was that the arbitrator did not have the authority to rule on the matter, as the extended days were not covered by the CBA, and thus, there could not be a misapplication, misinterpretation, or violation of the CBA. The union attempted to bootstrap several unrelated articles to the issue, specifically, unjust discipline and discrimination in retaliation for exercise of concerted activity, as the counselor had held several offices for the union and was an active union member ever since joining the union when he was first hired by the district. In prior years he had participated in the grievance process, both personally and on behalf of other employees. He further contended that the 25 extended days were part of his salary by law, calling on the annual salary notices as evidence. He claimed that his extended days were an extension of his regular work and not supplemental, and therefore were governed by the CBA.

Because the CBA was silent on the issue of extended days under a supplemental contract, the arbitrator ruled that he did not have the power or authority to determine an issue outside of the CBA or to change any terms in the CBA. The arbitrator further ruled that without further evidence, a contentious relationship in years past did not automatically prove retaliation. Lastly, he ruled that an adverse employment action does not constitute discipline when the facts indicate a clear management need for the decision. Therefore, the evidence compelled the arbitrator to find in favor of the school board.

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

First, just because an employee happens to be previously engaged in union activities that may be perceived as hostile to the employer does not make this employee impervious to justifiable adverse actions. Second, this case indicates why it is imperative to remove or leave out of a collective bargaining agreement things which impact your management rights. If an issue is not in the contract, it is not grievable.

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## **House Bill 318: School Resource Officers**

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House Bill 318 began as a bill to define the qualifications and responsibilities for school resource officers (SROs). As the bill progressed, the SAFE Act, which had started out in another bill, was amended into this bill. HB 318 passed in the General Assembly on June 27 and was delivered to the governor for his signature on July 24. Once the governor receives the bill, he has 10 days to either sign or veto the bill. If he does not sign it within 10 days, it becomes law. Below is an overview of the contents of this bill related to SROs. A separate article follows this on the SAFE Act in HB 318.

### **School Resource Officers**

The bill defines a *school resource officer* as follows:

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*“A peace officer who is appointed through an MOU between a law enforcement agency and a school district to provide services to a school district or school.”*

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SROs must complete basic training through Ohio peace officer training commission and at least 40 hours of SRO training within one year after appointment approved by Ohio peace officer training commission. This training can be satisfied through NASRO, OSROA, or a peace officer certified to train. Note that current SROs are exempt from these requirements.

### ***Memorandum of Understanding***

Prior to employing an SRO, school districts must enter into a memorandum of understanding (MOU) with their local law enforcement agency. The MOU must clarify the purpose of the SRO program, SRO roles, and expectations of SROs. If a district already has an SRO, it must enter into an MOU within one year after the effective date of the bill, which will be 91 days after the governor signs the bill. Students may be given input into the drafting process for the MOU through the school administration.

The MOU must address the following:

- Goals for SRO and background or suggested expertise (child/adolescent development)
- Professional development/training on age-appropriate practices for conflict resolution and de-escalation, crisis intervention methods
- Roles, responsibilities, and expectations of SRO, school administrators, staff, and teachers
- Protocol for handling criminal activity vs. school discipline
- Coordinated crisis planning and updating school crisis plans
- Discretionary items to build safe and positive learning environment, positive relationship with law enforcement, staff, decreasing youth in juvenile justice system

### ***SRO Services***

SROs may perform the following services:

- Assist with emergency management plan (adoption, implementation, amendment). SRO must consult with local law enforcement and first responders in this work.
- Additional responsibilities such as follows:
  - Provide a safe learning environment
  - Be a valuable resource to school staff
  - Foster positive relationships with students
  - Develop problem-solving strategies affecting youth and protecting all students

### ***School Safety Funding***

The uncodified section of the bill adds \$12 million in funding for school safety training grants for fiscal year 2019. The use of school safety training grant funding includes but is not limited to the following:

- Support of SRO certification training
- Any type of active shooter and school safety training
- All grade-level type educational resources
- Training to identify and assist students with mental health issues
- Any other training related to school safety

Schools and county boards must work or contract with a police department or sheriff's office to develop programs and training.

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## **House Bill 318: SAFE Act**

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The SAFE Act, or Supporting Alternatives for Education Act, in House Bill 318 addresses positive behavior intervention and supports (PBIS), discipline for violating a school's code of conduct, and suspension of students in preK–3.

## **SAFE Act: Positive Behavior Intervention and Supports**

Within three years of the effective date of the bill, districts must provide continuing education or professional development in PBIS as part of school-wide implementation of PBIS framework to the following:

- Teachers who completed teacher prep program that did not include PBIS
- All district administrators preK–3 that have not completed a course, continuing ed, or professional development in PBIS (includes superintendent, building principals, assistant principals)

The LPDC must establish model professional development courses and monitor compliance.

The bill requires the State Board of Education to establish a policy and standards for implementation of PBIS and a policy and standards for use of seclusion and restraint.

The bill defines PBIS as follows:

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*“A multi-tiered, school-wide, behavioral framework developed and implemented for the purpose of improving academic and social outcomes and increasing learning for all students.”*

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### **State Board Updates to PBIS**

The Ohio Board of Education is charged with updating OAC 3301-35-15 as follows:

- Districts must implement PBIS on a system-wide basis
- Districts must comply with SBOE policy and standards updates
- Districts must submit any required reports to ODE or the General Assembly on PBIS, suspension and expulsion of preK–3 students
- District PBIS frameworks may focus on the following:
  - Data systems that enable monitoring of academic progress, behavioral incidents, attendance, and other indicators
  - Investment in curricula & instructional strategies, matched to student needs, and data to support academic instruction
  - Expectation that classroom practices be aligned to school-wide system
  - Improving staff climate/culture regarding classroom discipline via positive and proactive communication and staff recognition

### **PBIS on State Report Cards**

State report cards will indicate, as a Yes or No answer but not as a letter grade, whether a district has a PBIS framework in compliance with law.

### **Zero-Tolerance Policy**

Each district’s zero-tolerance policy must comply with state law (no disciplinary suspensions for truancy or absence) and PBIS policy.

### **School Climate Grants**

The uncodified section of the bill adds \$2 million in funding for fiscal year 2019 for school climate grants to implement PBIS frameworks, evidence- or research-based social and emotional learning initiatives, or both. The grants will be administered by the state superintendent based on priority, as follows:

1. Districts with one or more schools with higher than average percentage of students identified as economically disadvantaged
2. Districts with one or more schools with high suspension rates

### 3. Other districts

A maximum amount of \$5000 per school or \$50,000 per district will be granted.

#### **SAFE Act: Suspension and Expulsion**

The suspension and expulsion part of the SAFE Act will be phased in over the next four years. The suspension and expulsion changes are primarily in two sections of the Revised Code: 3313.66 and 3313.668, with the latter being the new section that will be phased in gradually over the next four years.

##### **R.C. 3313.66**

*Suspensions:* Students must be allowed to complete assignments missed for out-of-school suspension (OSS). Students on in-school suspension (ISS) also must be allowed to complete assignments and serve suspension “in a supervised learning environment.”

*Expulsions:* For expulsions for bringing a knife to school, the bill adds that the knife must be “capable of causing serious bodily injury.”

*Emergency Removals:* PreK–3 may be removed only for the rest of the school day and shall return the next day. No written notice and no hearing is required for these removals. A student must be permitted to return the next day.

##### **R.C. 3313.668(B)(1)(a)**

Schools may not issue OSS or expel preK–3 students unless the student commits one the following offenses:

- Brings a firearm to a school or school event, activity, property
- Brings a knife capable of causing serious bodily injury
- Commits act that is a crime for an adult and that results in serious physical harm to persons or property while at school, school event, or activity
- Makes bomb threat to a school building or premises of activity

##### **R.C. 3313.668(B)(1)(b)**

Schools may issue a 10-day OSS as necessary to protect the immediate health and safety of the student, classmates, classroom staff and teachers, or other school employees.

##### **R.C. 3313.668(B)(2)–(4)**

- (B)(2): Principal should consult with a mental health professional under contract with the district prior to suspending or expelling preK–3 students. If mental health services are needed, the principal or mental health professional shall assist the parent or guardian in locating providers or referrals. No financial burden to district or parents is required.
- (B)(3): Suspended or expelled preK–3 students must get the same notice and hearing as all other students in R.C. 3313.66.
- (B)(4): Districts may still issue ISS for preK–3 students as long as the suspension is served in a supervised learning environment.

#### **Implementation Plan**

For the next four years, each school or district must report to ODE the number of OSS and expulsions issued to preK–3 students for the following offense categories:

- Offenses in R.C. 3313.668(B)(1)(a) – gun, knife, crime, bomb
- Offenses in R.C. 3313.668(B)(1)(b) – 10-day OSS for protection
- Any other offense not described above

Data from 2018–2019 report will be used as baseline data. After 2021–2022, schools shall report to ODE the above data only if ODE deems it necessary.

2018–2019 – *Baseline Year*: Districts shall issue all suspensions and expulsions according to R.C. 3313.66. All districts are exempt from compliance with R.C. 3313.668(B).

2019–2020: Districts must comply with R.C. 3313.668(B)(2) and (3). Districts are considered in compliance with R.C. 3313.668(B)(1) if they reduce the “any other offense” category of OSS and expulsion by 25% from the baseline report to ODE

2020–2021: Districts must comply with R.C. 3313.668(B)(2) and (3). District is considered in compliance with R.C. 3313.668(B)(1) if it reduces the “any other offense” category of OSS and expulsion by 50% from baseline report to ODE

2021–2022: Full implementation begins. All OSS and expulsions of preK–3 students must comply with R.C. 3313.668(B). The number of OSS and expulsions in the “any other offense” category must be zero. All preK–3 suspensions and expulsions must be for offenses in R.C. 3313.668(B)(1)(a) and (b).

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## Special Education Spotlight: Update on Individual Liability under IDEA

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Ennis Britton introduced Special Education Spotlight in the January 2018 issue of [School Law Review](#) as a showing of our commitment to keep you well informed of hot topics in special education and issues that are common to school districts. The first featured article was a recent federal court decision out of the state of Washington related to personal liability under the Individuals with Disabilities Education Act (IDEA).

At the time, the U.S. District Court in the Western District of Washington denied a motion to dismiss filed on behalf of the superintendent, special education director, and school psychologist, who argued that parents could not amend their IDEA complaint to add individual educators as parties to their case. The basis for the motion was that although the IDEA permits legal action against educational agencies, it does not allow for individual liability. As noted by the district court judge, the decision to deny the motion to dismiss was based upon the fact that neither the employees presented nor the court itself found an argument in support of, or a decision from any federal circuit court, that school district employees cannot be held individually liable under IDEA. Having no affirmative precedent to rely on, the case continued in the Western District Court.

On March 28, 2018, the court held that the IDEA does not provide for individual liability based upon the language and intent of the IDEA. The court determined that the IDEA lacks available remedies against individual school district employees or officials, and that redress for alleged violations of the IDEA is more appropriately pursued against the school district and not individual defendants in their individual capacities. As such, the court ultimately determined not to allow the parents to amend their IDEA complaint to add individual school employees as defendants in addition to the school district.

The court first looked to the language of the statute and recognized that the appeals process for disputes references the parents and local education agencies but is silent with regard to liability imposed on individual employees of the school district. Given this silence, the court focused the issue on whether individual liability is an appropriate form of relief for the purposes of the IDEA.

In making its determination, the court was persuaded by the analysis of the District Court of Western Pennsylvania in the 2007 case *Taylor v. Altoona Area Sch. Dist.* In this decision, the court held that “the statutory scheme of the IDEA contemplates that redress for violations of the IDEA should be ‘pursued against the recipients for federal funds rather than against individuals employed by those recipients.’” As such, the court concluded that the IDEA contemplates that violations should be pursued against recipients of federal funds rather than the individuals employed by them.

In the current case, the parents sought reimbursement for educational expenses, private school placement, and all expenses related to that placement, including private tutoring, transportation costs, services related to the student's disability, and attorney fees. Like the court in the *Taylor* case, this court recognized that the IDEA provides for reimbursement for many of these claims; however, the claims originate out of a school district's failure to provide a free appropriate public education (FAPE) and not the actions of the individual employees. Therefore, the alleged violations of the IDEA must be pursued against the school district and not against individual defendants in their personal capacities.

### **What This Decision Means for Your School District**

This ruling is out of Washington state, which is not the Sixth Circuit that governs Ohio; however, it is an affirmative federal court decision that individual employees cannot be held personally liable under IDEA. This decision provides further support to argue that educators in Ohio cannot be named individually in a lawsuit against a school district alleging it failed to provide a child with a FAPE.

Source: [Crofts v. Issaquah Sch Dist 72 IDELR 15, 118 LRP 12367, March 28, 2018](#)

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## **Section 504 Seminars Coming in October**

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Based on the overwhelming positive feedback we received following the 2017 Special Education Seminars, Ennis Britton has developed a Section 504 Seminar for October 2018! Our Special Education Team will travel throughout Ohio to present this professional development opportunity in five different locations. Each seminar will consist of two general sessions and two breakout sessions with our Special Education Team. The general sessions will cover the basics of Section 504 and compliance officer training. Additionally, participants will choose from breakout session topics including accommodations, trauma and mental health, service animals, and extracurriculars.

Our Special Education Team has developed materials and practical tips that are designed to help your special education team members confidently and knowledgeably tackle difficult compliance issues. This full-day seminar will be held at five locations across Ohio:

- October 15: **Cincinnati**
- October 16: **Columbus**
- October 17: **Northwest Ohio/Toledo**
- October 18: **Cleveland**
- October 19: **Mahoning Valley**

The cost of the seminar is \$150 per attendee. The cost includes materials to be added to the custom Ennis Britton binders from the October 2017 seminars. Participants who do not have the Ennis Britton binder with the Ohio Operating Standards may purchase one for \$50. 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. Registration will be opened in August. An announcement will be sent when registration for the seminars opens.

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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.

- **August 1** – Deadline to file statistical report with ODE (RC 3319.33)



- **August 3** – Deadline to submit November emergency, current operating expenses, or conversion levy to county auditor for November general election (RC 5705.194, 5705.195, 5705.213, 5705.219)
- **August 7** – Special election day (RC 3501.01)
- **August 8** – Deadline for school districts to file resolution of necessity, resolution to proceed, and auditor’s certification for bond levy with board of elections for November election, Deadline for county auditor to certify school district bond levy terms for November election (RC 133.18); Deadline to submit continuing replacement, permanent improvement, or operating levy for November election to board of elections (RC 5705.192, 5705.21, 5705.25); Deadline to submit emergency levy for November election to board of elections (RC 5705.195); Deadline to submit phased-in levy or current operating expenses levy for November election to board of elections (RC 5705.251)
- **September 30** – Deadline to file business advisory council plan with ODE (RC 3313.821)

## Upcoming Presentations

### 2017–2018 ADMINISTRATOR’S ACADEMY SEMINAR SERIES

#### ARCHIVES AVAILABLE

Low-Stress Solutions to High-Tech Troubles  
 Take Hold on Public Relations  
 Special Education Legal Update  
 Education Law Year in Review

#### OTHER UPCOMING PRESENTATIONS

#### **August 1: Montgomery County ESC**

– Bill Deters

#### **August 2: Clermont–Brown Regional Network – Principals**

– Ryan LaFlamme

#### **August 2: Northwest Ohio ESC**

– Bill Deters, Bronston McCord, Gary Stedronsky

#### **August 3: Ohio School Boards Association – Attendance, Tuition, and Custody Law Workshop**

– Hollie Reedy

#### **August 9 & 10: Trumbull County ESC Summer Conference**

– Megan Bair, John Britton, Pamela Leist, Giselle Spencer

#### **August 10: Butler County ESC – Curriculum Directors**

– Gary Stedronsky

#### **August 23: Ohio School Boards Association Collaborative Conversations – Finance: Managing and Monitoring Educator Certifications**

– Pamela Leist

#### **August 31: Hamilton County ESC – Ethics for Speech Language Pathologists**

– Jeremy Neff

**September 4: Butler County ESC – Principals**

– Bronston McCord

**September 7: Ohio School Boards Association – Collective Bargaining Workshop**

– Bill Deters

**September 7: Ohio Association of School Personnel Administrators – Boot Camp**

–Bronston McCord

**September 18: Brown County ESC & Southern Ohio ESC**

– Jeremy Neff and Pamela Leist

**September 20: OASPA Fall Conference**

– Megan Bair, Bronston McCord

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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 Nancy via [email](#) or phone at 513-674-3451. Archived topics include the following:

- Three Hot Topics in Special Education
- School Employee Nonrenewal
- New Truancy and Discipline Laws
- Supreme Court Special Education Decisions
- Employee Licensure
- Transgender and Gender-Nonconforming Students
- Contract Nonrenewal
- Ohio Sunshine Laws
- School Employee Leave and Benefits
- Managing Workplace Injuries and Leaves of Absence
- Special Education: Challenging Students, Challenging Parents
- Fostering Effective Working Relationships with Boosters
- Low-Stress Solutions to High-Tech Troubles
- Requirements for Medicaid Claims
- Effective IEP Teams
- Discrimination: What Administrators Need to Know
- 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
- Crisis, 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  
Giselle Spencer  
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:

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

### School Finance

Taxes • School Levies •  
Bonds • Board of Revision

#### Team Members:

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