



# School Law Review



## JULY 2019

Principal Discloses Confidential Information to a Group of Teaching Staff.....	1
Justices Decline to Take up Challenged to District Pro-Transgender Policy .....	2
Restraint and Seclusion in Schools .....	3
Special Education Spotlight: Second Grader’s Behavior Shields District from IDEA’s “Stay-Put” Requirement.....	3
Budget Bill Update .....	4
Save the Date: Special Education Legal Compliance Roadshow .....	5
Upcoming Deadlines .....	5
Upcoming Presentations .....	5

## Principal Discloses Confidential FMLA Information to a Group of Teaching Staff

A teacher sued an Ohio school district after a principal disclosed the basis for the teacher’s FMLA request to a teaching team of five other teachers. The principal learned the basis for the request from a human resources employee and informed the teaching team that the teacher would be missing time for “psychological reasons.” The principal further told the team that, for her, “personally, with my upbringing, my background, it was hard for me to understand somebody taking time off for psychological reasons.”

A teacher who was present at the team meeting contacted the teacher to let her know what was discussed. The teacher alleged that her complaints were not addressed, and filed a lawsuit alleging various claims, including a violation of the FMLA, a hostile work environment claim, a constructive discharge claim (the teacher had resigned), as well as violations of the Americans with Disabilities Act (ADA), and other state and federal laws. The school district moved for summary judgment.

The school district argued that the teacher suffered no injury or adverse employment action, that the teacher could not support her hostile work environment claim based on her disability, and that it was unreasonable for her to resign under the circumstances.

The court denied the district’s motion for summary judgment, finding that the teacher’s lawsuit should proceed to a trial based on her hostile work environment claim and constructive discharge claim. The court ruled that the case should proceed because the principal revealed confidential medical information to the teaching team without consent, and also implied that the teacher was using FMLA inappropriately. The court found that a reasonable juror could determine that questions of fact remained to be decided by a jury with respect to the teacher’s hostile work environment claim, and that her resignation was a reasonably foreseeable consequence of the principal’s actions. As a result of the court’s decision, this case will now proceed to trial.

### What this means for your district:

School district administrators should not disclose confidential medical information to other employees without the consent of the employee. Although it was not unreasonable for the principal to know the reason for the teacher’s FMLA leave, it certainly was not advisable for the principal to inform members of the teaching team why the

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teacher needed to take FMLA leave or to question the need for the leave in front of the other teachers. The other teachers had no reason to know why the teacher needed FMLA leave because it had no bearing on their job duties. To avoid potential claims like this, school districts should advise their principals and other employees not to disclose confidential medical information to other employees without the consent of the employee.

*King v. Cincinnati Public Schools*, 2019 WL 1167949, Case No. 1:17-cv-794 (March 13, 2019)

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## Justices Decline to Take up Challenge to District Pro-Transgender Policy

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On May 28th, 2019 the U.S. Supreme Court declined to hear the appeal of a group of students who objected to a Pennsylvania school district's policy. The policy allows transgender students to use restrooms and locker rooms according to their gender identity.

In *Doe v. Boyertown Area School District*, a group of students felt uncomfortable with the school district's policy and challenged it as a Section 1983 action on the basis that it violated their constitutional privacy rights under the 14th Amendment and Title IX, and that it violated Pennsylvania tort law. They asked for a preliminary injunction against the district from allowing transgender students to use their preferred bathroom. (C.A. 3, 2018, No. 17-33113)

U.S. Department of Education regulations permits schools to "separate toilet, locker room, and shower facilities on the basis of sex." However, the Third Circuit Court of Appeals noted that this statute bars federally funded educational programs from discriminating based on sex, and does not require, but merely permits, segregated facilities on the basis of sex, and recently has been interpreted to protect students on the basis of gender identity.

Counsel for the students contended that students who objected to the district's policy felt "embarrassed by the presence of opposite-sex students in the locker room and restrooms," so much so that one of the plaintiffs left the school altogether.

While urging the justices not to take up the case, the school district detailed how they replaced group showers with individual showers in its locker rooms to add privacy. The district maintained that the privacy concerns of students were being protected because no student was required to undress in the presence of any other students. Further, single-user restrooms were available to any student who preferred those facilities.

The Third Circuit held that even if the policy implicated the student's rights to privacy, the state has a compelling reason not to discriminate against transgender students, and the policy was narrowly tailored to achieve that interest. The constitutional right to privacy is not absolute and must be weighed against important competing governmental interests. The Third Circuit agreed with the District Court that the claim was unlikely to succeed on the merits and declined to issue the preliminary injunction.

It held, "In any event, we decline to recognize such an expansive constitutional right to privacy- a right that would be violated by the presence of students who do not share the same birth sex. Moreover, no court has ever done so. As counsel for the School District noted during oral argument, the appellants are claiming a very broad right of personal privacy in a space that is, by definition and common usage, just not that private." (opinion, at 20)

The Supreme Court justices declined the appeal without comment, which leaves the Third Circuit's ruling upholding the policy intact.

### **What this means for your District:**

Even though the state of the law is unsettled with regard to many aspects of transgender student rights, this case supports the conclusion that cisgender students face an uphill battle to challenge districts that take steps to support transgender student needs.

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## Restraint and Seclusion in Schools

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The use of restraint and seclusion in school districts continues to be a high priority for state and federal policy makers. Ohio's first regulations specifically addressing restraint, seclusion, and positive behavior intervention and supports took effect in 2013 as Ohio Administrative Code 3301-35-15. In June 2018, the General Assembly passed House Bill 318, also known as "the SAFE Act." This law addresses a variety of student discipline issues, including a requirement to rewrite Ohio's restraint and seclusion regulations.

Ohio Administrative Code 3301-35-15 was due for review by August 2018, but the process has not been completed. HB 318 set a deadline for revision of OAC 3301-35-15 by early February 2019. Again, no revisions were made. However, work is ongoing at the Ohio Department of Education (ODE) and various stakeholder groups are being presented with draft rule revisions this summer. It is anticipated that in the coming months, there will be a proposed rule presented for public comment and consideration by the State Board of Education.

In the meantime, existing requirements for the use of restraint and seclusion remain in place. This includes absolute restrictions on certain practices, and significant data tracking and reporting requirements. The summer "break" is a good time for administrators to review existing training programs, plan for which staff members may require additional training due to student assignments and program changes, and review reporting data for the recently completed school year to determine if there are any patterns or gaps that need to be addressed.

While the use of restraint and seclusion generally should be rare, consistent reports of zero incidents may raise a red flag. A recent report from the federal Government Accountability Office (GAO) found that nine of the nation's 30 largest school districts reported no incidents of restraint or seclusion in the last reported year (2015-2016). The GAO and U.S. Department of Education presume that such reports are inaccurate, with the GAO reporting that, "We are encouraged that Education recognizes the seriousness of this issue and the data quality issues it has allowed to persist when districts inappropriately and inaccurately report zero incidents of restraint and seclusion."

In addition to whatever new requirements might be rolled out by the U.S. Department of Education to address its concerns, long-proposed federal legislation is expected to be reintroduced later this year. The bill, called the "Keeping All Students Safe Act," is likely to overlap significantly with Ohio's restraint and seclusion regulations.

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### Special Education Spotlight: Second Grader's Behavior Shields District from IDEA's "Stay-Put" Requirement

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The U.S. District Court, Southern District of Ohio recently denied a parent's motion for an emergency statutory injunction when a school district moved a second-grade student with autism spectrum disorder from his current placement during a pending dispute.

After a year and a half of co-taught classrooms, small group instruction and occupational therapy provided pursuant to the student's IEP, the student engaged in behavior which involved throwing chairs at staff members, running out of the school building, and striking himself in the jaw. He was removed and suspended for four days. The District convened the IEP team to discuss a change in placement, and the parent objected, noting that she did not believe the IEP and behavior plan had been implemented appropriately and that with changes to his services, he could remain at the elementary school in the least restrictive environment.

The District filed a due process complaint seeking to remove the child from his current placement and put him in a more restrictive environment for 45 days due to the risk of injury to the student and to others. The parents responded that the District had denied the student a FAPE and violated IDEA. During the pendency of the due process, the District served the student at home, then contracted with an autism center. The District and parents did not execute any agreement. Email correspondence shows they communicated about the placement and the

parents emailed their understanding. Their understanding being that the student would attend the autism center he had been attending and the District provides the transportation. Another due process complaint was filed by the parents seeking to have his placement returned to the elementary during the proceedings. The IHO determined that the child should be placed at a center for students with autism as the interim alternative placement.

In this case, the court noted that the IDEA's "stay-put" provision generally enables a student with a disability to remain in their current placement pending a dispute over the appropriateness of the particular placement. Though this provision creates a presumption favoring the child's current placement, a district can overcome that presumption if they are able to show that maintaining the child in the current placement is substantially likely to result in injury to himself or others.

The court ultimately found that even though the stay-put provision applied (that the child should remain at the elementary because no formal change to the IEP was made nor did the evidence demonstrate agreement of the parents for purposes of the stay-put provision) the district met its burden to show that keeping the student in the current placement was substantially likely to result in injury to the student or to others. The court explained that these behavioral problems raised serious safety concerns to everyone involved. Therefore, the student could be removed from his current placement despite the "stay-put" provision, and the statutory injunction to order him to remain at the elementary was inappropriate. The court held that the school district had shown that, due to the child's behavioral problems, keeping the student in his current placement was substantially likely to result in injury to himself or others.

**What this means for your district:**

The IDEA's "stay-put" requirement may be met, but may be altered by a court if the District demonstrates that a student displaying severe behavioral problems that are substantially likely to result in injury to themselves or others if the student is maintained in the stay-put placement indicated on the IEP. This case involved several unique factors that led to the court's decision, so caution is warranted, and this should not be viewed as a common solution.

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## Budget Bill Update

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The FY 19-21 budget bill (HB 166) failed to meet the deadline of June 30. Lawmakers were able to buy more time after they could not come to an agreement by that date. On Sunday, both chambers passed SB 171 and Governor Mike DeWine signed it shortly thereafter. The bill gives lawmakers 17 more days to come up with a deal on the state operating budget. The bill must be signed by July 17 by Governor DeWine. This is the first time that the state operating budget has not met its deadline since 2009.

The action taken on Sunday does not prohibit state functions and services. This action allows agencies to operate on a temporary budget. This extension emerges from policy disagreements among chamber leaders, including several education matters. Saturday was reported as a day full of "marathon negotiations." House Speaker Larry Householder was positive when he said he felt they just needed to put in a little bit more time and they would be finished. He said, "We were very close." Senate President Larry Obhof was also positive about the events leading up to the extension. He said, "We've had great conversations today," but also expressed the need for a little more time.

Although there is positivity among chamber leaders, the 17-day extension is not looked upon as a positive action. Governor Mike DeWine said in a statement, "while I am disappointed that the budget process has extended beyond July 1st...I urge the legislative conference committee to continue negotiations and pass a full budget promptly." If lawmakers do not have an agreement by July 17, they risk a state government shutdown.

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## Save the Date: Special Education Legal Compliance Roadshow

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Based on the overwhelming positive feedback we received following the 2018 Special Education Seminars, Ennis Britton has developed a Special Education Legal Compliance Seminar for October 2019! 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 issues. Our Special Education Team will travel throughout Ohio to present this professional development opportunity in five different locations.

- October 7: **Mahoning Valley**
- October 8: **Cleveland**
- October 21: **Columbus**
- October 22: **Northwest Ohio/Toledo**
- October 23: **Cincinnati**

Details, including when and how to register for this opportunity will be sent to clients in August. Stay tuned!

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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.

- **July 1:** Deadline for board to notify teaching and nonteaching employees of succeeding year salaries (RC 3319.12, 3319.082); Treasurer must certify available revenue in funds to county auditor (RC 5705.36(A)(1))
  - **July 10:** Deadline for a teacher to terminate a teaching contract without consent of the board of education. (RC 3319.15)
  - **August 6:** Special Election (RC 3501.01; .32)
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### Upcoming Presentations

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#### SAVE THE DATE! 2018–2019 ADMINISTRATOR'S ACADEMY SEMINAR SERIES

##### July 11, 2019: 2018–2019 Education Law Year in Review

Find out the new education-related laws that passed in the budget bill and other legislation, as well as important court decisions and other changes that affect Ohio schools.

You spoke, and we listened! Based on client input regarding the preferred format for Ennis Britton's Administrator's Academy Seminar Series, these presentations will now be offered via a live video webinar professionally produced by the Ohio State Bar Association. As always, an archive will be available also.

Participants must be registered to attend each event. All three webinars will be archived for those who wish to access the event at a later time. You may register on our [website](#) or contact Kayla via [email](#) or phone at 513-674-3451.

#### OTHER UPCOMING PRESENTATIONS

**July 25: NWOASBO Human Resources & Treasurers**  
Presented by Erin Wessendorf-Wortman

**August 1: High AIMS**  
***Avoiding Professional Pitfalls for Educators***  
Presented by Erin Wessendorf-Wortman

**August 1-2: Trumbull County Administrator's Retreat**  
*Legal Update*  
Presented by Megan Bair  
*Special Education Year in Review and Legal Update*  
Presented by Pam Leist

**August 7-8: Ashtabula County Summer School Administrator's Conference**  
***Legal Update and Special Education***  
Presented by John E. Britton and Pam Leist

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Want to stay up to date about important topics in school law?  
Check out Ennis Britton's [Education Law Blog](#).

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

### **Labor and Employment**

- School Employee Nonrenewal
- Employee Licensure
- School Employee Leave and Benefits
- Managing Workplace Injuries and Leaves of Absence
- Requirements for Medicaid Claims
- Discrimination: What Administrators Need to Know

### **Student Education and Discipline**

- New Truancy and Discipline Laws – HB 410
- Transgender and Gender-Nonconforming Students
- Student Discipline
- Student Privacy

### **School Finance**

- School Levy Campaign Compliance

### **School Board Policy**

- What You Should Know about Guns in Schools
- Crisis, Media, and Public Relations
- Low-Stress Solutions to High-Tech Troubles
- Ohio Sunshine Laws

### **Special Education**

- Three Hot Topics in Special Education
- Supreme Court Special Education Decisions
- Special Education Scramble (2018)
- Special Education Legal Update (2017)
- Special Education Legal Update (2016)
- Effective IEP Teams

### **Legal Updates**

- 2017–2018 Education Law Year in Review
- 2016–2017 Education Law Year in Review
- 2015–2016 Education Law Year in Review

## **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

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