



School Law Review



JUNE 2019

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Ohio Ethics Commission Answers the Question: Can a Board Member be a Coach?

Given their choice to enter into elective office, school board members are typically service oriented individuals. They are very active in their communities and are often interested in the athletic programs of their district. Thus, it is not surprising that many school board members would want to help out by coaching or assisting a coach with an athletic team. On January 9, 2019 the Ohio Ethics Commission received a request from a district’s superintendent for an advisory opinion letter on behalf of a board member. The member wanted to pursue a coaching position with the district and asked if he could accept employment as a paid coach or serve as a volunteer coach.

The opinion indicates that a board member is prohibited, under Ohio ethics laws, from being employed as a paid coach by the district they serve. Ohio Revised Code section 3313.33(B) expressly states that members of the board may not “be employed in any manner for compensation.” RC 2921.42 (A)(4) also provides that a public official is prohibited from having an interest in the profits and benefits of a contract of the public agency he or she serves. A school board member who is a compensated employee of a district would have an interest in the district by entering into an employment contract as a coach. As a result, the commission’s opinion states that “RC 2921.42(A)(4) prohibits the school board member from serving simultaneously as a paid district coach.”

The opinion further provides that a board member may volunteer as a coach without any compensation. There is no statute that prohibits a member from serving as a volunteer coach. Additionally, there is no prohibited interest in a public contract when a board member volunteers his or her time without compensation. Although, members in this position may be required to abstain from participating in matters directly affecting the athletic department. This could include voting, discussing, deliberating or taking any other actions regarding athletic department personnel. They may also be required to abstain from voting on an employment/supplemental contract for an employee who works in that sport/activity or who oversees the program in which the board member volunteers (i.e. – athletic director) because of concerns about undue influence. However, the Ethics Commission found that a member was “not prohibited from participating in matters that affect all athletic

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department personnel within the district uniformly” (i.e. voting on a CBA that includes an increase in compensation to supplemental positions) or from participating in general budgetary matters that might include funding for athletics and compensation or benefits for employees.

It appears that the Ethics Commission likely issued the opinion to address the situation where board members volunteer to take the place of a paid supplemental coach rather than to serve as a volunteer in some other capacity, such as announcing the game, taking tickets, etc. However, the Ethics Commission was not very clear in delineating between someone who volunteers as a coach versus someone who volunteers in another capacity. For that reason, board members who volunteer in a capacity other than taking the place of a supplemental position are also advised to follow the advice in this Ethics Commission opinion.

Justices Decline to Review Case Involving Strip Search of 4-Year-Old at School

Earlier this month, the U.S. Supreme Court declined to hear a case involving a warrantless strip search of a 4-year-old student. The case began in 2014 when I.B., a 4-year-old, was attending a preschool Head Start program in Colorado. April Woodard, a Human Services caseworker, went to the school to investigate a report that I.B. had visible bumps and bruises on her body. In the school nurse’s office, Woodard undressed and took pictures of I.B.’s unclothed areas without getting I.B.’s permission or the permission of I.B.’s parent/guardian. I.B.’s mother found out from her daughter what happened at school and filed a lawsuit against Woodard, claiming the warrantless strip-search violated the Fourth Amendment.

The 10th Circuit Court of Appeals affirmed lower court decisions and dismissed the case on the grounds of qualified immunity. Qualified immunity shields public officials from actions for damages unless their conduct was unreasonable in light of clearly established law. The defense of qualified immunity places a burden on the plaintiff to show that a constitutional violation occurred, and that this constitutional right was clearly established at the time of the incident. A constitutional right is established if it is clear that every reasonable official would understand that their actions violates that right.

The court acknowledged that as a general rule, a search requires a warrant based on probable cause. Exceptions to the warrant requirement include consent, exigent circumstances, and special needs. Since there was no warrant, no consent, and no exigent circumstances, the relevant question in this case, was 1) whether a warrant was required for the search because the special needs exception did not apply and 2) if it did, whether the search nonetheless violated the special needs doctrine.

Both the Supreme Court and the 10th Circuit have not ruled on whether the special needs doctrine permits a social worker to search a child to investigate suspected child abuse. However, they did note that other courts are split on this very issue. The Fourth and Seventh Circuits have both held that a social worker’s visual inspection of a child upon suspicion of child abuse falls under the special needs doctrine, and therefore a warrant is not required under the Fourth Amendment. However, four other circuits, the Third, Ninth, Second and Fifth Circuits, have held that social worker examinations of children based on abuse suspicions are not candidates for special needs analysis.

The plaintiffs here attempted to show that Ms. Woodard’s search violated clearly established Fourth Amendment law because she lacked a warrant, and because the special needs exception did not apply. However, based on the split in authority shown above, the 10th Circuit Court determined there is not clearly established law on whether the special needs doctrine applies to warrantless searches of children of suspected abuse by social workers. Since the plaintiffs failed to show clearly established law on this issue, they failed to overcome the qualified immunity given to public officials. Therefore, the defendants were entitled to qualified immunity, and the plaintiff’s Fourth Amendment claims were dismissed.

The mother of I.B. attempted to appeal the case to the Supreme Court to answer three questions: whether a warrant was required for a search of a child for signs of abuse, whether the strip-search at school, even without a warrant, violated clearly established law, and whether the entire doctrine of qualified immunity should be examined. While the appeal gained support from groups such as the ACLU and the NAACP Legal Defense and Educational Fund, the justices of the Supreme Court denied review without comment. Therefore, the split among the circuit courts remains.

What this means for your District:

As a general rule, school district staff should be very cautious to engage in strip searches of students for any reason and should consult with legal counsel before doing so if possible. In the event that child abuse or neglect is suspected, school district staff should not engage in investigation of such suspicion but should instead report the suspicion to law enforcement and/or child protective services.

Ohio Appellate Court Rules Transgender Minor May Change Legal Name

The Court of Appeals in Southwest Ohio recently issued a decision that is the first of its kind in Ohio about the best interest factors to be applied to an application to change the name of a minor for purposes of gender identity should be applied. (In the Matter of Change of Name of HCW, (Ct. App. Warren, 2019) CA 2018-07-069)

This case involved a 15-year-old, biologically female student who sought to change his legal name so that it would match with his gender identity. The mother of the minor filed the application on his behalf in probate court with the consent of both parents, and all appeared at the hearing. The court heard from the parents that the minor had been presenting himself as a boy for about a year. The minor had spoken with his school counselor, and teachers at the school referred to him by his preferred name. The minor had been seeing a therapist specializing in transgender issues and had been diagnosed with gender dysphoria. The father provided the probate court with a letter releasing the child for male hormone therapy and noted that they were consulting with a children's hospital regarding the same. The parents agreed with the name change and noted that they believed it in the minor's best interest.

The probate court denied the application to change the minor's name after applying the best interest factors announced in prior controlling cases. The basis for the denial was that the minor's youth may cause his beliefs to change over time and the court was not saying "no" but "not yet" to give the minor time to age, develop, and mature. Mother appealed on the minor's behalf, alleging the court abused its discretion in denying the name change because it was based solely on the transgender status of the child and was arbitrary, unreasonable and unconscionable.

The court of appeals looked at the statute governing name changes for minors, R.C. 2717.01(B), noting that the standard in name change cases is whether the facts set forth a reasonable and proper cause for changing the name of the applicant. The statute also contains disqualifying factors, none of which were applicable to the case.

To determine whether there is a "reasonable and proper cause" courts must consider what is in the best interest of the minor. Some of the factors to be considered as announced in prior cases are the child's relationship with each parent, the length of time a child has used a surname, the preference of the child, whether the surname is different from the parent with whom they reside, parent failure to maintain contact with and support of the child, and any other factor relevant to the child's best interest. The court noted that this standard refers to the last name of the child, and these same factors were not well-suited to a first name change based on gender identity.

The court of appeals found that the probate court relied heavily on the child's maturity as "not being ready to make a life altering decision," and ignored the child's parents statement that they were seeking the name change on the child's behalf and that they believed it to be in his best interest. The court of appeals also found that the probate court ignored the medical documentation submitted, including the diagnosis and statement of obtained medical therapy, which constituted an abuse of discretion.

The court of appeals reversed the decision of the probate court, and the case was remanded to the probate court.

What this case means for your district:

This is the first Ohio appellate case to consider what factors are appropriate to be applied in gender identity name change cases for minors. While school districts may allow a child to use a preferred name and refer to the child as that name (i.e. similar to nicknames), care should be taken around the legal names within school records and electronic databases, to only modify the student's legal name once it has been legally changed by the courts.

ECOT to Pay Back \$60 Million to the State

In April, the 10th District Court ruled that the State Board of Education's decision on the Electronic classroom of tomorrow (ECOT) to pay back \$60 million to the State was unappealable and therefore was enforceable against ECOT

Background

As a background on ECOT, it opened in 2000 and was an online school that allows students to log in to their online platform to access educational curriculum. ECOT is classified as a community school which receives funding from the state of Ohio based on the number of full-time equivalent (FTE) students enrolled in the school. R.C. 3314.08(C). The community school self-reports the number of FTE students to the Ohio Department of Education (ODE), who then adjusts the payment of funds to reflect the number of FTE students. ODE performs periodic FTE reviews to investigate whether a funding adjustment is warranted for a particular school year. This investigation can lead to one of two findings: 1) a finding that ODE owes additional funding, or 2) that the community school cannot substantiate the number of FTE students for which it received funding and ODE will reduce the amount of funds they receive. This reduction, or "clawback", occurs on a going-forward basis by reducing, over an extended period of time, the amount of money paid to the community school.

In 2016, ODE completed an audit of ECOT's FTE data and determined it had misreported its FTE numbers resulting in a false report that was approximately 242.7% of the actual figures. Meaning that ECOT's actual FTE numbers were just 41.2% of what ECOT claimed them to be. ECOT appealed this finding to the state Board of Education ("BOE"). Based on the evidence presented, the hearing officer concluded ECOT's actual FTE numbers were 44.6% of its reported numbers. This finding entitled ODE to claw back over \$60 million in overpayment. Over ECOT's objection, the BOE adopted the hearing officer's recommendation and authorized ODE to take measures in order to obtain repayment of the \$60 million in overpayment.

ECOT First Appeal

In June of 2017, ECOT appealed the administrative action of the BOE to the Franklin County Court of Common Pleas pursuant to R.C. 119.12. The Common Pleas Court dismissed the case for lack of jurisdiction. The court viewed R.C. 3314.08(K)(2)(d) as requiring all decisions made by the state BOE to be "final" and unappealable.

ECOT Second Appeal

ECOT appealed to the 10th District Court of Appeals asserting the BOE's decision was final with respect to administrative proceedings, but they still had an avenue to appeal the BOE's decision in the courts under R.C. 119.12. This statute provides that: "Any party adversely affected by any order of an agency issued pursuant to any adjudication [other than those accepted elsewhere in this section] may appeal to the court of common pleas of Franklin county ***." ECOT argued they were entitled to appeal the decision adopted by the BOE because the decision was an "adjudication" by an agency in a "quasi-judicial" proceeding. The court ultimately agreed with ECOT and allowed them to appeal the BOE's decision to court. *Electronic Classroom of Tomorrow v. Ohio State Board of Education*, 116 N.E.3d 348, 362 Ed. Law Rep. 1073 (10th Dist. 2018).

BOE/ODE Reconsideration

However, in July of 2018, the BOE and ODE filed an application seeking reconsideration of the 10th District's decision stated above. In April 2019, upon reconsideration, the 10th District Court determined they had erred in their previous ruling. The court determined the statute sets forth the procedure a community school may use to appeal ODE's determination to the BOE. R.C. 3314.08(K)(2). The statute also provides that any decision made by the BOE is "final". R.C. 3314.08(K)(2)(d). The court looked to previous cases and determined the word "final", in the context of a decision of an administrative body, means the decision is not subject to an appeal under R.C. 119.12. Thus, the court reinstated the decision of the trial court and dismissed the appeal for lack of jurisdiction. *Electronic Classroom of Tomorrow v Ohio State Board of Education*, No. 17AP-767, 2019 WL 1858225 (10th Dist. April 25, 2019).

What this means for your district:

Ultimately, the courts have ruled that ECOT is not able to appeal the decision made by the BOE to court. Therefore, the decision of the BOE to adopt the finding that ECOT is to pay back \$ 60 million will stand.

Teacher Fails to Establish Retaliation Claim Over Water Quality Complaints

A Michigan school board successfully defended itself against a retaliation claim from a teacher who had complained to her supervisors about the water quality in the school. *Brown v. Detroit Pub. Schs. Cmty. Dist.*, 18-1098 (6th Cir. 2019). The teacher alleged she was harassed, reprimanded, and improperly transferred after making complaints to her superiors with regard to the school's unsafe drinking water. The teacher sued the school as well as several school administrators alleging retaliation for exercising her First Amendment right to free speech.

In order to state a valid First Amendment retaliation claim, there must be: "1) some constitutionally protected speech; 2) an adverse action taken against her that would deter a person of ordinary firmness from continuing to engage in that speech; and 3) a causal connection that the adverse action was motivated by the speech." The 6th Circuit Court ruled that the transfer from one building to another was the only action that might qualify as retaliation. However, the teacher's failure to specify who was responsible for the transfer, along with the failure to name the school district as a defendant, led the Court to conclude that the complaint did not have enough information to state a valid claim for retaliation.

Legislation in the Works: HB 154

HB 70, enacted in 2015, revised Ohio law and required the Superintendent of Public Instruction to establish academic distress commissions (ADCs) for certain school districts with continued low academic performance. Each commission is to appoint a chief executive officer who has the power to manage the operation of a qualifying district.

However, some legislators believe that HB70 and the establishment of ADCs have not improved low performing school districts and have proposed HB 154 which would dissolve all ADCs for low-performing school districts and repeal the law on the establishment of new commissions.

Progressive Improvement Interventions

HB 154 would require a school district board of education to establish an improvement team for each school building under the board's control that received an "F" the previous school year. If a district was subject to the ADC under HB 70, under the proposed language of HB 154, it would be required to begin the improvement team process beginning July 1, 2019. Districts not subject to the ADC would begin the process beginning July 1, 2020. Further, HB 154 proposes that the Superintendent of Public Instruction must designate these school buildings as "in need of improvement."

Establishment of an improvement Team

HB 154 also proposes that a school improvement team must be established in the first year in which a school gains “in need of improvement status.” The team must consist of both administrators and teachers. Further, the team may consist of community stakeholders with oversight from the board. However, HB 154 does not specify the exact number of members that must be on the team. The bill requires the school improvement team to do each of the following:

1. Conduct a performance audit, reviewing the needs of students, parents, teachers, and administrators of the school building. As part of the audit, the team must convene a group of parents and community stakeholders within the attendance zone of the school building to seek input on student needs and improvement strategies.
2. Develop a school improvement plan based on a multi-tiered, evidence-based model. The plan may, but is not required to, include measurable benchmarks for improvement in 1) parent and family engagement, 2) creating a culture of academic success among students, 3) building a culture of student support among school faculty and staff, 4) student attendance, 5) dismissal and exclusion rates, 6) student safety and discipline, and 7) student promotion and graduation and dropout rates.
3. Submit the improvement plan to the district board by the final day of the school year in which the school is designated with “in need of improvement” status.

Further, school improvement teams may request technical support from the Ohio Department of Education during the development of the improvement plan. Teams may also recommend that the district initiate a community learning center model process for the building.

Implementation of Improvement Plans

Under HB 153, school buildings must begin the improvement plan after they retain “in need of improvement status” by receiving an “F” for a second consecutive year. Once the plan is implemented, the improvement team must monitor the building’s progress with oversight from the board. School buildings that receive an “F” for a third consecutive year must continue to implement the improvement plan with oversight from the district board. During this third year, the ODE may perform a mid-year and end-of-year review of the measurable benchmarks set out in the school’s improvement plan. The ODE then may provide any feedback it has to the team, the district board, and the district superintendent. School buildings that receive an “F” for a fourth consecutive year must continue to implement their improvement plan. At this time, the state Superintendent must review the progress made under the plan and use the State Board of Education criteria to determine if the school may move out of “in need of improvement status.” The bill does not provide for any consequences for a school that receives an “F” after the fourth consecutive year.

Existing school restructuring provision proposed to be repealed

Current law requires a district to restructure any building that ranked in the lowest 5% of all public schools by performance index score for three consecutive years. Under current law, a district was forced to do one of the following:

1. Close the school and reassign the school’s students to other schools with higher academic achievement;
2. Contract with another school district or nonprofit or for-profit entity with a record of effectiveness to operate the school;
3. Replace the school’s principal and teaching staff, exempt the school from any specified district regulations regarding curriculum and instruction at the request of the new principal, and allocate at least the per-pupil amount of state and local (nonfederal) revenues to the school for each of its students; or
4. Reopen the school as a conversion community school.

HB 154 proposes to repeal the school district requirement to restructure in any of the above stated ways.

Current Status

HB 154 was introduced in March of 2019. On May 1st, 2019, the bill passed the House by a vote of 83-12 and on May 15, 2019 was referred to the Senate's Education Committee which is where it currently sits.

Save the Date: Special Education Legal Compliance Roadshow

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!

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.

- **June 1:** Deadline to take action on and give written notice of intent not to reemploy nonteaching employees (RC 4141.29(l)(1)(f)); Deadline to take action on and give written notice of intent not to reemploy teachers (RC 3319.11(D)); Deadline to take action to nonrenewal contracts of administrators other than superintendent and treasurer (RC 3319.02)
 - **June 30:** End of 2018–2019 school year (RC 3313.62); End of third ADM reporting period (RC 3317.03(A))
 - **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))
 - **August 6:** Special Election (RC 3501.01; .32)
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Upcoming Presentations

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

June 7: 42nd Annual OSBA and OCSBA Workshop
Protect and Serve is Not Enough: SROs in Schools
Presented by Hollie Reedy and Giselle Spencer

June 18-19: OACTS Summer Conference
Special Education Update for CTCs; Legal Update for CTCs
Presented by Pam Leist

June 18: Mercer County Legal Update
Education Law Update
Presented by Ryan LaFlamme

June 25: OSROA Legal Conference
School Based Law Update
Presented by Erin Wessendorf-Wortman

June 28: OSBA Sports Law Workshop
Top Legal Issues Impacting Athletic Programs
Presented by Bill Deters and Pam Leist

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

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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 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

School Finance

Taxes • School Levies •
Bonds • Board of Revision

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