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School District Transgender Policy Violates Title IX

On August 9, 2019, a federal judge in Virginia ruled in favor of a transgender student in holding that a school district’s policy violated his rights under Title IX and the Equal Protection Clause. The *Grimm v. Gloucester County School Board* case stemmed from a school district’s policy requiring students to use restrooms and locker rooms that corresponded to their “biological genders.” The district provided alternative facilities for transgender students.

The court initially ruled that claims of discrimination on the basis of transgender status for gender-stereotyping are actionable under Title IX. The court further found that denying Grimm the ability to access the facilities corresponding with his gender identity were not only actionable but did in fact result in a violation of Title IX and the Equal Protection Clause.

The Board argued that it had not engaged in discrimination and that Grimm had not suffered any harm as a result of its policy. The court found this argument to be unconvincing. The court determined that the district’s policy subjected transgender students to discriminatory treatment by excluding them from places similarly situated students had access to. Further, Grimm did suffer emotional harm due to the fact he was unable to comfortably access restrooms at school. Grimm was further subjected to harm when the

school district refused to update his school records in order to reflect his male identity. Failure to do so has negated his male identity and marked him different than other males any time he provided a copy of his transcript to another entity.

This ultimately led the court to grant a permanent injunction against the school district’s restroom and locker room policy. The injunction further awarded Gavin nominal damages and ordered the school district to change his school records to conform with his gender identity.

While the decision from the Fourth Circuit Court of Appeals is not controlling on Ohio school districts, the Sixth Circuit did rule on a very similar case back in 2016. In *Dodds v. United States Department of Education*, the Sixth Circuit Court of Appeals agreed with a lower district court decision and determined that an eleven-year-old transgender girl had a strong likelihood of success in her claims against the school district and should therefore be allowed to use the school restrooms conforming with her gender identity.

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It is important to note the decision in *Dodds* relied on guidance from the United States Department of Education that has since been rescinded. The current position of the USDOE is that they will not accept any complaints alleging a transgender student was denied access to restrooms and locker rooms and will only accept complaints of harassment or bullying for failing to conform to sex-based stereotypes. Thus, in light of this new guidance, it remains unclear how an Ohio court would rule on this issue today.

What this means for your district:

The issue of providing accommodations to transgender students remains unclear and is a matter that will doubtless be subject to further litigation before any clarity is provided. Districts should proceed with caution when faced with these issues. For additional advice on handling requests for accommodations for transgender students, please contact an Ennis Britton attorney for assistance.

AG Offers Opinion About Arming School Personnel

The Ohio Attorney General’s Office recently released an opinion in response to a request for legal advice on the issue of arming school staff. The letter requested, among other things, an analysis on how the training requirements under R.C. 109.78(D) apply to school employees authorized by the board of education to carry or possess a deadly weapon on school property under R.C. 2923.122(A).

R.C. 109.78(D) in full provides:

(D) No public or private educational institution or superintendent of the State Highway Patrol shall employ a special police officer, security guard, or other position in which such person goes armed while on duty, who has not received a certificate of having satisfactorily completed an approved basic police officer training program, unless the person has completed twenty years of active duty as a police officer.

R.C. 2923.122(A) prohibits any person from knowingly conveying, or attempting to convey, a deadly weapon into a school safety zone. However, there is a specific exception set out in R.C. 2923.122(D)(1)(a) which excludes any other person from this prohibition:

“who has written authorization from the board of education or governing body of a school to convey deadly weapons... in a school safety zone or to possess a deadly weapon... in a school safety zone and who convey or possesses the deadly weapon... in accordance with that authorization.”

The letter sought advice on whether or not a school employee who has been authorized to carry a deadly weapon by the board of education under R.C. 2923.122(D)(1)(a) is subject to the training requirements of R.C. 109.78(D). The Attorney General’s Office reiterated their argument laid out in their amicus brief in the appeal of *Gabbard v. Madison Local School District Board of Education*. The court in that case concluded that school employees authorized by the board of education to carry firearms on school premises were not subject to the training requirements of R.C. 109.78(D) because they were not employed by the district in a security capacity. The Attorney General’s Office agreed and opined that in order to determine which provision outlined above is applicable to an employee hired by a school district, we must analyze whether the individual is employed in a role comparable to that of a security guard or police officer. In doing so, we must look to the person’s job title along with the duties and responsibilities assigned to him or her.

What this means for your District:

If an employee is hired by the district in a security capacity, then he or she is subject to the training requirements expressed in R.C. 109.78(D) (i.e. approved basic training police program, or twenty years active duty of a police officer). However, any other employee hired by a school district who does not serve in such a role (e.g. teacher,

principal, custodian) and who is authorized by the board to carry or possess a firearm under R.C. 2923.122(D)(1)(a), is not subject to the training requirements of R.C. 109.78(D).

Public Comment on Restraint, Seclusion, and PBIS Rule

In 2013 the Ohio General Assembly and the Ohio Department of Education implemented new requirements related to restraint and seclusion of students at school. The implementing regulation also touched on the concept of positive behavior intervention and supports (PBIS), but merely *defined* the concept and “encouraged” training. Regulations are placed on five year review cycles, but this regulation has largely remained untouched until now.

In 2018 and 2019 the General Assembly passed several laws addressing student discipline that are aimed at reducing the use of traditional disciplinary measures (i.e. suspension and expulsion). Included in these legislative changes are an increased emphasis on PBIS. Soon, every new college graduate with a degree in K-12 education will have received PBIS instruction before setting foot in their first classroom. Likewise, schools will be required to provide training to those teachers whose careers predate this new requirement, as well as ongoing refresher training for all teachers.

In conjunction with these legislative changes, ODE has published proposed revisions to the 2013 restraint, seclusion, and PBIS rule. Part of the regulatory process requires a period for public comment on proposed changes. That period is open now through September 20. The rule (OAC 3301-35-15) can be reviewed and comments can be given at:

<http://education.ohio.gov/About/Ohio-Administrative-Code-OAC-Rule-Comments>

Particular interest may be in the changes related to training. No longer merely “encouraged,” PBIS training is required and must include “sustainable training structures in place to provide ongoing coaching and implementation with fidelity.” Depending on when the rule is implemented, it will likely accelerate an existing deadline for PBIS training from 11/2/21 to an earlier date.

Changes are also made to restraint and seclusion rules; such as requiring restraints to be “immediately” removed when “immediate risk” is “dissipated,” debriefing for all restraints, the development of behavior intervention plans for all students (regular and special education) who “repeatedly” engage in behavior that leads to restraints, and the provision of some sort of parental rights notice when restraint and seclusion is used. Notably, none of these new mandates is conditioned upon the provision of state funding.

Significant changes were made in the 2013 proposed rule for restraint, seclusion, and PBIS when the education community advocated for its staff and students. Changes have already been made in the current proposed rule based on very early feedback from the education community. Now is the time to give feedback on any areas of concern.

Are Text Messages on Personal Cell Phones Public Records?

It is no secret that board of education members and school employees often communicate with one another through their personal cell phones. However, board members and employees rarely consider that these private text messages could potentially be disclosed to the public. Two recent decisions have highlighted the need for board members and school employees to proceed with caution as these text messages may be considered public records subject to disclosure upon request.

On May 15, 2019 a special master determined that a school district did not deny a requester public records when it declined to provide her with the cell phone call and text detail logs of particular district employees. (*Paule v. Woodmore Local Schools*, 2019-Ohio-2625.) The requester in this case argued that the administrators conducted district business through calls and texts with their personal cell phones that the district paid for. The special master

found the district did not require the administrators to provide copies of their wireless bills or expense reports related thereto, and therefore had no obligation to disclose documents that did not exist and were not in their possession.

The special master also went on to conclude that the call and text message logs were not records subject to disclosure because a “record” is defined as

Any document, device, or item, regardless of physical form or characteristic, *** created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

R.C. 149.011(G). The special master stated that there was no evidence that the district required their administrators to document their cell phone usage or that this usage information would document the organization, functions, policies, decisions, procedures, operations, or other activities of the district. Therefore, the personal cell phone call and text detail logs were not records subject to disclosure.

However, shortly after this report and recommendation was handed down, a similar case reached the Ohio Court of Claims. In this case, the presiding Judge concluded that the text messages on personal cell phones of city council members were subject to the Public Records Act. (*Sinclair Media III, Inc. v. Cincinnati*, 2019-Ohio-2623) In this case, the plaintiff requested text messages of particular public officials in which the employment status of the city manager was discussed. The city argued that the text messages did not meet the definition of a “record” subject to disclosure and that the messages were not “kept by” a public office because they were located on the personal cell phones of the city council members.

In rejecting the city’s argument, the court noted that Ohio courts generally treat text messages and emails sent by public officials in the same manner as other records, regardless of whether they are on privately-owned or publicly-issued devices. The issue is not whether the text messages were sent or stored on personal devices, but whether they document the functions, policies, procedures, operations, or other activities of the city. The court determined that the text messages reflecting on the employment decisions of public offices clearly document the operations and activities of that office. Therefore, the text messages in this case were public records subject to disclosure.

What this means for your District:

In each of these cases, the decisions focused on whether or not the messages document the functions, policies, procedures, operations or other activities of the public office. The key is the content of the messages not the device on which they are sent. If the messages document the functions, policies, procedures, operations or other activities of the school district, these messages could be subject to a public records request even if located on a personally owned device. As a result of these decisions, school districts should inform and educate their board of education members and employees that their text messages could be subject to disclosure depending on the content of the message. Boards of education may need to update their current records and retention policies to ensure compliance in accordance with these decisions.

Special Education Spotlight: School District Defends Discrimination Complaint Due to Bus Driver’s Statements

A recent ruling from a California court required a district to defend against claims of disability discrimination when a parent alleged that a bus driver made derogatory comments to her child who suffered from cerebral palsy. The student was nonverbal and demonstrated several physical traits associated with his condition.

After noticing potential signs of abuse from her child, the mother went to review the bus recordings at the district’s transportation office. The parent observed several instances of the bus driver yelling and making derogatory comments toward her child. These comments included: “you’re just being a brat”, “you almost look like you know what you’re doing” and “oh he’s a pisser this morning,” referring to the student’s inability to control his bladder and

tendency to engage in repetitive movements. It was not clear what type of knowledge the bus driver had about the student's condition or the extent of his disability when these statements were made.

In order to prevail on a disability discrimination claim, a plaintiff must be able to show that the student was treated unfavorably because of their disability. The district in this case argued that the parent's claim should be dismissed because there was no showing that the bus driver's comments were made in connection to the student's impairment. In rejecting this argument, the court stated that any abuse in response to a student showing symptoms of his or her disability is enough to meet the causation standard for a discrimination claim under the ADA and the Rehabilitation Act. It is important to note that this finding does not mean the district lost the case – only that the parent presented sufficient allegations for the case to move forward.

It is also important to note that the parent made a sufficient showing of deliberate indifference by the district in order to potentially recover money damages under Section 504 and the ADA. The court stated that districts are vicariously liable for their employees engaging in discriminatory conduct. Therefore, the district may be required to pay money damages whether or not they are aware of their employee's actions.

What this means for your district:

It is critical that support staff receive training and have knowledge about all forms of discrimination; including disability-related discriminatory actions. They should also be trained to work effectively with students who have disabilities. Although districts sometimes have confidentiality concerns when giving support staff any information related to a student's disabilities and needs, districts have a responsibility to ensure that support staff are well informed about the needs of their students with disabilities and have a proper understanding of disability related behaviors they may encounter in their job duties both during the school day and at after school activities. IEP and Section 504 teams should discuss during meetings with parents what types of information should be shared with the support staff who will work with the student.

Registration is Open for Special Education Legal Compliance Seminar

Based on demand from our past IDEA and Section 504 Legal Seminars, Ennis Britton's Special Education Team is excited to provide another dynamic professional development opportunity for special education professionals and other school personnel this October - A Practical Guide to Special Education Legal Compliance! Our Special Education Team will host a full-day seminar in five different locations across the state. We will discuss critical hot topics and provide your staff with practical strategies to tackle the most challenging legal compliance issues for students with disabilities.

This seminar is open to all special education directors and school staff in Ohio, but space is limited. Participants must be registered to attend. Register at <http://www.ennisbritton.com/client-resources/ennis-britton-special-education-seminar-series>. Please specify how many binders you want at the time of registration. We hope you can join us!

October 7:	Mahoning Valley – Joyce Brooks Center
October 8:	Cleveland – Cuyahoga County ESC
October 21:	Columbus – Quest Conference Center
October 22:	Northwest Ohio/Toledo – Northwest Ohio ESC
October 23:	Cincinnati – Butler County ESC

Three General Sessions

- Child Find & Initial Evaluations
- Ongoing Services & Discipline
- Annual Review & Exiting Services

On the day of the event, registration will begin at 8:30 a.m. The seminar will take place from 9:00 a.m. to 3:00 p.m. Lunch will be provided.

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.

- **September 30** – Deadline to file business advisory council plan with ODE (RC 3313.821)
- **October 1** – Deadline for board to adopt annual appropriation measure (RC 5705.38)
- **October 7** – Deadline for voter registration for November election (RC 3503.01, 3503.19)
- **October 15** – Deadline for certification of licensed employees to State Board of Education (RC 3317.061)
- **October 31** – End of first ADM reporting period (RC 3317.03)
- **November 1** – Deadline for classroom teachers to develop online classroom lessons (“blizzard bags”) in order to make up hours for which it is necessary to close schools (RC 3313.482)
- **November 5** – General election day (RC 3501.01)

Upcoming Presentations

SAVE THE DATE!

2019–2020 ADMINISTRATOR’S ACADEMY SEMINAR SERIES

December 12, 2019: Public Records Law Review

April 16, 2020: Student Discipline Primer

July 9, 2020: 2019–20120 Education Law Year in Review

Ennis Britton’s Administrator’s Academy Seminar Series are offered via a live video webinar professionally produced by the Ohio State Bar Association and is free of charge to clients.

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.

September 6: OASPA Boot Camp

Presented by Erin Wessendorf-Wortman and Megan Bair

September 11: OASBO Payroll & Benefits Seminar CE Region

Presented by Hollie Reedy

September 16: OASBO Payroll & Benefits Seminar NW Region

Presented by Ryan LaFlamme

September 17: Southern Ohio ESC Tackling Technology Challenges and Other Legal Updates

Presented by Pam Leist and Jeremy Neff

September 19: OASPA Fall Conference
Legal Updates for HR Professionals
Presented by Bill Deters and Ryan LaFlamme

September 23: OASBO Payroll & Benefits Seminar
NE Region
Presented by Megan Bair

September 26: BASA
Leadership Meets the Law
Presented by Hollie Reedy

October 1: OASBO Ohio Valley Chapter
Budget Bill Update for Treasurers
Presented by Pam Leist

October 2: OASBO Payroll & Benefits Seminar
CE Region
Presented Gary Stedronsky

October 2: OASBO
Records Retention
Presented by Hollie Reedy

October 11: OIAAA State Conference
Boundaries
Presented John Britton

October 11: OAEP
Custody and Tuition
Presented Hollie Reedy

October 16: OASBO
Payroll Seminar
Presented Hollie Reedy

November 10-12: OBSA Capital Conference
11/10 – 1:00pm “Evaluation, Nonrenewal and Termination”
Presented by John Britton
11/11 – 9:00am “Into the Woods: Advanced Public Records Law”
Presented by Hollie Reedy
11/11 – 10:30am “Disproportionality Discipline Dilemmas”
Presented by Jeremy Neff, Darrel Yater and Mona Burts-Beatty
11/11 – 2:30pm “Regulating Employee Social Media Use”
Presented by John Britton

November 15: Miami University Speech Language Pathology Graduate Program
“Special Education Challenges in Schools”
Presented by 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](#).

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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