



October 2019

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Help Us Welcome a New Member of the Ennis Britton Team!



Ennis Britton is excited to announce that attorney Robert J. McBride has joined our team! Bob has dedicated his practice to representing public school districts and private sector clients in the areas of employment law, civil rights defense, board leadership, labor relations, general civil litigation and construction law.

His experience includes negotiating collective bargaining agreements and labor arbitrations, as well as advising clients on compliance with statutes such as the Ohio Public Employees' Collective Bargaining Act and the Fair Labor Standards Act. Bob also advises clients on compliance with civil rights laws covering race, sex, national origin, religion, age, disability, genetic information, family and medical leave and veteran status. He represents clients before administrative agencies such as the Equal Employment Opportunity Commission, the Ohio Civil Rights Commission, the Ohio Unemployment Compensation Review Commission, the United States Department of Labor Wage and Hour Division, the National Labor Relations Board, and the State Employment Relations Board. Bob is frequently asked to present at conferences across the state on topics related to school operations, employment and more. He is a member of the firm's School Finance and Construction and Real Estate practice teams.

Bob has practiced law for more than twenty-four years. He graduated cum laude from the University of Notre Dame Law School in 1995. He also holds a Bachelor of Arts degree from the University of Dayton, where he graduated magna cum laude, as well as a Masters of Public Administration from the University of Akron. Bob is a recognized community leader. He is member and past chair of the Stark County Bar Association's Grievance Committee and a member of the SCBA Labor Law Committee. He also serves on the Board of Directors and is Chair of Operations Committee for CommQuest Services. He is a former board member of both the YMCA of Central Stark County and Meyers Lake YMCA, where he served as board chair. Bob was a proud member of the Leadership Stark County's 12th graduating class as well.

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We hope you help us in welcoming Bob to the firm! You can contact Bob at our Cleveland Office.

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Court Sides with District in Teacher Termination and Vacates Back Pay

The Sixth District Court of Appeals delivered a win to school districts recently when it reversed a lower court's decision ordering the Perkins Local School District to reinstate a former teacher who had been terminated with an award of \$367,202.52 in lost wages and benefits. The case was brought by former teacher and coach Tracey Hiss. Hiss was terminated for cause after the district learned she supplied several members of her girls track team with Lidoderm patches – prescription patches containing lidocaine that help with pain relief.

When the superintendent learned of the allegations, he met with Hiss and subsequently placed her on paid leave pending further investigation. He also reported the allegations to the police, who subsequently charged her with a minor misdemeanor for her actions. The district held a predisciplinary hearing and the superintendent sent notice of his intent to recommend termination. Hiss, through legal counsel, objected to some of the reasons listed in the notice because they had not been addressed at the predisciplinary hearing. The superintendent subsequently held another predisciplinary hearing and again recommended termination which the board approved. Hiss requested a hearing to challenge the board's intent to terminate before a state appointed referee. At the termination hearing, Hiss introduced evidence of an incident where a prior coach, Crabtree, had given a student Tylenol to help reduce pain. She argued that the board should not have terminated her contract due to the fact that this teacher merely received a reprimand and a brief suspension from coaching, where she was being terminated.

After conclusion of the five-day hearing, the referee issued his report and recommendation that the board terminate Hiss's teaching contract. In making this recommendation, the referee found that the board had sufficient policies prohibiting teachers from both possessing and distributing controlled substances and medicines to students without a parent's permission.

Shortly thereafter, the Board adopted the referee's recommendation and passed a resolution to terminate Hiss's teaching contract. Hiss then appealed this decision to the common pleas court. The court applied the Daugherty test of good and just cause, concluding that the board lacked cause to terminate Hiss's contract. The court focused in particular on the fact that Crabtree, who had engaged in similar behavior, received a much less severe discipline. The district appealed, claiming in part that the court of common pleas abused its discretion in applying this new test and effectively usurping the role of the ODE referee.

On appeal, the Sixth District Court of Appeals agreed that the court of common pleas abused its discretion when it substituted its own judgement in place of the board of education. The court of appeals concluded that the court's reliance on the Daugherty test to define "good and just cause" was misplaced. The court reasoned that, while an arbitrator may use the Daugherty test to determine the standard of good and just cause in a labor-arbitration matter, the Ohio Supreme Court has failed to adopt the Daugherty test in just cause teacher termination cases.

Thus, the common pleas court exceeded its authority by relying on the Daugherty test as opposed to the cases interpreting R.C. 3319.16 as to whether good or just cause exists.

Examining the merits of the case, the court also determined that Hiss's misconduct was , a "fairly serious matter" that falls within the realm of good and just cause for termination under R.C. 3319.16. Hiss repeatedly gave

prescription pain medicine to students in direct violation of district policy that could have ultimately caused serious harm to the students. The court opined that this added to the fact that the board of education complied with procedural requirements of R.C. 3319.16 by providing Hiss with two informal hearings as well as a hearing before the referee justified the board's decision to terminate. Therefore, the board's earlier decision to terminate Hiss's teaching contract was reinstated.

What this means for your District:

This decision is a positive one for school districts and helps to limit courts from arbitrarily overturning the judgement of a board of education and ODE hearing officer. It also illustrates that districts should be mindful of past practice when deciding whether to terminate a teacher's contract and should strictly follow procedures to limit non-substantive challenges in court.

Increase in Threshold Salary Levels Under FLSA

On September 24th, 2019, the Department of Labor issued a final rule that increases the threshold salary level as well as implements other changes to the overtime rules under the Fair Labor Standards Act. The rule becomes effective January 1, 2020.

Under the FLSA, nonexempt employees are entitled to minimum wage as well as overtime for all hours worked over 40. The FLSA exempts certain employees from overtime and minimum wage requirements, including executive, administrative and professional employees. To qualify for the exemption, these employees must be paid more than the FLSA salary threshold.

The final rule raises the salary threshold from \$23,660 to \$35,568 (from \$455/week to \$684/week). This means that employees who make less than the new amount will no longer be FLSA exempt as executive, administrative or professional employees.

The Department of Labor rule implements other changes. Effective January 1st, employers will be allowed to use bonuses and incentive payments including commissions to constitute up to 10 percent of the \$35,568 threshold. Such payments must be nondiscretionary and awarded at least annually to qualify. The new rule also includes a provision that allows an employer to "catch up" if the bonus is not high enough in a given year for the employee to retain his/her exempt status. The additional payment must be provided within one pay period after the end of the 52-week period.

The "highly compensated employee" salary threshold was also raised from \$100,000 to \$107,432. Employees making more than this amount do not need to meet the EAP exemption. The rule does not contain any automatic increases of the salary threshold to account for inflation.

What this means for your District:

Districts should review their lists of FLSA-exempt employees to determine whether they make less than the new salary threshold. Some positions that may be affected include technology, food service, maintenance and transportation supervisors. If affected employees make less than the new amount after January 1, 2020, employers should consider options for addressing this issue such as increasing salary above the new minimum or limiting these workers to forty hours a week to avoid overtime payments.

Special Education Spotlight: Another U.S. Supreme Court Decision on the Horizon

It has been two years since the United States Supreme Court issued two IDEA decisions in the same term – *Endrew F.* and *Frye*. At that time, it had been nearly a decade since the last IDEA decision by the Court. Will this term bring another significant decision?

SCOTUS is considering a request to review a decision arising out of a Maryland school district's decision to unilaterally increase the number of hours a special education student spends outside of the general education classroom. The parents allege that this decision, by definition, violated IDEA and should justify their demand for a private special education placement. Also at issue is the intervention specialist's destruction of some raw data that was used to inform progress reports.

Although the trial and appellate courts both found that the unilateral decision of the intervention specialist to increase the amount of time that the student spent in the special education room was improper, they also found that this action did not "significantly impede" the parents' right to meaningfully participate in the IEP process. A significant factor in the court decisions was that the parents had previously requested a full-time special education placement and the intervention specialist's changes moved in that direction. As for the records destruction, the court found this was also improper but did not prevent the parents from having sufficient information to meaningfully participate.

As the case now stands, the school district has prevailed. It prevailed not because it was technically compliant, but because the appellate court concluded it took reasonable steps that led to a reasonable outcome for the student. This might come as a surprising result given the significant attention that is given to technical compliance with special education law. If the Supreme Court accepts review of the case, it will decide whether a parent must demonstrate that a procedural violation caused a loss in educational benefits. Stay tuned!

R.F. v. Cecil County Public Schools (Petition Filed June 24, 2019), No. 18-1591.

Plain Local Files Lawsuit to Prevent ORC 3311.242 From Taking Effect

On September 18, 2019 Plain Local Schools Board of Education approved, with a 5-0 vote, a resolution to file a lawsuit against the State of Ohio to prevent Ohio Revised Code 3311.242 from taking effect on October 17 with the rest of the provisions contained in the Ohio State Budget.

The new statute pertains particularly to school districts situated in a township that contain two or more school districts within its borders. The new statute provides that "qualified electors" (electors residing within the territory proposed to be transferred) who reside in an "eligible township" (a township with two or more school districts) may petition for a transfer of school district territory to another school district to which the territory is adjoining.

If a sufficient number of electors (10% of electors who voted in the last general election) are certified by the Board of Elections to have signed the petition, it would be placed on the next ballot (general, primary, and special election 90 days after the certification). If the majority approves, the district will notify the Ohio Department of Education of the vote. The township trustees may then negotiate a formal agreement with the Board of Education in the district to which the territory will be transferred. The Board of Education is not required to enter into the formal agreement. The transfer becomes complete when a map showing the transfer is filed with the county auditor and the legal title of the school property in the territory is vested in the new district.

The State Board of Education must approve the agreement and notify, in writing, to the board of education affected by the transfer. District and township trustees must equitably divide the funds and indebtedness.

These provisions were proposed in the House but the Senate did not agree. It made it into the final bill through the conference committee and it was not vetoed by the Governor.

Unlike other statutes governing the transfer of territory under other circumstances, this new statute does not appear to grant a right to a hearing to determine the merits of the proposed transfer.

Ennis Britton is Proud to be a Platinum Sponsor of the OSBA Capital Conference!

Ennis Britton is proud to be a Platinum Sponsor of the 2019 Ohio School Boards Association Capital Conference. This means you will see our team of attorneys and firm logo in a lot of places! The firm is the exclusive sponsor of the OSBA Conference App, which will be activated this month. The conference app is a very helpful tool to schedule your activities, download handouts, learn more about track sessions, and find your way around the conference.

A new feature this year allows you to log in and track your certificates of attendance. You can download the free app through the Apple App Store or Google Play Store. You also may access the app online at <http://conference.ohioschoolboards.org/app>.

In addition, the firm is sponsoring the Conference Spotlight Session ***Lifting Leaders – How to Grow Leadership***. The spotlight session takes place Sunday, November 10 from 1:30 p.m. to 3:30 p.m. in Room A210-212.

The Ennis Britton Consulting Group will have a booth at the trade show. Stop by **Booth 813** and to see the services they can provide to your district and management team.

Join our attorneys presenting at Capital Conference this year for exciting, informative (and entertaining!) track sessions. Here is when and where you can find us:

Sunday, Nov. 10th

1:00 p.m. – Room A123-125
“Evaluation, Nonrenewal and Termination”
Presented by John Britton

Monday, Nov. 11th

9:00am – Room A210-212
“Into the Woods: Advanced Public Records Law”
Presented by Hollie Reedy

10:30 a.m. – Room A220-222
“Disproportionality Discipline Dilemmas”
Presented by Jeremy Neff, Darrel Yater and Mona Burts-Beatty

2:30pm – Room A213-215
“Regulating Employee Social Media Use”
Presented by John Britton

3:00pm – Room A210-212
“We’re Under Attack – This is Not a Drill!”
Presented by Robert J. McBride

Last but not least, don’t forget to join us for Ennis Britton’s Capital Conference reception. All attendees are welcome to attend. Please R.S.V.P. to Barbara A. Billow at bbillow@ennisbritton.com.

Monday, November 11, 2019
4:00 p.m. to 6:00 p.m.
Hyatt Regency Columbus
Franklin Rooms A, B & C

We are thrilled to be a part of this annual event and hope to see you there!

Time is Running Out to Register 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 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, and Cincinnati is almost full. 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 (CANCELLED)
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.

- **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 is 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.

**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 by John Britton**

**October 11: OAEP
Custody and Tuition
Presented by Hollie Reedy**

**October 11: SWOPA
Legal Update
Presented by Erin Wessendorf-Wortman**

**October 16: OASBO
Payroll Seminar
Presented by Hollie Reedy**

October 16: Northwest Ohio ESC

Shedding Light on Sunshine Laws

Presented by Pamela A. Leist

November 7: BASA's Central Office/Assistant Superintendent Professional Learning Series

Critical Relationships and Human Resources

Presented by John Britton

November 11: OIAAA State Conference

Understanding the Lines- Ensuring Appropriate Behavior in the Coach-Student Athlete Relationship

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
Robert J. McBride
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:

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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Jeremy Neff
Hollie Reedy
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