



**October 2020**

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## FFCRA Leave Guidance Changes Now Effective

A lawsuit challenging the Department of Labor (DoL) FFCRA leave guidance was filed in April 2020 by the New York Attorney General. (New York v. U.S. Dep’t of Labor, No. 20-CV-3020 (JPO), 2020 WL 4462260 (S.D.N.Y. Aug. 3, 2020) The decision of the federal district court invalidated four sections of the DoL regulations. The invalidated regulations included:

- The persons covered as “health care providers” who could be excluded from the leave provisions of the Act,
- Regulations stating the employer must permit intermittent leave under the EPSLA or EFMLEA,
- Prior notice of leave provisions, and
- Availability of leave if the employer does not have work for the employee to do.

DoL recently issued a new temporary rule with explanations of some of the provisions (intermittent leave) and clarification/amendment of others (notice of leave), effective September 16- December 31, 2020. Unless extended through additional legislation, the leave provisions in FFCRA (EPSLA and EFMLEA) expire at the end of December.

DoL clarified and expanded upon its interpretation on intermittent leave. An ongoing question for public schools has been how to administer the use of EFMLEA leave for child care when the employee’s child(ren) are on a hybrid schedule, attending in person and remotely from week to week or day to day. Updated regulations clarify that EFMLEA child care leave for parents whose students are on hybrid programs is not considered intermittent leave.

The rationale - because school buildings are closed to students on days when students attend remotely, remote days are considered a qualifying reason for leave. In contrast, when the child goes to school in person, the school is open. When the school switches back to remote learning, it is a new qualifying reason for leave. This guidance is different from previously-published guidance and is a new interpretation. Intermittent leave was addressed at questions #20-22 of the DoL “FFCRA Questions and Answers”. It is assumed this Q & A will be revised after the effective date.

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DoL's new explanation of the rationale as published in the Federal Register, 85 FR 57677 :

*The employer-approval condition would not apply to employees who take FFCRA leave in full-day increments to care for their children whose schools are operating on an alternate day (or other hybrid-attendance) basis because such leave would not be intermittent under § 826.50.*

*In an alternate day or other hybrid-attendance schedule implemented due to COVID-19, the school is physically closed with respect to certain students on particular days as determined and directed by the school, not the employee. The employee might be required to take FFCRA leave on Monday, Wednesday, and Friday of one week and Tuesday and Thursday of the next, provided that leave is needed to actually care for the child during that time and no other suitable person is available to do so. For the purposes of the FFCRA, each day of school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day.*

*The employee may take leave due to a school closure until that qualifying reason ends (i.e., the school opened the next day), and then take leave again when a new qualifying reason arises (i.e., school closes again the day after that). Under the FFCRA, intermittent leave is not needed because the school literally closes (as that term is used in the FFCRA and 29 CFR 826.20) and opens repeatedly. The same reasoning applies to longer and shorter alternating schedules, such as where the employee's child attends in-person classes for half of each school day or where the employee's child attends in-person classes every other week and the employee takes FFCRA leave to care for the child during the half-days or weeks in which the child does not attend classes in person.*

*This is distinguished from the scenario where the school is closed for some period, and the employee wishes to take leave only for certain portions of that period for reasons other than the school's in-person instruction schedule. Under these circumstances, the employee's FFCRA leave is intermittent and would require his or her employer's agreement.*

**Teleworking employees:** DoL clarified that an employee may take intermittent leave while teleworking for any of the FFCRA qualifying reasons if the employer permits it.

**Notice and documentation of leave:** The DoL also amended one regulation that required notice to the employer of the need for leave prior to taking the leave.

**EPSLA leave:** Notice of the need for leave cannot be required prior to the leave. The revision states that notice of leave after the first day should be given "as is practicable."

**EFMLEA leave:** If the need for the leave is foreseeable, notice should be given in advance. If not foreseeable, the employee must give notice "as is practicable." Employees may be required to provide documentation including the employee's name, dates for which leave is requested, qualifying reasons for the leave, and an oral or written statement the employee is unable to work.

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

Administering EPSLA and EFMLEA child care leave has been challenging. DoL's interpretations and positions continue to evolve. These regulations clarify some of the questions we have been getting, although additional questions remain. Please consult with an EB attorney if you have specific questions about how the newly-effective regulations apply in specific situations.

Find the notice in the Federal Register here: <https://preview.tinyurl.com/yysmuzlq>.

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## Special Education Spotlight: INSERT

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The U.S. Department of Education's Office of Special Education Programs (OSEP) published a new COVID-19 Q&A on September 28, 2020 ([OSEP QA 20-01](#)). While OSEP explicitly cautions that the Q&A "is intended only to provide clarity to the public regarding existing requirements," it nonetheless provides insights on how long-standing rules and laws will be applied to the novel COVID-19 virus.

In support of school districts that are guiding their decision-making based on the health and safety of students and staff, OSEP repeatedly describes health and safety as "most important" and "paramount." If a hearing officer or court is making a decision based on the equities (i.e. fairness) the emphasis of OSEP on safety will weigh in favor of schools making reasonable adjustments to how IDEA is implemented. However, OSEP also repeatedly states that school districts "remain responsible for ensuring that a free appropriate public education (FAPE) is provided to all children with disabilities." This requires an individualized response to COVID-19 that focuses on "each child's unique needs" and ensures "challenging objectives."

To strike the balance of protecting health and safety while also providing FAPE, OSEP points school districts to the normal IDEA processes. The Q&A notes that no changes to the law or regulations have been made at the federal level. Interestingly, when discussing the timeline for initial evaluations OSEP advises that states "have the flexibility to establish additional exceptions" to the 60 day initial evaluation timeline. As of this writing, the Ohio Department of Education has not taken actions to allow for COVID-19 specific exceptions from the timeline.

Otherwise, OSEP's Q&A largely points to approaches that have been addressed in prior "Special Education Spotlight" articles, Ennis Britton blog posts, and in our Coffee Chat webinar series. These approaches include conducting records review evaluations when in-person evaluations are not possible, using virtual team meeting platforms, and delivering services flexibly (e.g. teletherapy, consultation with parents.). OSEP warns against conducting remote evaluations if doing so would violate the instructions of the test publishers.

The discussion of extended school year (ESY) services is perhaps the topic most likely to generate interest in the short-term. After clearly distinguishing ESY from compensatory education or recovery services, OSEP acknowledges the authority of the states to establish standards for ESY. Note that in Ohio the standard is based on excessive regression and recoupment. OSEP proceeds to observe that, understandably, ESY services may not have been provided over the past summer due to COVID-19 restrictions. In such cases, OSEP encourages school districts to "consider" providing ESY during times such as the regular school year or scheduled breaks (e.g. winter break).

The Ennis Britton Special Education Team will continue to monitor and share with clients the latest developments as we navigate this unusual school year. Please contact a member of our team with questions or concerns.

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

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## ODE Updates Guidance on Educator Licensure and Certification for 2020-21

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ODE has updated its guidance related to educator licensure and certification requirements for 20-21.

### **Educator Licensure**

House Bill 197 of the 133rd General Assembly, the coronavirus relief bill, provides flexibility to educators regarding the renewal of credentials previously set to expire on July 1, 2020. Under this law, the period for educators to

complete their renewal requirements and renew their licenses has been extended to Dec.1, 2020. According to ODE, Educators will need to complete their legally required professional development by Dec. 1, 2020, or an additional three semester hours of professional development will be required for renewal.

### **Temporary One-Year License**

ODE is granting a one-time, one-year temporary license for the 2020-2021 school year to applicants who meet all other qualifications for licensure but have been unable to complete their required initial licensure examinations. Applications for one-year temporary licenses will be accepted by the Office of Educator Licensure until Dec. 1, 2020.

### **Certification Flexibility**

Pursuant to House Bill 164 of the 133rd General Assembly, a superintendent may employ or assign an educator to teach a subject area or grade level for which the person is not licensed that is within two grade levels of the person's licensure grade band. To qualify, an educator must hold a professional or resident educator teaching license issued under section 3319.22 of the Ohio Revised Code (alternative licenses do not qualify) and have at least three years of teaching experience. This flexibility is available only for the 2020-2021 school year.

Special education is carved out of this flexibility due to the requirements of federal law. Accordingly, an educator may not be employed or assigned as an intervention specialist or teach in a special education classroom without holding the appropriate licensure as an intervention specialist. Conversely, an individual holding a Resident Educator Intervention Specialist License or a Professional Intervention Specialist License and having at least three years of teaching experience can serve as the teacher in a regular education classroom for the 2020-2021 school year only.

More information can be found in the links above or at the Reset and Restart page of the ODE website. We will keep you up to date with the latest changes as always.

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## **Parents Sue Interim Health Director Over School Mask Mandate**

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A group of parents have filed suit in the Putnam County Court of Common Pleas seeking injunctive and declaratory relief against the order issued by Interim Health Director Lance Himes requiring facial coverings to be worn by students while at school, subject to certain exemptions. At the request of Himes, the case has been transferred to the Franklin County Court of Common Pleas.

The Complaint, filed on September 9, 2020, seeks an unspecified declaration from the Court, presumably that the mask order is unconstitutional or otherwise void.

Among other arguments, the Complaint alleges that the order was promulgated in an unlawful way, not following the requirements of Ohio law governing the manner in which administrative agencies adopt rules. The Complaint also alleges that the order violates the separation of powers set forth in the Ohio Constitution.

The Complaint also alleges that the order violates the plaintiffs' First Amendment rights because the wearing of masks is now a political issue, with Joe Biden in favor of masks and Donald Trump against masks. Thus, the order requires plaintiffs to publicly take a position in support of a political issue they do not agree with.

The Plaintiffs allege that the order likewise violates the religious freedom of the parents who hold sincerely held religious beliefs that conflict with wearing a mask. The Complaint argues that the language of the order referring to an established religious requirement is too stringent a standard and is not supported by the Constitution.

Other arguments that are set forth in the Complaint allege that the order requires parents to purchase a product from the private market in order for their children to attend school, which they are compelled by law to do, and thus constitutes an unlawful taking of property.

Finally, the Complaint alleges that the order infringes on the right of parents to rear their children and misappropriates the likeness of children required to wear a mask by destroying basic expressive communication, deleting peoples' sense of self and erasing evidence of their existence in a certain time or place.

A similar suit was filed by parents in Muskingum County in August against the Ohio Department of Health, the Zanesville-Muskingum County Health Department and East Muskingum Local School District asking to lift the mask mandate.

We will keep you apprised of any developments in these cases.

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## **Ennis Britton Consulting Group: Reducing the Risk of COVID-19 Airborne Transmission through Building Improved Building Ventilation**

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School is finally back in session, and many students are back in school. Districts have made many plans that address issues like masks, social distancing, school buses, special education, split schedules, staggered attendance and more. But is this enough?

One area of risk that should perhaps be reconsidered is the potential for students, teachers and staff to become infected through the airborne transmission of the COVID-19 virus. There is an emerging consensus that COVID - 19 virus particles present in coughs, sneezes, and the exhaled breath of an infectious person can be transported in the air and dispersed throughout a room while remaining aloft for hours. These airborne virus particles can also be picked up in re-circulated ventilation air and spread throughout a school building. In this way, they can infect people who haven't had close contact with the infectious person.

In an open letter entitled, "It's Time to Address Airborne Transmission of COVID – 19" authors Lidia Morawska of the International Laboratory for Air Quality and Health, Queensland University of Technology, Brisbane, Australia and Donald K. Milton of the Institute for Applied Environmental Health at the University of Maryland School of Public Health argue that the current guidance from most public health organizations is insufficient to provide protection from airborne virus carrying micro-droplets released into the air by infected people. The problem is especially acute in enclosed areas (like schools), particularly those that are crowded and have inadequate ventilation.

They go on to state that they are "...concerned that the lack of recognition of the risk of airborne transmission of COVID – 19 and the lack of clear recommendations on control measures against the airborne virus will have significant consequences: people may think that they are fully protected by adhering to the current recommendations, but in fact, additional interventions are needed for further reduction of infection risk." Masks and social distancing are essential which is why they are so strongly recommended. But clearly schools could and should consider doing more!

According to the American Society for Heating, Refrigeration and Air-conditioning Engineers (ASHRAE) "Transmission of [COVID-19] through the air is sufficiently likely that airborne exposure to the virus should be controlled. Changes to building operations, including the operation of heating, ventilating, and air-conditioning systems, can reduce airborne exposures. Ventilation and filtration provided by heating, ventilating, and air-conditioning systems can reduce the airborne concentration of [COVID-19] and thus the risk of transmission through the air."

To address this very concern, The Harvard University T.H. Chan School of Public Health issued a report entitled "Schools for Health - Risk Reduction Strategies for Reopening Schools". One part of the report includes actions schools can take with regard to their mechanical ventilations systems that will help to mitigate the spread of airborne COVID-19 virus particles. The following five actions are summarized from that report:

## **Action 1: Increase outdoor air ventilation**

Simply put, this means bringing in more outdoor air while decreasing the amount of air that is re-circulated. The settings on your mechanical ventilation system can be adjusted to increase the amount of fresh air that is brought into the building. ASHRAE recommends disabling demand-controlled ventilation and opening outdoor air dampers to 100% as indoor and outdoor conditions permit. Ventilation systems often shut down or go into an “unoccupied” mode at night. This setting should not be used. ASHRAE recommends running your building’s ventilations system 24/7 if possible. Exhaust fans often operate on a timer system. Instead they can be set to run continuously. Finally, consider bypassing energy recovery ventilation systems that can leak potentially contaminated exhaust air back into the outdoor air supply

## **Action 2: Filter re-circulated indoor air**

Every mechanical ventilation system has an air filter that “cleans” recirculated air before it is pumped back into the building. Not all air filters are the same, some work better than others. Districts should consider using upgraded filters that achieve a level of filtration equivalent to MERV- 13 (ASHRAE Standard 2017b) or the highest level achievable. Be sure that the new filters maintain the proper amount of air flow. No matter the type of filter you use they should be checked to ensure they are installed correctly and that they are changed frequently.

## **Action 3: Supplement with portable air cleaners**

Where modifications to the operation of the existing mechanical ventilation system are simply not possible, consider bringing in air cleaning devices. Select portable room air cleaners with High Efficiency Particulate (HEPA) or high-MERV filters. Be sure to size devices carefully based upon the size of the room.

## **Step 4: Consider advanced air quality techniques**

There is some evidence that the COVID-19 viral particles “hang” in the air longer when humidity levels are lower. Increasing humidity levels can reduce the time that the virus particles stay in the air. One word of caution - increasing humidity levels can have unintended consequences, like creating mold in your building. This action should only be considered with the advice and consultation of a technical expert.

## **Action 5: Verify ventilation and filtration performance**

It may have been some time since your building’s mechanical ventilation system was comprehensively examined by a professional mechanical engineer or other qualified consultant. Modern school building mechanical ventilation systems are complex. Some aspects of the system may no longer be operating optimally. Now is the time to hire a qualified consultant to conduct a thorough evaluation of your building’s mechanical ventilation system. These professionals can also advise your district around the best adjustment to your mechanical ventilation system.

Not every district will be able to implement each of these actions and cost will certainly be a factor. Still they are all worth considering, particularly as an additional strategy within your overall plan to help reduce the potential for students, teachers and staff to become infected with the COVID-19 virus.

If you would like assistance or more information, contact Steve Shergalis at (330) 441-0562 or [sshergalis@ebconsultinggroup.com](mailto:sshergalis@ebconsultinggroup.com).

*The Ennis Britton Consulting Group delivers comprehensive management solutions to address the needs of school districts across the State of Ohio. Staffed by former school administrators and drawing on more than 70 years of combined experience, the EBC consultants design signature solutions to address your districts unique challenges.*

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## Ennis Britton's 2020-21 Administrator's Academy Seminar Series

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We know that school districts face many challenges this year, and we are here to help! We are taking a different approach to the 2020-21 Administrator's Academy Seminar Series by offering five live interactive webinars rather than the typical that we have offered in the past. Our goal is to address a broader list of topics in a way that takes up less time from your busy day. The webinars will be presented in an interactive zoom webinar format. Attendees will have an opportunity to hear about hot topics from an Ennis Britton attorney, and will also have an opportunity to collaborate with colleagues and in smaller discussion groups. The webinars will take place from 11:00 a.m. to 12:00 p.m. on the following dates:

- October 22, 2020: Student Privacy Challenges
- December 10, 2020: Lame Duck Legislative Overview
- February 11, 2021: Managing Employee Leaves
- April 15, 2021: Shedding Light on Sunshine Laws
- July 15, 2021: 2020-2021 School Law Year in Review (from 10:00 a.m. to 12:00 p.m.)

Due to the change in format, these events will not be archived or recorded.

### Registration

You must be registered to attend any of these events. You may register on our website or by contacting Hannah via email or phone at 614.705.1333. Attendees will be provided a certificate of attendance. Any administrators and board members from your district are invited to attend.

We hope you can join us!

### About Our Administrator's Academy Seminar Series

At Ennis Britton, we believe our role is to provide key legal guidance to our clients before a problem arises. This way, clients can make informed decisions and avoid legal pitfalls. We created the Administrator's Academy to provide school district administrators and board members with the latest legal information to help them manage their districts in an efficient, effective, and proactive manner.

The Administrator's Academy consists of a series of presentations, each covering a specific topic or area of education law. Our experienced attorneys provide a legal overview as well as real-life examples to help administrators navigate and understand the complicated legal environment. Participants have the opportunity to ask questions and to hear different perspectives on topics pertinent to school management. The Administrator's Academy presentations are provided as a complimentary service to our clients and are free of charge. Ennis Britton will also work with LPDCs for the attainment of CEU credit.

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## Upcoming Presentations

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### Special Education Coffee Chats

The Ennis Britton Special Education Team invites you to join a facilitated conversation with student services personnel and Ennis Britton attorneys to discuss the COVID-19 educational impacts. We know that as educational

leaders, you are great collaborators, and if there was ever a time for sharing your insights on how to serve students, it is now.

We began this innovative program in the spring, and offered a reduced schedule over the summer. With the most unusual return to school of our careers upon us, we're returning to an every other week schedule starting this Thursday, August 6th. During the chats, our special education team of attorneys will provide a quick overview of hot topics – then turn things over to you and your colleagues across the state. We will help facilitate discussions and encourage you to take your conversations in the direction that best serves your students and school district.

If you are interested in joining us for this coffee chat, please contact Hannah Reichle, at [hreichle@ennisbritton.com](mailto:hreichle@ennisbritton.com) to receive the Zoom conference link (it will be sent Thursday morning). If you have already signed up (including last spring or over the summer), you are on the list and do not need to sign up again. If you have changed positions, please forward this email to the appropriate people in your district. The general logistics are as follows:

- Our next Coffee Chat is scheduled for October 1<sup>st</sup> starting at 9:00 AM. We aim to be done in less than an hour because we know you are very busy. Attendees will be placed in a virtual waiting room until the meeting begins. After brief introductions, you will be prompted to join a breakout room.
- Topics for the October 1<sup>st</sup> breakout rooms are:
  - Accommodations: How to implement supports across different settings
  - Monitoring: How to track delivery of services and student progress
- The Zoom chat feature will be available throughout this session. You may send messages to all participants or send “private” messages to facilitators.
- Special Education Team members will be available by email or cell phone if you have follow-up questions.

We encourage you to continue sending us your suggestions for future chats! When we get through this – and we will – we know that there will be formal disputes about compliance. However, we are confident that in most cases moving forward amicably will have far more to do with our clients demonstrating good faith efforts to serve children in an extremely difficult situation than with concerns about technical compliance, precise calculation of service minutes, meeting timelines, etc.

We're here to help you with the technical side of compliance, but we also want to make sure we are helping you with the bigger picture. If any professionals are up to the challenge of creatively solving problems and adjusting to ever-changing government directives, it is educators. We are inspired by your efforts and honored to be a part of your team. Thank you again!

### **Other Presentations**

We are currently scheduling administrator retreats for the 2020-2021 school year (in person or via videoconference). Contact us soon if you would like to schedule a retreat for your administrators!

**October 1: Ohio Association of Career-Technical Superintendents  
OACTS Issues Forum  
*The Changes and Challenges of Employee Leave Amid COVID-19*  
Presented by Pam Leist**

**October 5: BASA Fall Conference  
*Hard Lessons Learned: A Pandemic Legal Perspective*  
Presented by Hollie Reedy and Giselle Spencer**



**November 5: Ohio Association of School Psychologists Annual Conference**  
***Challenges of Remote Meetings***  
Presented by Pam Leist

**Ohio School Boards Association Virtual Capital Conference and Trade Show**

**November 9 at 2:15 p.m.**  
***Addressing Employee Absenteeism***  
Presented by John Britton

**November 10 a 2:15 p.m.**  
***Remote Control—Professionalism in the Digital Age***  
Presented by Jeremy Neff and Giselle Spencer

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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 Hannah via [email](#) or phone at 614-705-1333. 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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Bill Deters  
Ryan LaFlamme  
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