



**September 2020**

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## Injunction Seeking to Prevent Implementation of Title IX Regulations Denied

The U.S. District Court in the Southern District of New York recently denied a request for a preliminary injunction to prevent new Title IX regulations from becoming effective on August 14, 2020.

In general, Title IX prohibits discrimination on the basis of sex in schools. It is often used in sexual harassment claims of students involving teacher-on-student harassment or student-on-student harassment. Since 1997, the U.S. Department of Education (the “DOE”) issued guidance discussing how schools should resolve allegations concerning sexual harassment and sexual violence.

The DOE adopted formal regulations in 2020 after publishing a notice of proposed rulemaking in 2018. The regulations contain several provisions that depart from past guidance. The plaintiffs, the State of New York and New York City School District, requested an injunction alleging that the regulations

exceed the DOE’s authority; that they are arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with federal law; and that the DOE failed to follow procedures required by law in issuing the regulations.

In order to obtain a preliminary injunction, a plaintiff must show a clear or substantial likelihood of success on the merits of the underlying claim. The court found that it is undisputed that DOE has the authority to promulgate rules and regulations implementing Title IX. It also found that the DOE had the authority to define the operations of a school to which Title IX applies and to specify how the grievance procedure contained in the regulations would apply to both the alleged victim and the alleged perpetrator of harassment. Further, the DOE regulations were not determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Therefore, the court determined that the plaintiffs did not have a clear or substantial likelihood of success on the merits so the request for a preliminary injunction was denied and the new Title IX regulations went into effect on August 14, 2020, a mere 100 days after they were issued.

### What this means for your District:

The new Title IX regulations became effective on August 14, 2020. Districts should have adopted a revised Title IX policy to comply with the new regulations, and trained their Title IX coordinators, investigators, and decision makers on the new policy and regulations. In addition, it is recommended that all K-12 employees be trained on the new

**Cincinnati:** 1714 West Galbraith Road • Cincinnati, OH 45239 • (513) 421-2540 • Toll-Free Number: 1 (888) 295-8409  
**Cleveland:** 6000 Lombardo Center • Suite 120 • Cleveland, OH 44131 • (216) 487-6672  
**Columbus:** 300 Marconi Boulevard • Suite 308 • Columbus, OH 43215 • (614) 705-1333

[www.ennisbritton.com](http://www.ennisbritton.com) | [www.twitter.com/EnnisBritton](https://www.twitter.com/EnnisBritton) | [www.linkedin.com/company/ennis-britton-co-lpa](https://www.linkedin.com/company/ennis-britton-co-lpa)

Title IX regulations because a school district will be presumed to have actual knowledge of sexual harassment if any employee has knowledge of such conduct. To assist our clients with this training, Ennis Britton has recorded training modules that are available to clients for Title IX coordinator, investigator, decision maker, and employee training purposes. If you wish to utilize those training modules, please contact Barb Billow at [bbillow@ennisbritton.com](mailto:bbillow@ennisbritton.com) or 513-421-2540.

*State of New York v. United States Department of Education*, U.S. Dist. S. NY, 20-CV-4260 (August 9, 2020).

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## **Special Education Spotlight: Addressing Food Allergies in District COVID-19 Procedures**

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It is safe to assume that school at the start of the 2020-21 school year looks very different than in years past. As schools continue to adjust plans and implement safety protocols to address COVID-19 pandemic challenges, administrators should take time to discuss how the needs of students with food allergies will continue to be met during in-person instruction.

By way of background, students who suffer from food allergies may be considered individuals with disabilities if the allergies substantially limit a major life activity such as breathing or learning. These students receive protections under two separate disability-related laws – Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990. Note that in some rare circumstances, students may also be eligible for special education and related services under the Individuals with Disabilities Education Act.

A student who suffers from food allergies may be eligible for a Section 504 plan if the severity of the allergies requires some type of accommodations or modifications during the school day or at school-related activities.

School districts should take time to identify students who receive accommodations for food allergies and consider whether additional changes or protocols need to be adopted this year based on a district's in-person educational model. For instance, if students will be eating in different locations such as in a classroom rather than in the cafeteria, district 504 teams should make sure that appropriate staff have been trained to respond to an allergic reaction. There are a number of online training resources that may help staff gain the necessary knowledge quickly.

Also, any materials necessary for treatment, such as an epi-pen, should be readily available in the new location. School districts should also explore what steps may be taken in the classroom or other lunch area to avoid exposure to food allergens. This might include use of cleaning protocols, providing opportunities for students and staff to wash hands before and after eating, and implementing new classroom rules such as not permitting students to share food. In some cases, a food allergy may be severe enough that districts may consider banning certain types of foods in the lunch area and classroom. Designating allergen-free zones may be useful, although districts should be cautious implementing plans that isolate students with allergies.

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

If your district teams decide to make adjustments for this year, make sure the changes are well documented. Amendments to Section 504 or IEP plans may be necessary. It is also important to clearly indicate that some changes may only be applicable while COVID-19 protocols are in place. You should contact our special education legal team if you have questions about how or whether a student requires accommodations.

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## Court Denies Unemployment Benefits to Striking Employees

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In a novelty decision, the Fifth District Court of Appeals of Ohio has upheld a trial court decision affirming the denial of unemployment benefits to 51 non-teaching employees who went on strike after OAPSE and the Board of Education were unable to reach an agreement on a successor contract.

In Ohio, employees are entitled to unemployment benefits in cases of a lockout. However, employees engaged in a labor dispute during which they can continue working while negotiations proceed are not eligible for benefits. Here, the Unemployment Commission found that the employees were engaged in a labor dispute, other than a lockout when they applied for benefits and were therefore not eligible.

The Ohio Supreme Court has defined a lockout as a “cessation of the furnishing of work to employees or a withholding of work from them in an effort to get for the employer more desirable terms.” A lockout can be actual or constructive. A constructive lockout occurs when “the conditions of further employment announced by the employer are such that the employees could not reasonably be expected to accept them and the terms manifest a purpose on the part of the employer to coerce his employees into accepting them or some other terms.”

In reconciling these disputes, the Unemployment Commission will analyze whether the employer will allow employees to continue working under the status quo of the expiring agreement while negotiations continue and whether the employees agree to continue working. It boils down to whether management or the union changed the status quo.

The court found that the record established that the Board did not withhold work in an effort to gain a bargaining advantage. The applicable CBA expired in July of 2017. The parties began negotiating in April of 2017 and the Board permitted work to continue under the preexisting agreement all the way into March of 2019 when the strike commenced. The Court further found that the Board had made a last, best, and final offer to the union but did not implement it or threaten to implement it. Therefore, the Court found that it was not the employer who had changed the status quo. The union, on the other hand, did not act reasonably under the circumstances because it could have pulled its strike notice, continued to negotiate and continued to work while doing so, and then it could have ultimately refiled the strike notice if need be. Because it was the union that changed the status quo, and doing so was unreasonable under the circumstances, there was credible evidence for the Unemployment Commission to find that the employees were ineligible for benefits because they were not subjected to a lockout.

Ohio Assn. of Pub. School Emps. v. Unemp. Comp. Rev. Comm., 2020-Ohio-4028

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## Tackling Masks and Requests for Exemption

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Likely, you have already received exemption requests from the requirement for students and teachers to wear masks. Some districts have created forms to streamline the process of requesting an exemption, which also serves to meet the requirement to document the requests and the reason for an exemption.

The reasons for requesting an exemption from the requirement to wear a mask include:

1. If a student or staff member has a physical, mental, or developmental condition that prevents him or her from wearing a mask.
2. A religious exemption, which states there must be an “...established sincerely held religious requirement exists that does not permit a facial covering.”

3. Face masks do not have to be worn while eating and drinking while seated, while actively participating in recess or physical education when 6 feet apart.
4. During lessons when needed (language instruction or while playing an instrument).
5. When students are 6 feet apart and the teacher determines a “mask break” is necessary.
6. When an individual is alone in an office or other enclosed space.

Deciding whether a religious belief is required by the religion and how the First Amendment impacts these decisions are best made on a case by case basis with legal counsel. These decisions also may have other considerations, which make them a good choice to discuss with counsel. Requiring the parent to provide some evidence of the religious requirement that prevents a facial covering is reasonable. Districts have a compelling interest in ensuring safety for all students and staff. Discuss the issue of students with mask exemptions in your meetings with the local health department. It is helpful to know how the health department advises handling students (i.e. placement in classrooms, virtual instruction, risk factors to the entire school population) without masks or if the advice changes if a significant percentage of students are exempt from wearing masks.

Other areas warranting attention are the “mask break” language of the order, which states that where students are able to maintain six feet of distance and a mask break is “deemed necessary by the educator supervising the educational setting.” Provide guidance to teaching staff concerning the use of these breaks and your district’s expectations, including the duration and conditions for a “mask break.” Without parameters, some teachers may interpret this language with widely varying outcomes- or administer it according to their personal beliefs rather than a uniform district/building approach. Remember, the general rule is that masks are to be worn indoors, including in classrooms.

Another exception is the “snack and meal time” mask break time: We recommend discussing this at the district/building level so there is a shared understanding that wearing masks is the rule and eating and snacking are the exception. These breaks should be limited by set times such as the student’s lunch time, or as their disability requires.

Staff members also may make requests for exemption, and districts should consider whether these requests are warranted based on their facts and circumstances. Districts may request medical or other supporting documentation to consider the basis for the request (for students or staff).

A word on face shields: Face shields are not an adequate substitute for a mask, per an Ohio Department of Health FAQ and CDC guidance. However, face shields may be used to supplement mask protection. In addition, they may be used when one of the exemptions; such as communicating with a hearing-impaired person or English language learner, applies.

Don’t forget your transportation department. Students must wear masks while waiting for or riding a school bus.

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## **Liability Bill (HB 606) Offers Additional Protection During Pandemic**

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House Bill 606, a civil immunity bill that was proposed in May, but not enacted before the Legislature’s summer break, was enacted upon the acceptance of the conference committee report in both the House and Senate on September 2. It currently awaits the governor’s signature. The bill includes uncodified language that is intended to provide temporary civil immunity (From March 9, 2020 until September 30, 2021) for claims related to transmission of or exposure to COVID-19. This protection is in addition to the statutory immunity already provided to government entities, including public school districts, under Chapter 2744 of the Revised Code. This temporary immunity may be offered as a defense by a school district in a civil lawsuit and will provide protection from liability, as long as there is no evidence that the District or a District employee engaged in reckless conduct or intentional misconduct. Under

the bill, reckless conduct occurs when a person “with heedless indifference to the consequences . . . disregards a substantial and unjustifiable risk” and acts in a way that is likely to cause an exposure to or transmission of COVID-19.

Perhaps most importantly, the bill includes a declaration that no government order, recommendation or guideline creates or should be construed as creating a duty of care on an individual that may be forced in a cause of action or that creates a new cause of action or substantive right to sue a school district or other government entity. This protection will help districts defend against lawsuits brought by an individual who claims the district acted recklessly when it failed to comply with a government order or recommendation.

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

While public school districts in Ohio already receive broad statutory immunity, this bill might provide additional defenses against lawsuits brought by staff, students or community members who are exposed to COVID-19 while attending school or a school-related event.

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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 Barb Billow at [bbillow@ennisbritton.com](mailto:bbillow@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:

- 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.
- Upcoming Coffee Chat Dates: September 17, October 1, October 15 and October 29, November 1.

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!

**September 15: Southern Ohio ESC  
*Education Law Legal Update***

Presented by Gary Stedronsky and Bill Deters

**September 24: OASPA Fall Conference  
*Education Law Legal Update***

Presented by Hollie Reedy and Jeremy Neff

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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 Barb via [bbillow@ennisbritton.com](mailto:bbillow@ennisbritton.com) or phone at 513.421.2540. 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:

John Britton  
Bill Deters  
Ryan LaFlamme  
Robert J. McBride  
Bronston McCord  
Jeremy Neff  
Hollie Reedy  
Giselle Spencer  
Gary Stedronsky



# Attorney Directory

**John Britton**

6000 Lombardo Center, Suite 120  
Cleveland, Ohio 44131  
P: 216.487.6673  
C: 216.287.7555  
Email: jbritton@ennisbritton.com

**William M. Deters II**

1714 West Galbraith Road  
Cincinnati, Ohio 45239  
P: 513.421.2540  
C: 513.200.1176  
Email: wmdeters@ennisbritton.com

**J. Michael Fischer**

1714 West Galbraith Road  
Cincinnati, Ohio 45239  
P: 513.421.2540  
C: 513.910.6845  
Email: jmfischer@ennisbritton.com

**Ryan M. LaFlamme**

1714 West Galbraith Road  
Cincinnati, Ohio 45239  
P: 513.421.2540  
C: 513.310.5766  
Email: rlaflamme@ennisbritton.com

**Pamela A. Leist**

1714 West Galbraith Road  
Cincinnati, Ohio 45239  
P: 513.421.2540  
C: 513.226.0566  
Email: pleist@ennisbritton.com

**Robert J. McBride**

6000 Lombardo Center, Suite 120  
Cleveland, Ohio 44131  
P: 216.487.6675  
Email: rmcbride@ennisbritton.com

**C. Bronston McCord III**

1714 West Galbraith Road  
Cincinnati, Ohio 45239  
P: 513.421.2540  
C: 513.235.4453  
Email: cbmccord@ennisbritton.com

**Jeremy J. Neff**

1714 West Galbraith Road  
Cincinnati, Ohio 45239  
P: 513.421.2540  
C: 513.460.7579  
Email: jneff@ennisbritton.com

**Hollie F. Reedy**

300 Marconi Boulevard, Suite 308  
Columbus, Ohio 43215  
P: 614.705.1332  
C: 614.915.9615  
Email: hreedy@ennisbritton.com

**Giselle Spencer**

6000 Lombardo Center, Suite 120  
Cleveland, Ohio 44131  
P: 216.487.6674  
C: 216.926.7120  
Email: gspencer@ennisbritton.com

**Gary T. Stedronsky**

1714 West Galbraith Road  
Cincinnati, Ohio 45239  
P: 513.421.2540  
C: 513.886.1542  
Email: gstedronsky@ennisbritton.com

**Erin Wessendorf-Wortman**

1714 West Galbraith Road  
Cincinnati, Ohio 45239  
P: 513.421.2540  
C: 513.375.4795  
Email: ewwortman@ennisbritton.com

**Cincinnati Office:** 513.421.2540

**Cleveland Office:** 216.487.6672

**Columbus Office:** 614.705.1333