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School Law Review

Bullying and Statutory Immunity for Boards of Education, School Staff

On November 10, 2020, the Ohio Supreme Court issued a decision in *A.J.R. v. Board of Education of the Toledo City School District et. al*. The case was brought by the parents of a kindergarten student against a teacher, principal, assistant principal, and the Toledo Public School District Board of Education. The complaint alleged that the defendants were liable for failing to effectively respond to multiple incidents of bullying against their daughter while she attended school. Specifically, the parents claimed that the student was repeatedly picked on by classmates. One classmate targeted the student, and even caused a puncture wound with a pencil. The parents reported the bullying to staff on at least four occasions and were told several times by staff that the bullying would not continue. Eventually, the parents withdrew the student from school and filed the complaint.

The trial court granted summary judgment for each of the defendants including the staff members and school board, finding the parents failed to overcome the district's statutory immunity protection by providing sufficient evidence that the defendants disregarded a known or obvious risk of physical harm. The appeals court reversed, concluding instead that the district officials had failed to stop the bullying or effectively intervene after becoming aware of it. The matter was appealed to the Ohio Supreme Court.

In reaching its decision, the Ohio Supreme Court stated that under state law, school officials and boards receive broad statutory immunity. There are three exceptions: acts outside the scope of employment; acts or omissions made with malicious purpose, in bad faith, or in wanton or reckless manner; or when liability is expressly imposed by law. This case focused on whether the school employees acted recklessly or "in perverse disregard of a known risk."

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 | www.twitter.com/EnnisBritton | www.linkedin.com/company/ennis-britton-co-lpa

The Court unanimously ruled in favor of the teacher and school district. The Court concluded that there could be no finding of reckless behavior where the record establishes that staff took actions such as responding consistently to complaints of bullying, speaking promptly with students about teasing, frequently asking how students are doing, and actively monitoring students in the classroom and lunchroom. The Court also relied on evidence that the student who stabbed her classmate with a pencil had shown no previous behavior that would demonstrate she posed a risk of harm to others.

What this means for your district:

This case illustrates is the importance of promptly taking action when complaints are filed and just as important, following up after the completion of the investigations, not only in cases of bullying but also in all other cases where allegations of harassment may have been made. Because bullying may continue, staff actions to follow up are important in ensuring the situation does not continue. It also is imperative that these efforts are documented in writing and maintained.

***A.J.R. v. Lute et. al.*, Slip Opinion No. 220-Ohio-5168 (Ohio Nov. 9, 2020)**

Special Education Spotlight: Divorce and Due Process

Divorce, custody, school attendance and tuition are difficult enough without adding the IDEA into the mix. When divorced parents have contradictory opinions about the education and identification of their child such as whether they are eligible for IDEA services, or regarding the plan for placement or related services for their child, it can definitely complicate the situation.

On November 9, 2020, the U.S. Supreme Court denied to hear an appeal of an unpublished decision out of the 6th Circuit Court of Appeals. The Supreme Court's decision to deny the appeal supports a favorable case from our circuit which offers some helpful guidance about how custody battles might impact a parent's ability to challenge special education decisions.

The case was brought by a father who challenged the identification of his 2nd grade child as emotionally disturbed (ED) by filing for due process against the Solon City School District in Northern Ohioin April of 2018. Meanwhile in May of 2018, the mother was granted custody which included the sole right to make educational decisions for the child in a custody dispute. The hearing officer assigned to the due process found the father had failed to prove the school district had inappropriately identified the child, and the SLRO affirmed.

In May 2019, a year later, the father filed a federal district court action *pro se* (representing himself) to challenge the administrative proceedings. He alleged the child did not have a disability and there were procedural errors with the state administrative proceeding.

The district court ruled that father did not have standing to sue on behalf of his child (non-lawyers may not assert the rights of another person in federal court) and that he did not have standing to sue on behalf of himself, because he was not a "parent" as that terms is defined in the IDEA and its accompanying regulations. The court found that even though he is a biological, divorced parent, the regulations state that where a judicial decree grants the right to make educational decisions for a child to one person, that person (or persons) are the parent for purposes of IDEA. In this case, mother was the

only parent under the IDEA definition because she has the sole right to make educational decisions for the child.

The father appealed to the 6th Circuit Court of Appeals, which affirmed the district court's judgment. At no time from the filing of the federal claim did father have the right to make educational decisions for the child. Therefore, in this case, the court found that a parent who does not have the legal authority to make educational decisions as a result of a divorce and custody decree on behalf of the child may not bring a claim under IDEA.

What this means for your district:

Identification, placement or services disputes with divorced parents can be a complex situation. This ruling reminds us to carefully review divorce and custody decrees to ensure that the District is working with the parents who are legally able to make educational decisions. Some decrees give both parents the right to make educational decisions, in which case both parents likely meet the definition of parent under the IDEA and would have rights to challenge decisions made. Contact the EB Special Education team members to discuss specific situations.

***Okwudii F. Chuckwuani v. Solon City School District,* . No. 20-187, (writ of certiorari denied on November 9, 2020).**

Ohio Supreme Court Affirms Decision that the Ohio Student Privacy Act Forbids Release of Student Records of Deceased Student

In January 2020, we reported to you that the Second Appellate District Court in Ohio ruled the death of a student does not remove the legal protections of the confidentiality of student records. Find more details from the January 2020 report here. *State ex. rel CNN, Inc. v. Bellbrook-Sugarcreek Local School Dist.*, 2019-Ohio-4187.

This case was appealed to the Ohio Supreme Court, which issued a decision on November 5, 2020. By way of background, CNN and other local and national media organizations sought student records regarding a deceased adult former student who killed nine people and injured 27 others in a mass shooting in Dayton, Ohio on August 4, 2019. Relief was denied by a trial court and appeals court in Ohio.

The Ohio Supreme Court specifically found that school districts are "prohibited from releasing any personally identifying information about [a student] without … consent." The Court determined that there was no exception provided for in Ohio's Student Privacy Act, R.C. 3319.321, to permit the release of personally identifiable information when the student is deceased. While the Court mentioned the Family Educational Rights and Privacy Act (FERPA), it found that it did not need to consider the federal law as state law prohibited the disclosure of the requested record.

As a result, the Second Appellate District Court's decision was affirmed, through the Court's finding that the Ohio Student Privacy Act "unambiguously forbids disclosure of the requested records."

State ex rel. Cable News Network, Inc. v. Bellbrook-Sugarcreek Local Schools, 2020-Ohio-5149 (Nov. 5, 2020)

Court of Appeals Rules on Case Involving Termination of TTD Benefits

Temporary total disability (TTD) is a wage replacement benefit provided by the Bureau of Workers' Compensation (BWC) to employees who are temporarily unable to perform the duties of their job due to a work place injury that has been recognized ("allowed") by BWC.

TTD benefits increase the costs of the claim for the employer by increasing the reserve taken out to cover potential costs and by the corresponding impact of costs of the claim on the employer's premiums. Accordingly, it is in the employer's interest to reduce the period that an employee qualifies for TTD benefits in order to reduce overall BWC costs.

TTD benefits can be terminated for several reasons. The focus of this most recent Court of Appeals case is refusal of an offer of suitable work. TTD benefits may be terminated if an employee refuses a good faith offer of suitable alternative employment. Suitable employment is work that is within the employee's physical abilities, taking into account any restrictions for lifting, pushing, pulling or other physical activities that may be required for the work. For many employers, this may be a light duty position. Employers are not under any obligation to provide light duty work, but it may make financial sense to do so in some cases, particularly in the context of a workers' compensation claim.

In order for a good faith offer of suitable work to be a basis for terminating TTD, it must be in writing, it must describe the duties that the employee will be required to perform with enough specificity that the employee and his or her treating physician can determine whether or not the job offer meets the employee's physical limitations. A good faith offer is one that is clearly within the employee's limitations. At least 48 hours should be granted for the acceptance or rejection of the offer. It would be best if a job description specifying the duties is provided with the offer for the physician's review.

The question in this case is whether it matters if the employee has a good faith reason to reject the offer. In other words, can an employee, with good reason, reject an employer's job offer and still retain TTD benefits? The answer, is no.

Here, it was not in dispute that the offer was suitable and was made in good faith by the employer. It was therefore, a qualifying job offer sufficient to serve as a basis for terminating TTD if rejected. However, the magistrate to whom the case was assigned found that because the employee likewise had a good faith reason for rejecting the offer, the employee could retain the TTD benefits.

The Court of Appeals reversed. Whether the employee had a good faith reason to reject an offer would only be relevant to considering whether the employer's offer was made in good faith (e.g., employer says your light duty assignment is in Alaska). If the Employer makes a suitable offer in good faith, the only relevant inquiry is whether the employee is capable of doing the job. If the employee is capable, a rejection of the offer can be a basis for terminating TTD benefits. The Court reasoned that the law governing TTD follows the principle that there must be a causal relationship between the work-related injury and the claimant's inability to return to work to support an award of TTD compensation. That requirement would not exist if the claimant could reject an offer on grounds other than the inability to perform the work, even for reasons that are understandable and based in good faith.

If you have an employee who qualifies for TTD, consider whether there is alternative suitable employment or light duty work available that could be offered to the employee. If so, you will want to ensure that you

make a qualifying offer in writing. Contact one of the Ennis Britton Workers Compensation team members for assistance. We can help provide a qualifying offer and advise on filing a motion to terminate TTD when appropriate.

***State ex rel. Ryan Alternative Staffing, Inc. v. Moss*, 2020-Ohio-5197 (10th Dist. App. Nov. 5, 2020).**

Terminated Teacher Cannot use Mandamus to Overcome a Failure to file an Administrative Appeal

The Third District Court of Appeals of Ohio has affirmed the decision of a trial court granting summary judgment in favor of a board of education against a teacher seeking reinstatement through a mandamus action.

The teacher was in the process of completing the Resident Educator Program. At the time, teachers were required to obtain passing scores on five different tasks. Teachers were permitted to repeat failed or uncompleted tasks in subsequent years of the program and there was also an ability to obtain an extension for one year, in the event the teacher was unable to complete the tasks in time. Here, the teacher was granted such an extension.

During the extended year, the teacher completed the final two tasks and submitted them for scoring. The scores were to be released on June 30. This put the school board in a pickle because it needed the scores to determine if it wanted to offer the teacher another contract but also needed to inform the teacher by June 1 that it intended not to renew the teacher's contract or it would be forced to offer a contract. The Board chose to offer a one-year contract to the teacher at its meeting in May.

Subsequently, the teacher found out he failed one of the tasks and would not be issued a license. The teacher was unable to obtain another extension by law and ODE did not grant the teacher a substitute license. Accordingly, the teacher was without a teaching license for the coming school year. The Board of Education held a special meeting on June 7th at which it terminated the teacher's employment for the teacher's failure to pass the exam and obtain a professional license. The Board did not follow any of the teacher termination procedures contained in R.C. 3319.16, including providing written notice of the Board's action, time for a hearing, etc.

Subsequently, the RESA regulations were revised and ODE deemed that under the new program requirements, the teacher would have been issued a license. ODE issued a license to the teacher retroactive to July 1, a little less than a month after the Board took its action to terminate. The teacher, through the union, demanded that he be reinstated, and by letter the Board refused. A grievance ensued and proceeded to arbitration which was decided in favor of the Board because it had just cause to terminate.

The teacher then filed the mandamus action that is the subject of this case. A mandamus action is a lawsuit whereby a person requests a court to force a public entity or officer to do an act it has a clear legal duty to perform. The teacher asked the court to either require termination proceedings in accordance with 3319.16 or to reinstate the teacher with a one-year contract.

As a quick reminder, per R.C. 3319.16, a board of education may terminate a teacher contract for "good and just cause." Before terminating the contract, the Board must provide written notice of its intent to do

so, it must afford the opportunity for a hearing before the board or a neutral referee, it must then publicly adopt an order of termination setting forth the grounds for termination. A teacher has 30 days to appeal an order of termination by a Board of Education. **Note that you may have collective bargaining agreement provisions that place additional procedural requirements or limitations on this process.**

The issue on appeal was whether mandamus was an appropriate action because the teacher could have filed an administrative appeal of the board's decision to terminate under 3319.16 and thus had an "adequate remedy at law" negating the applicability of a writ in mandamus. This is not a novel question and the outcome here is not much of a surprise. The Court ruled that an administrative appeal under 3319.16 is an adequate remedy at law and so mandamus was not appropriate. The teacher should have filed an administrative appeal to challenge the decision of the Board.

However, there are several insights in the case into how courts may interpret the requirements of R.C. 3319.16 in a termination appeal, particularly where there may be procedural defects:

1. **Actual notice of the Board's action is all that is required to trigger the 30-day appeal period.**

   Even though the Board did not provide official written notice of its actions, there was sufficient evidence in the record, that the teacher knew of his termination well before he filed his mandamus action, and thus could have filed an appeal. The Court only assumed for purposes of the case but did not decide, that merely hearing from a third party who attended the board meeting that the termination had occurred constituted sufficient notice. In any case, do not rely on others to inform the employee of the Board's action. You want that appeal period to begin to run as soon as possible so get written notice to the employee as soon as possible.

2. **Even if the Board ignores completely the procedural requirements for termination, the termination is subject to an administrative appeal.**

   The right to the appeal is based on what the law requires the Board to do, not what it actually does. So even where there are procedural defects or no procedure at all, the employee still must be vigilant in filing an appeal or the trial court will not have jurisdiction.

3. A court has the authority to remand a matter back to a board of education for further proceedings.

   It is therefore possible that rather than reinstate a teacher, a court could remand back to a board of education to conduct appropriate termination proceedings.

A question that went unanswered was whether ODE backdating the license it granted to the teacher to July 1 would have negated the Board's just cause for terminating the teacher when it was apparent in June that the teacher would not have a license as of July 1, the first day of the contract. Had the teacher filed an administrative appeal, this may have been addressed by the court.

What this means for your district:

While it is always a good idea to follow applicable procedural requirements, failure to do so may not delay the employee's time to appeal. However, failure to follow procedures in a timely filed appeal may be cause for reinstatement or remand for further proceedings by the Board.

***State ex rel. Unterbrink v. Elida Local Schools Bd of Edn. 2020-Ohio-5378* (3rd Dist. App. Nov. 23, 2020)**

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

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.

Upcoming Presentations

Special Education Coffee Chats

The Ennis Britton Special Education Team invites you to join a series of facilitated conversations 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.

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.

This series has been offered since May. In light of the slowdown of new guidance and legislation we are moving to a monthly schedule. Just like you, we strive to be responsive to the changing situation with the pandemic and will revisit the scheduling and format of the Coffee Chats regularly.

If you are interested in joining us for this coffee chat, please contact our Legal Secretary, Hannah Reichle, at hreichle@ennisbritton.com to receive the Zoom conference link (it will be sent Thursday morning). If you have already signed up, 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 next Zoom conference for the 2020-2021 school year is set for Thursday, December 3rd 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.
- 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! 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!

December 4: OASPA Virtual Conference – *Everything’s Different, Nothing’s Changed: Special Education in 2020 and Beyond*
Presented by Jeremy Neff and Erin Wessendorf-Wortman

December 4: Brown County ESC/Southern Ohio ESC Legal Update
Presented by Pam Leist and Hollie Reedy

Follow Us on Twitter: @EnnisBritton
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 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:
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: 216.470.3392
Email: rmcbride@ennisbriton.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