



**March 2021**

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## Biden Administration Announces States Must Give Standardized Tests in 2020-2021 School Year

Unlike the spring of 2020, the United States Department of Education (“USDOE”) announced that it is “not inviting blanket waivers of assessments” for the 2020-2021 school year. While it appears that state testing must occur, the USDOE will permit flexibility in the administration of the assessments.

In a letter dated February 22, 2021, Ian Rosenblum of the Office of Elementary and Secondary Education restates that “President Biden's first priority is to safely re-open schools and get students back in classrooms, learning face-to-face from teachers with their fellow students.” To do so successfully, according to Rosenblum, “... we need to understand the impact COVID-19 has had on learning and identify what resources and supports students need.” The letter further states that assessments “play an important role in advancing educational equity.” The data provided through the assessments is necessary to help target resources and supports.

The letter recognizes that a business-as-usual approach would not suffice in these unusual times. The guidance suggests three areas of flexibility for states to consider in administering the assessments:

- Extending the testing window and moving assessments to the summer or fall;
- Giving the assessment remotely, where feasible; and
- Shortening the state assessment, to make testing more feasible to implement and prioritize in-person learning time.

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## What this means for your district?

While we are uncertain of specifics at this time, it appears clear that state testing for the 2020-2021 school year will occur in some form. We will continue to monitor developments on state assessments as additional guidance is issued by the Ohio Department of Education.

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## May Schools Discipline Students for Offensive Social Media Posts?

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### The U.S. Supreme Court will decide in *B.L. v. Mahanoy Area School District*

The U.S. Supreme Court recently agreed to hear a First Amendment case about student social media use related to extracurricular activities. In June 2020, the Third Circuit Court of Appeals affirmed a lower court's ruling in favor of a student who was removed from the cheer team after making offensive social media posts.

Frustrated with her lack of advancement on the cheer squad, the freshman student posted to Snapchat "*F\*\*\* school f\*\*\* softball f\*\*\* cheer f\*\*\* everything*" to her 250 followers. When peers on the cheer team reported the message to a coach, the student was removed from the team, but was later told she could try out again the following year. Her parents filed suit in a federal court on her behalf arguing that MAHS violated her First Amendment rights.

The school district contends that U.S. Supreme Court precedent justified its disciplinary action, especially a school's prerogative to discipline students' use of vulgar or plainly offensive speech established in *Fraser*.<sup>1</sup> School policy elevated expectations of behavior for student athletes, preventing them from tarnishing the school's image. Furthermore, cheer team rules discouraged "foul language" and required students to act with respect for the school, coaches, and others on the team. Negative internet posts about cheer also were prohibited.

The Third Circuit decided in favor of the student, because the Snapchat post was off-campus speech, and, thus according to the court, *Fraser* did not apply. It refused to give schools discretion to regulate vulgar speech in extracurricular activities while outside of school. The court also extended previous precedent -- ultimately concluding that *Tinker*, which allows schools to discipline disruptive speech, "does not apply to off-campus speech." The court determined that students' vulgar social media posts about school or school activities fall outside the parameters of school discipline. Though the court recognized *possible* discipline for violent posts, it punted that question for another day.

On January 8, 2021, The U.S. Supreme Court agreed to hear the case. The question certified by the Court was:

"Whether *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), which holds that public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus."

Legal arguments have yet to be filed, and oral arguments have not been scheduled. Look for updates from Ennis Britton as this case progresses.

## What does this mean for your district?

Schools struggle to determine appropriate student social media regulation, and courts have offered conflicting First Amendment guidance. While the Third Circuit decision is not binding for schools in Ohio, the Supreme Court decision will be, and Ohio schools will have to abide by it when it is issued. The decision may have a big impact on how athletic codes of conduct are written and enforced, and could have other impacts on discipline for off-campus speech with a nexus to school activities. In the meantime, Ohio schools should consider using restraint when disciplining students for social media posts outside of school, even those that could potentially disrupt the education environment or extracurricular activities.

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## Special Education Spotlight: IDEA Regulations Update

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In the November 2020 Special Education spotlight, anticipated regulatory changes for restraint and seclusion were reviewed. In addition to those changes, the entire set of Ohio administrative code regulations implementing IDEA is under review. As was noted in the restraint and seclusion article, Ohio generally operates on a five-year regulatory review process. The Ohio IDEA regulations were last updated in 2014. There has not been a major revision of the federal IDEA regulations in a decade, so Ohio has significant flexibility in revising its regulations as long as they do not conflict with the existing federal regulations.

The review of state IDEA regulations has been underway for more than two years. Various iterations of the rewrite have been floated, including essentially eliminating all portions of the regulations that mirror federal regulations and simply referring to the federal regulations. A common theme of the different approaches has been to better align Ohio's regulations with the federal regulations (i.e. to eliminate additional requirements from Ohio's regulations).

In July 2020, a complete set of the proposed Ohio regulations was published for public comment. This version looked very similar to the current regulations in format. It is mostly a copy of the federal regulations with limited additions of state-specific language. After public comment closed, the Ohio Department of Education continued to gather input and is now in the process of presenting proposed rule changes to the State Board of Education. Rules are being introduced four sections per month in committee, and it is anticipated that the full State Board will vote on all the regulations at its May 11, 2021 meeting.

Many of the proposed changes mirror the stated goal of aligning the state regulations to the federal regulations. The area that has drawn the most interest by far is parental consent for a change of placement (Ohio Administrative Code 3301-51-05(C)(5)). As published in July 2020, ODE recommended removal of this state-imposed requirement. ODE commentary on this change stated: "This portion is inconsistent with IDEA/Federal Regulations and that is why it was removed. Placement is an IEP team decision. The IEP team includes the parent."

Anecdotally, special education leaders who hold a strong position on this proposed change universally support it. With this change, parents would not lose their right to challenge changes of placement, and school districts would not be able to overcome stay put placement demands during due process complaints about proposed placement changes. However, the change would align Ohio IDEA regulations to the federal rules and the state rules for most peer states. It also would make important changes to the legal process for handling placement disputes.

Despite this, it is anticipated that ODE will not present the July 2020 version of the parental consent regulation to the State Board. Instead, ODE likely will propose no change to the current state-imposed consent requirement for changes of placement.

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

Currently, Ohio is not aligned with federal IDEA regulations or the regulations of other major states regarding consent for changes of placement. As a result, school districts may find themselves forced to choose between costly litigation to overcome parental consent or simply complying with parental demands, even when they may not be appropriate to a child's needs. The changes proposed by ODE in July 2020 would address this important issue while still leaving parents with significant rights to participate in placement decisions and to challenge placement changes.

It is important for public education leaders to speak up now to ensure that their input is considered alongside whatever input has led ODE to step back from the proposed removal of the state-imposed consent requirement. Major changes to the proposed regulations are not likely after the State Board acts in May. It is essential to contact ODE's Office for Exceptional Children and members of the State Board of Education before the May 11 meeting. State professional organizations also can be an important vehicle for sharing your input.

Please contact a member of the Ennis Britton Special Education Team with questions about the regulatory changes and how you can share your input with ODE and the State Board of Education.

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## **Ohio Court Denies Temporary Restraining Order to Halt Return to In-Person Instruction**

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Earlier this month, a judge in Hamilton County sided with the Board of Education of the Cincinnati Public School District ("Board") when she denied the Cincinnati Federation of Teachers' ("Union") motion for a temporary restraining order and preliminary injunction that sought to delay the return to in-person learning. *Cincinnati Fed. of Teachers v. Bd. of Education of the School District of Cincinnati*, No. A2100376 (Feb. 1, 2021).

The Board voted to resume in-person instruction beginning February 1, 2021. In response, the Union filed a motion for a temporary restraining order on the basis that the Board's decision to resume in-person instruction violated provisions of their collective bargaining agreement ("CBA"). In particular, the CBA provides that the Board and the Union will cooperate with one another in making reasonable provisions for the health and safety of its teachers. Additionally, the CBA provides that if a teacher believes that they are being required to work under unsafe or unhealthy conditions beyond the normal hazards of the job, then they have a right to file a grievance. In response, the Board argued that the court should dismiss the case because it lacked jurisdiction and because the Board has the express authority to make decisions regarding in-person instruction.

In reaching its decision, the court looked to §4 of the Norris-Laguardia Act, 29 U.S.C. §104, which generally prevents courts from granting injunctive relief involving labor disputes. However, an exception to this general rule applies if the controversy involves a labor dispute, an evidentiary hearing is held, the underlying dispute is subject to the arbitration procedure of the collective bargaining agreement, and the basis for injunctive relief is satisfied.

In evaluating the union's claim, the court relied on previous Supreme Court precedent which held that a union's claim that a board failed to provide them with notice and opportunity to discuss the closure of a facility fell under the exclusive jurisdiction of the State Employment Relations Board ("SERB"). *State ex rel. Wilkinson v. Reed*, 99 Ohio St.3d 106 (2003). The court analogized the union's "failure to cooperate" claim to the claim in *Reed*. Thus, the court concluded that SERB had exclusive jurisdiction over the claim and therefore, it was not subject to the arbitration process. Because the claim was not subject to the arbitration process, the union's claim did not meet the exception to the general rule that prevents courts from granting injunctive relief in a labor dispute.

The teachers in this case also filed a grievance due to their belief that they were being required to work under conditions which were unsafe or unhealthy. Though the arbitration process with respect to this grievance was proceeding, the union asked the court to issue a status quo injunction while the grievance was being resolved. In evaluating this claim, the court looked to a particular section of the CBA which stated that the Board is invested with the governmental authority and control of Cincinnati Public Schools. The provision further stated that the Board's authority includes the authority to make rules, regulations and policies that are necessary for the government of schools, the employees, and their students.

This court further noted that the Ohio legislature has vested superintendents and boards of education with almost unlimited reasonable authority to manage and control the schools within their districts. Courts will not interfere with grant of discretionary power, so long as it is exercised in good faith and is not a clear abuse of discretion. Here, the court determined that the return to in-person instruction clearly fell within the authority granted to the Board. Thus, the court concluded that the claims brought by the Union were not arbitrable and the court could not issue an injunction.

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

Ohio superintendents and boards of education have the ultimate decision-making authority in determining whether their schools return to in-person instruction and other decisions about the management and operation of the public schools. Courts recognize that Ohio has granted superintendents and boards of education with almost unlimited authority to manage and govern the schools within their districts. So long as boards and superintendents exercise this power reasonably and in good faith, without violating the laws of the state of Ohio, courts will seldom interfere.

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## **Ennis Britton Proudly Welcomes A New Member of Our Legal Team!**

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Ennis Britton is delighted to announce that Kyle Wheeler, Esq., has joined the firm. In addition to practicing in all areas of school law, Kyle joins the Special Education and Construction and Real Estate Practice Groups of Ennis Britton.

Kyle is not new to the firm or our clients, having clerked with Ennis Britton since Summer 2018 and throughout law school. As a law clerk, Kyle was exposed to multiple aspects of school law, including public and student records, legislation, special education, labor and employment, and civil rights. A strong writer, Kyle has researched and drafted legal memoranda, presentations and articles on unique questions of law and the impact of legislative and legal trends of public education.

Kyle is a 2020 graduate of Cleveland Marshall College of Law with the distinction of *cum laude*. He earned his undergraduate degree in Business Operations from The Ohio State University. Due to the COVID-related delay in the administration of the bar examination, Kyle was registered to practice law and certified for “Practice Pending Admission” (PPA) prior to his regular admission to the state bar. During his PPA, Kyle successfully argued a case in state court, and attended mediation proceedings and other litigation conferences.

Originally from Brunswick, Ohio, Kyle works in the Cleveland office of Ennis Britton. In his free time, Kyle enjoys golfing.

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## Firm News: Ennis Britton Super Lawyers for 2021!

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We are very pleased to announce that the highly reputed organization Super Lawyers has selected Ennis Britton’s Gary Stedronsky as a Super Lawyer and Erin Wessendorf-Wortman as a Super Lawyers Rising Star for 2021!



*Gary Stedronsky*  
Super Lawyer



*Erin Wessendorf-Wortman*  
Rising Star

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**Gary Stedronsky** is a shareholder who has been with Ennis Britton since 2003. He started as a law clerk while attending law school. As a member of Ennis Britton’s Construction & Real Estate Team and School Finance Team, he provides counsel to school districts throughout Ohio on matters related to property issues, public finance matters, tax incentives, and more. He is a published author and frequent presenter on many education-related topics. Gary received the prestigious Super Lawyers Rising Star award five years in a row and has received the Super Lawyers award three years in a row!

**Erin Wessendorf-Wortman** is a shareholder with the firm. As a member of the firm’s Special Education Team and Workers’ Compensation Practice Team, Erin represents school districts across Ohio on a variety of matters including labor and employment issues, civil rights, special education, public records, and more. She is a published author and frequent presenter on many education-related topics. Erin received the prestigious Super Lawyers Rising Star award four years in a row and this year has received the Super Lawyers award!

Super Lawyers is a national rating service that publishes a list of attorneys from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement.

To qualify as a Rising Star, an attorney must score in the top 93rd percentile during a multiphase selection process that includes peer nominations and evaluations combined with independent research. A Super Lawyers rating is considered a very prestigious designation in the legal field. Only those in the top 5 percent of the total lawyers in the state are selected to Super Lawyers, and only 2.5 percent of newer lawyers are selected to Rising Stars. We commend Gary for his selection to Super Lawyers and Erin for her selection to Rising Stars!

Visit the Super Lawyers [website](#) to learn more.

## Ennis Britton at ALAS

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**Theme: The Future is Now**  
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Hot Topics, Legal Updates and Dynamic Sessions

**Highlights**

- 20th Year Anniversary Celebration!
- Dynamic Virtual Experience
- Leaders from across Ohio
- 3 Semester Hours of Graduate Credit Available
- Group Discounts Available!

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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 may 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 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](mailto: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, March 4<sup>th</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.
- 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!

**March 5: Brown Co. ESC – *Superintendent’s Legal Briefing***  
Presented by Ryan LaFlamme

**March 5: OASPA Spring Conference**  
Presented by Ryan LaFlamme and Bill Deters

**March 11: Butler Co. ESC – *Superintendent’s Legal Update***  
Presented by Bill Deters

**March 19: Hamilton Co. ESC — *Superintendent’s Legal Update***  
Presented by Pamela Leist

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Follow Us on Twitter: [@EnnisBritton](https://twitter.com/EnnisBritton)  
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  
Kyle Wheeler

## **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  
Kyle Wheeler

## **School Finance**

Taxes • School Levies •  
Bonds • Board of Revision

### **Team Members:**

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Bill Deters  
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