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School Law Review

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Court Finds in Favor of Professor Who Refuses to Utilize Student's Preferred Gender Pronouns

This case arose because a philosophy professor at Shawnee State University (Portsmouth, Ohio) refused to abide by the University's policy requiring that he refer to students with pronouns corresponding to their gender identity. The professor is a devout Christian whose religious convictions influence his thoughts on human nature, marriage, gender, sexuality, morality, politics, and social issues.

At the start of the 2016-17 school year, the University informed its faculty that they were required to refer to students by their preferred pronouns. The professor was informed that he would be disciplined if he refused to use a pronoun that reflects a student's self-asserted gender identity. In his class that semester, a student requested to be referred to utilizing female pronouns, and the professor would not oblige. The professor then requested accommodations for his religious and personal views. The student then filed a Title IX complaint against the professor. The professor's request for religious accommodations were denied by the University, and the Title IX complaint resulted in a conclusion that the professor created a hostile environment for the students in his class; a violation of the University's nondiscrimination policies, which resulted in discipline.

Then, the professor filed a lawsuit alleging that the University violated his rights under the Free Speech and Free Exercise Clauses of the First Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Ohio Constitution, and his contract with the University.

The Sixth Circuit found that First Amendment free speech rules apply differently when it is government speech. Normally when public employees are speaking pursuant to their official duties, they are not speaking as citizens with First Amendment protections: therefore, the Constitution does not protect their speech/communications from employer discipline. However, in this case, the Sixth Circuit highlighted its belief that professors at public universities retain First Amendment protection – at least when engaged in core academic functions, such as teaching and scholarship.

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The Court rejected the argument that "…teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction." *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 680 (6th Cir. 2001). The Court recognized the professor's rights to academic freedom and freedom of expression within this case, including within that academic freedom the choice to use pronouns to shape classroom discussion. At the university level, this professor was able to make choices regarding gender identity for appropriate classroom discussion in his political philosophy courses.

In summary, the Court remanded the case back to the lower court for the lower court to issue a decision in compliance with the First Amendment rights recognized by the Sixth Circuit.

What this means for your District

While this case deals with speech from a university professor, and not that of a K-12 educator, it is a good case to be aware of when faced with situations that may arise from staff members who refuse to refer to a transgender student with the student's preferred pronouns or nicknames. Schools are required to recognize the academic freedoms that exist for educators, but how this will be balanced against the needs of minor students in the future will be one to watch. In this case, the Court was not remotely persuaded by the arguments of the University that a hostile environment was created by the professor's actions against the transgender students in his class, because the Court was not presented with any evidence or arguments that the student(s) was denied any educational benefits or opportunities.

Meriwether v. Hartop, (C.A. 6, 2021) 992 F.3d 492

Special Education Spotlight: OCR Issues Q and A

Arriving at a time that may be too late for many school districts, but right on time for others, the Office of Civil Rights (OCR) issued *Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment* on May 13, 2021. It applies in "…a situation in which elementary and secondary schools are closed for an extended period (generally more than 10 consecutive school days) because of exceptional circumstances, such as an outbreak of a virus or disease."

Recognizing that many schools across the country remain closed to in-person learning, OCR advises districts in the 27-question guidance of their continuing obligation to make individualized determinations for each student with a disability on how best to meet their needs if the student is not receiving traditional in-person instruction.

This may include the necessity to modify instructional material, provide equally-effective access to instruction, or relax safety and health protocols to accommodate students' disabilities. It mentioned such examples as extensions of time for assignments, videos with accurate captioning, and speech or language services through video conferencing as effective in remote learning.

The Q&A document covers more than just disability issues. It answers to common questions about schools' responsibilities under the civil rights laws OCR enforces, which prohibit discrimination based on race, color, national origin, sex, disability, and age by state and local recipients of Federal financial assistance. Accordingly, the Q&A has four sections:

1. Section 504 (discrimination based on disability)

2. Title VI (discrimination based on race, color, or national origin, including students who are English learners and students with undocumented status)

3. Title IX (discrimination based on sex)

4. Retaliation for reporting discrimination or filing a complaint

Looking at the Disability Discrimination section, here is what the Office had to say:

- It is not discriminatory for a school district to prioritize students with disabilities in returning to in-person learning. A district may consider whether a student has a disability when prioritizing students for in-person instruction. In returning to the physical classroom, schools and school districts also must continue to adhere to the Federal requirement that, to the maximum extent appropriate, students with disabilities receive their education in the same environment as their nondisabled peers. For example, in cases where schools can provide in-person learning only to some of their students, but not all, to meet the Centers for Disease Control and Prevention (CDC) safety guidelines, school leaders should develop criteria for prioritizing the opportunity for such instruction. For example, schools might prioritize offering the option of in-person instruction to younger students, students without reliable access to broadband or technology devices, students with disabilities, students experiencing homelessness, and/or others for whom remote learning is particularly challenging.
- Section 504 requires *individual* decision-making about the type of, frequency of, and manner in which special education and related services will be provided to students with disabilities. Accordingly, state-wide, district-wide, or school-wide policies that are designed to reduce or limit services for students with disabilities, without regard to the individualized needs of those students, violate Section 504.
- The CDC recommends that masks be worn at all times by all people in school facilities, including students. CDC notes, however, that a narrow subset of students and others with disabilities might not be able to wear a mask or cannot safely wear a mask because of their disability. Therefore, under Section 504, schools should make modifications for students regarding mask wearing as needed.
- Physical distancing might be difficult for students who have both visual and auditory impairments and require tactile interpreting or for students with disabilities whose education needs require close contact with school personnel. Therefore, schools must consider the student's 504 plan when addressing the student's disability-related needs that might be affected by physical distancing. Schools must take an individualized approach in determining how physical distancing might affect the services provided to students with disabilities. This individualized approach should be guided by information drawn from a variety of sources, including the student's 504 plan, the student's teacher, parents, medical personnel, and the results of any relevant tests administered to the student. The response also recommends the use of positive behavioral interventions and support for students with disabilities and all students to provide reminders about new safety procedures.
- A school district may not refuse to deliver remote learning or other educational services, including related services, until parents or guardians of students with disabilities sign a waiver of their student's right to services required by Section 504. To require such a waiver might violate the right

of students with disabilities to free, appropriate public education (FAPE) under Section 504. In cases of disputes about whether a school's decision to provide remote learning services for a student with a disability violates FAPE requirements under Section 504, parents and guardians may use the school's Section 504 due process procedures.

The Q&A document also addresses district obligations for other protected classes. As shown above, OCR has reinforced its stance on the priority of providing FAPE while serving students with disabilities during a pandemic. However, it's not unexpected that further guidance will come as the 2021-2022 school year commences.

School Funding Reform at the Center of Competing State Budget Plans

In early February, the Ohio House introduced HB 1. This bill, often referred to as the Cupp-Patterson Plan, proposes a significant overhaul of the State's school funding system. Chief among its objectives is developing a per-pupil funding amount that reflects actual costs, moving away from caps and guarantees, committing to a longer-term plan, and accounting for localized needs. The plan was developed during the prior session of the General Assembly and seemed poised for serious action before COVID-19 disrupted the legislative agenda.

HB 1 has enjoyed broad support among education groups, including disparate groups such as the Ohio School Boards Association and the Ohio Education Association. After it fizzled in the last session, it was widely expected to be a major part of budget debates during the first year of the current session. Not surprisingly, under Speaker Bob Cupp (the "Cupp" of "Cupp-Patterson") the House passed its budget proposal, HB 110, with HB 1 largely incorporated. The 70-27 vote on April 21 was somewhat bipartisan with 12 Democrats joining the Yeas and 6 Republicans joining the Nays.

Like the House, the Senate is dominated by the Republican Party, but this has not resulted in easy passage of HB 110 and Speaker Cupp's school funding reform plan. The school funding plan under consideration in the Senate moves away from the six year phase-in of the House plan, and instead provides initially larger increases in per-pupil expenditures with no commitment to longer-term increases. Notably, the Senate plan abandons the highly localized per pupil funding calculations of HB 1, and instead determines a single base cost to apply throughout the state.

Statements from leading Senators indicate a concern that the House plan would lead to unsustainable funding increases. Of particular concern to these Senators is the use of teacher salary increases as part of the calculation in base costs. They argue that increases in pay even since development of the formula mean that costs have already increased by hundreds of millions of dollars. Supporters of the House plan point to a dramatically improved state economy and tax revenues well above estimates as reasons to support an increased commitment to K-12 education. Instead, the Senate budget plan currently proposes a 5% reduction in income taxes.

Both the House and Senate budget plans move to a direct funding system for various school choice programs. This would eliminate the current process that often requires funding to be directed to school districts only to be deducted when a family uses a voucher or enrolls in a charter school. The Senate plan proposes a significant increase in voucher funding and the elimination of some restrictions on the opening of charter schools.

What this means for your District:

Joint testimony from the Ohio School Boards Association, Ohio Association of School Business Officials, and the Buckeye Association of School Administrators has urged adoption of the House plan as part of HB 110. Among other reasons, they point to the longer-term commitments and growth in K-12 funding offered by the House plan. They also point to the extensive efforts to gather stakeholder input to develop the original Cupp-Patterson Plan. Finally, they identify the process of developing an actual input/cost-based approach to identifying appropriate per-pupil funding as critical.

The current state budget expires at the end of June. In most budget years this means the General Assembly passes the new budget during a late night session on or about June 30. However, it must be noted that the current state budget was not passed until nearly two weeks into July 2019, after a temporary measure was passed to keep the government open. The time is now to share your views on the school funding reform plan, school choice funding, and other matters relevant to K-12 education. Current legislative activity is in the Senate. It is anticipated that in late June there will be a flurry of activity in both chambers as differences between House and Senate budget bills are resolved.

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 format 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.

Upcoming Presentations

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, as calendars book up quickly.

June 3: Chillicothe City Schools – *Level Up on Administrator Contracts*
Presented by C. Bronston McCord and Hollie Reedy

June 10, 202: OASBO Mentoring Lunch and Learn – *Level Up: Robert's Rules of Order*
Presented by Hollie Reedy

June 16: Mercer Co. ESC – *Administrator's Retreat Legal Update*
Presented by Ryan LaFlamme

June 21: Ohio Association of Career Technical Superintendents Summer Conference – *Superintendent Contracts & Legal Update*
Presented by Pamela Leist

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Want to stay up to date about important topics in school law?
Check out Ennis Britton's Education Law Blog.

Webinar Archives

Did you miss a past webinar, or would you like to view a webinar again? If so, we are happy to provide that resource to you. To obtain a link to an archived presentation, contact 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 may have a question in a more specialized area of education or public law. In order to help you obtain legal support quickly, 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

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