



**June 2021**

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## SCOTUS Affirms that Schools May Regulate Off Campus Speech

In a lengthy decision, the Supreme Court of the United States found that a Pennsylvania High School overstepped when it suspended a student from the cheerleading squad for using social media to criticize her exclusion from a spot on the varsity team and a private softball team. The High Court found the school’s actions to be a violation of the student’s First Amendment rights. However, the Court stopped well short of declaring that all off-campus speech is protected from school-based regulation.

After discovering that she did not make the varsity squad, and while shopping in a convenience store the following weekend, the student at issue (B.L.) took to social media to express her displeasure with the decision in two brief Snapchat posts - one of which included profanity. The posts

were initially shared with her social media friends, who shared the posts with other friends, including the child of the cheerleading squad coach. This upset team members and became a topic of chatter in a class taught by another coach. In response, B.L. was suspended from the JV squad for the upcoming year. This spurred the student and her parents to file suit in Federal Court.

After first granting a temporary restraining order and a preliminary injunction ordering the student’s reinstatement to the squad, the trial court ultimately ruled in B.L.’s favor, determining that there was no substantial disruption at the school. Further finding that the discipline violated B.L.’s First Amendment rights, the court awarded nominal damages, attorneys fees, and ordered the school to expunge the discipline from her record. The decision was upheld on appeal, with an added pronouncement that schools within the Third Circuit were not free to discipline for off-campus speech, which was partially defined in the opinion as “speech that is outside school-owned, -operated, or -supervised channels.”

The court went on to conclude that, since the speech here occurred off campus, the standard handed down in the oft-referenced case of *Tinker v. Des Moines Independent Community School District* (speech that materially disrupts classwork or involves substantial disruption or invasion of the rights of others) did not apply. This very

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narrow reading of *Tinker* may have prompted the U.S. Supreme Court to accept review to clarify, among other things, the application of the *Tinker* standard to student speech that occurs off campus.

In its June 23, 2021 opinion delivered by Justice Breyer, the Supreme Court held that school districts may have a special interest in regulating some off-campus student speech. However, that interest primarily exists only when the *Tinker* test is applied and in so applying finds that the student speech materially disrupts classwork or involves substantial disorder or invasion of the rights of others. However, unrestricted regulation of any speech that may relate to the school is unauthorized. In this case the Court opined that the student's speech was not disruptive to the school environment and therefore was subject to First Amendment protection.

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

While the media may portray this case as a victory for the student, in reality it is largely a carefully worded affirmation that, especially in the present technology age, actions away from school may have a disruptive impact at school. Yet the onus remains with the school to show how that disruption is manifested. The Court also affirmed a school's authority to apply discipline to extracurricular activities only. Districts are advised to review their board policies, codes of conduct and extracurricular guidelines for the necessary support of disciplinary consequences and notice of the possibility of corrective action for violations of school rules.

*Mahanoy Area School District v. B.L. ( Slip Opinion No 20-255)*

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## **Special Education Spotlight: IEP's and the COVID-19 Pandemic**

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As a result of the global COVID-19 pandemic, school districts across the country were forced to shut down and resort to virtual learning. The shift to remote instruction made it difficult, if not impossible to perform some services provided in students IEPs. Many parents are now claiming that as a result of these school closures and lack of in-person instruction, their children's academic, social or physical skills have shown signs of regression. They are filing complaints alleging that school districts be required to make up for the services that were not provided to their children during the pandemic.

Specifically, these complaints are seeking to require districts to provide their children with compensatory services. However, according to ODE, because school buildings were closed during the pandemic, the usual framework for determining whether compensatory services should be provided does not currently fit. School districts were forced into remote instruction and therefore did not fail to provide a FAPE (free, appropriate public education) simply because they stopped implementing a student's IEP as written for in-person learning. But this does not mean that districts are totally off the hook. Instead, the ODE (and other state education departments) is developing a remedy outside of IDEA and Ohio's implementing regulations and calling it "recovery services."

Based on advice from the ODE, school districts should be making case-by-case determinations on whether to provide these students with recovery services. ODE recommends considering the following questions to determine whether recovery services should be provided:

- Did the student make progress on his or her IEP goals and objectives prior to the ordered school-building closure period?

- What were the student’s baseline measures on his or her IEP goals and objectives prior to the ordered school-building closure period?
- Does the IEP team have documentation of the progress the student made during the ordered school-building closure period in the form of progress reports and other documentation?
- Did the district provide a FAPE to the student during the ordered school-building closure period?
- Was the student “accessible” during the ordered school-building closure period for the district to provide services?
- Did the parent or guardian refuse services during the ordered school-building closure period? If so, did the district document the refusal in a prior written notice?
- If the district provided a FAPE, did the student make progress?
- Did the student regress even with a FAPE provided during the ordered school-building closure period?

If it is determined that recovery services are needed, the District’s IEP team must then determine what services will actually be provided to the student and how that will be reflected on their IEP. During this process it is important that districts document the recovery services being provided, and the student’s progress with respect to these services.

Districts must realize that these recovery services are not a punishment for any failure to provide services. They are meant to help students recover from any deficiencies they may have suffered from as a result of the interruption of services caused by the COVID-19 pandemic. It is important for schools and parents to make a collaborative effort to best identify any services or support needed to ensure students bridge any gap left as the result of the pandemic.

**What this means for your District:**

We know every school district is reviewing the data of how all students performed over the last 18 months to determine what gaps and/or deficits exist. Expect that parent attorneys and advocates will be focusing intently on the progress of students with disabilities to ensure that the already present gap for some does not further widen due to the COVID-19 pandemic. Having a student’s IEP team review progress over the past year, inclusive of any closures or remote/hybrid learning, will be important to determining how a District provides FAPE. This is an area to watch moving forward to consider impacts within Ohio and nationally for how state education departments handle complaints from parents regarding services provided during the pandemic, as well as decisions from hearing officers on new “remedies” not provided for within IDEA and if FAPE can be impacted by pandemics.

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## **OCR Issues Letter of Interpretation Concerning Gender-Based Discrimination in Education**

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On June 16, 2021 the Office for Civil Rights of the U.S. Department of Education issued a Notice of Interpretation affirming its position that Title IX’s prohibition on discrimination on the basis of sex includes discrimination based on sexual orientation and discrimination based on gender identity.

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any education program or activity offered by a recipient of federal financial assistance. The Notice was prompted by the recent decision of the Supreme Court of the United States in *Bostock v. Clayton County*, where the court found that sex

discrimination under Title VII of the Civil Rights Act of 1964 encompasses discrimination based on sexual orientation and gender identity in the employment arena. OCR, which is responsible for enforcing Title IX's prohibition against sex discrimination in education programs and activities offered by recipients of Federal financial assistance, clarified that the High Court's reasoning and application in *Bostock* appropriately applies to any situations of discrimination based on sexual orientation and/or gender identity. The Department agreed with the Court that 'it is impossible to discriminate against a person' because of their sexual orientation or gender identity 'without discriminating against that individual based on sex.'" As both Title VII and Title IX specifically protect *individuals* against discrimination, the Department concluded that Title IX prevents recipients of Federal funds from sexual orientation and gender identity-based discrimination or harassment, and that to the extent other interpretations of the provision may exist, this is the best interpretation of the statute. This view is consistent with the Department's March 26, 2021, Memorandum from Principal Deputy Assistant Attorney General for Civil Rights Pamela Karlan interpreting application of the *Bostock* case Title IX.

Shortly after issuing the Notice of Interpretation the Department announced plans to amend the Title IX regulation enacted under former Education Secretary DeVos, indicating it will release a *notice of proposed rulemaking* to that effect in May 2022. According to the Department, the proposed amendment is intended to follow President Biden's *Executive Order on Preventing and Combatting Discrimination on the Basis of Gender Identity or Sexual Orientation* (January 20, 2021), and the *Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation and Gender Identity* (March 8, 2021). In to the notices of interpretation and rulemaking, the Department released a two-page fact sheet entitled, "Confronting Anti-LGBTQI+ Harassment in Schools: A Resource for Students and Families." These combined resources send a clear message regarding the Administration's commitment to gender equity in education.

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

While districts do not need to amend their Title IX policies and procedures at this time, the application of those policies and procedures must now extend to LGBTQI+ students and staff. Schools are officially "on notice" that the expectation of the federal government is that schools will commit themselves to protecting students in the LGBTQI+ community from discrimination and/or harassment in all educational opportunities and school activities, and that they will scrutinize any decision that appear to be on the basis of sex.

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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 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.

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## Upcoming Presentations

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### Presentations

We are currently scheduling administrator retreats for the 2021-2022 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.

**July 29: BASA New Superintendent Transition Program – *Pitfalls of the Sunshine Law and Board Meetings***

Presented by Pamela Leist and Hollie Reedy

**August 2: EB Webinar Series – *SCOTUS Ruling on High School Cheerleader’s Free Speech***

Presented by The Ennis Britton Team

**August 3: Greene County – *Legal Update***

Presented by Bronston McCord

**August 5: High Schools That Work – *Legal Update***

Presented by Erin Wessendorf-Wortman

**August 5: Trumbull County Administrator’s Retreat – *Legal Updates for Principals***

Presented by Pamela Leist

**August 6: Northwest Ohio ESC Administrator’s Retreat – *Legal Update***

Presented by Bronston McCord, Ryan LaFlamme, and Jeremy Neff

**August 6: Trumbull County Administrator’s Retreat – *Special Education Year in Review***

Presented by Pamela Leist

**August 6: Attendance, Tuition and Custody Law Workshop – *“I’m Back!” Handling Students Returning from Atypical Attendance Situations***

Presented by Giselle Spencer

**August 6: Ashtabula ESC Administrator’s Retreat – *Legal Update***

Presented by Hollie Reedy

**August 31: LRP National Webinar – *Anxiety’s New Look – Post-Pandemic Child Find and Eligibility Considerations***

Presented by 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 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

### **Team Members:**

John Britton  
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