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Parents of Bullied Student May Have the Right to Know Information Regarding the Discipline Imposed on the Harasser **Error! Bookmark not defined.**

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Parents of Bullied Student May Have the Right to Know Information Regarding the Discipline Imposed on the Harasser

The Family Policy Compliance Office (FPCO), which administers technical guidance regarding the Family Educational Rights and Privacy Act (FERPA), provided guidance regarding the release of information required following the conclusion of a discrimination complaint. Specifically, the FPCO addressed whether providing information to a complainant about the outcome of a discrimination complaint violates FERPA when such information involves or reveals the discipline imposed on the harasser.

The issue arose when an Office of Civil Rights (OCR) compliance resolution agreement required a district to revise its discrimination complaint procedures to comply with certain civil rights laws that require a school to notify the harassed or bullied complainant of the outcome of a discrimination investigation. The resolution agreement required the revised complaint procedures to state that notice of the outcome of a discrimination complaint would include the following information, when relevant: (1) that the discriminating individual is to stay away from the complainant, (2) that the discriminating individual is prohibited from attending school for a specified period, or (3) that the discriminating individual is being transferred to other classes or another school.

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FERPA protects the privacy of students' educational records and typically prevents a school from disclosing the type of discipline imposed on a student to another party. When presented with this possible conflict between FERPA's privacy requirements and OCR's requirement that the district release certain information regarding the outcome of a discrimination complaint, the FPCO indicated that it does not interpret FERPA as in conflict with the requirement that schools notify the harassed complainant of the outcome of an investigation because "...the information relates directly to the victim." Thus, the FPCO agreed with OCR's conclusion that this information should be released to the complainant. The FPCO also clarified that release of information regarding the harasser's discipline, when such discipline relates directly to the victim, applies to "all discrimination covered by the laws OCR enforces," not just harassment based on sex, as was presented in the case at issue.

Letter to Soukup, 18 FAB 33 (FPCO 2015).

How this Affects your District:

The general rule that school districts are prohibited pursuant to FERPA from releasing information regarding a particular student's discipline still applies. However, the FPCO has opined in this letter that there are exceptions to FERPA when civil rights discrimination cases are involved. Specifically, when a civil rights law requires the school district to disclose to the complainant the outcome of the investigation, such disclosure includes information related to the discipline of the harasser if the discipline relates directly to the victim. Practically speaking, these types of discipline disclosures help to protect the victim. The guidance does not advise school districts to release all information regarding discipline of the harasser to the complainant, however. Rather, if the discipline does not relate directly to the victim, release of information about the harasser's discipline would likely be a violation of FERPA.

Ohio Department of Education Orders Ohio Schools to Meet Special Education Requirements of Incarcerated Students

In March, 2015 the American Civil Liberties Union (ACLU) of Ohio filed a complaint against the Ohio Department of Education (ODE) alleging that students with disabilities at Cuyahoga County Juvenile Detention Center (CCJDC) were being denied special education services.

In August, ODE's Office of Exceptional Children issued findings letters to 14 Ohio school districts setting forth each district's specific deficiencies and a list of corrective actions that must be taken to reform special education services for children detained at CCJDC. The Office of Exceptional Children will monitor the implementation of the corrective actions as well as audit each district's special education services for detained students through May 31, 2016. Each school district was also ordered to award compensatory educational services to children who did not receive appropriate education while detained at CCJDC.

Federal law mandates that every student with a disability receive a free and appropriate education (FAPE) regardless of whether the student is expelled or detained at a juvenile or adult correctional facility.

The Ohio Operating Standards for the Education of Children with Disabilities generally requires that the school district where a child lives is responsible for providing the special education program. The school district of residence of the child's parents, with a few exceptions, is typically responsible regardless of which district or agency provides the educational services. This would include juvenile justice facilities. Section 3301-51-07 of the Ohio Operating Standards also applies to children with disabilities in adult prisons, with some exceptions.

How this Applies to Your District:

The school district in which a child resides is ultimately responsible for ensuring compliance with FAPE. Even if the child is detained at a juvenile justice facility, the school district of residence still is responsible for the child's access to appropriate special educational services while incarcerated. If you have any questions regarding incarcerated children, please do not hesitate to contact an Ennis Britton attorney.

Elementary and Secondary Education Act Reauthorization Bills Passed by the House and Senate, May Replace No Child Left Behind

The Elementary and Secondary Education Act (ESEA) has been overdue for reauthorization for seven years. In 2002, ESEA was reauthorized by President Bush and renamed No Child Left Behind (NCLB) which focused on mandatory assessments among student groups and many other reporting requirements, including offering school choice to schools not meeting adequate yearly progress, supplementary tutoring services to students, and much more.

Recently, both the U.S. House and Senate passed separate reauthorization bills to amend ESEA, effectively replacing NCLB. The House passed the Republican reauthorization bill, called the "Student Success Act" (SSA) on June 8, 2015 by a vote of 218-213. Eight days later, the Senate passed the bipartisan reauthorization bill, called the "Every Child Achieves Act" (ECAA) on June 16, 2015. After unanimously passing the Senate Committee on Health, Education, Labor and Pensions (HELP) by a 22-0 vote, the bill moved to the Senate where it passed 81-17.

Both bills are described by their proponents as "reflect[ing] a paradigm shift away from the one-size-fits-all assessments," promoting educator flexibility in the classroom by supporting innovation and creativity, and putting the focus on offering a well-rounded education to every child. Both bills seek to focus on academic progress while restoring the responsibility of improving student achievement to states, school districts, teachers, and parents. Other significant changes include the removal of federal assessment-based accountability systems and the inclusion of federal grants designed to offer funding to the lowest-performing schools.

Now that the two bills have passed their respective chambers, the next step is for the House and Senate to come together to work out the differences. Then a final bill will be sent to the White House for President Obama's signature.

The Student Success Act would give states authority to allow local school districts to design and administer their own local assessment systems in place of state assessments. States will be granted funds to review and reorganize assessment systems in order to improve the use of the assessments, as

well as to eliminate unnecessary tests. It also would allow parents to opt out of state testing requirements for their children.

The Every Child Achieves Act eliminates adequate yearly progress (AYP) by allowing states to create their own accountability systems. While the federal testing schedule remains intact, states are given limited flexibility. Federal teacher evaluation system requirements are eliminated but data reporting requirements for student subgroups are maintained. Under ECAA, states must adopt challenging state standards that the federal government is prohibited from determining or approving – the federal government will have no influence over this process. States will be required to identify struggling schools and the federal government will have no influence as in determining the appropriate methods of intervention.

ECAA also requires states to adopt standards to make students college- and career-ready and set achievement and graduation rate goals. Parents will receive information on how their children and the school are doing.

Previous versions of ECAA sought to enact “vouchers” that would allow resources to follow students from low-income families to the school of their choice, including private schools. While this amendment was not included in the final version of ECAA, there still may be attempts to include vouchers in the final ESEA reauthorization bill.

The House and Senate Come Together

In order for both chambers of Congress to pass an ESEA reauthorization bill, they must come together to merge the differences between SSA and ECAA. A committee of Senators and Representatives has been created to work out the differences between the bills. While the Democrats wish to strengthen accountability, particularly with regard to educating student subgroups, Republicans seek to reduce mandates and federal participation in state education by giving more flexibility to states and local school districts.

Some of the committee’s goal include: focus on academic progress of students via the restoration of responsibility to states, school districts, teachers, and parents to decide the best methods to improve student achievement; reducing the federal government’s role in order to empower parents and education leaders; and making sure federal law provides for all students, regardless of race, income, disability, or language status, access to a good education.

Secretary of Education Urges Further Improvements

U.S. Secretary of Education Arne Duncan asserts that the Senate bill is a step in the right direction for ESEA but admits that there is room for improvement. According to Secretary Duncan, a “good bill” will maintain the federal government’s role in protecting the most vulnerable students. Both congressional bills include amendments requiring the identification of struggling schools but Secretary Duncan believes the amendments do not specifically address how to solve such issues.

Secretary Duncan argues that reauthorization bills should expand access to high-quality preschools, ensure that schools receive the proper funding needed to do their jobs effectively, and that schools with a higher proportion of minority and low-income students receive an equitable share of funds and resources. He also calls for accountability and support for bold action for schools that consistently underperform and more focused resources for the lowest five percent of underperforming schools.

Lastly, he asserts that teacher innovation and creativity need to be supported especially when it positively affects the outcome for students.

How this Affects Your District:

While a reauthorization bill for the Elementary and Secondary Education Act is still a work in progress, expect changes to be coming soon. It is likely that states will become responsible for implementing standards for assessments and under-performing schools. Parents may be able to opt out of state assessments for their children.

Ennis Britton will keep you updated on the ESEA reauthorization process.

Appellate Court Affirms in Part, Reverses in Part and Remands Summary Judgment Orders in 11th Circuit “Rape Bait” Case

An Eleventh Circuit Court reversed in part and remanded a trial court decision regarding the use of an underage student in a “rape bait” sting operation. The student filed a complaint against the school’s Board of Education, principal, two assistant principals, and a teacher’s aide alleging violations of Title IX and section 1983 of the Equal Protection Clause.

Jane Doe, a female eighth grade special education student (“Doe”) was approached multiple times by a male eighth grade student (“CJC”) asking her to have sex in a bathroom. CJC had a history of discipline for sexual harassment allegations. Doe reported the propositions to a teacher’s aide who informed the principal. School policy required allegations of sexual harassment be reported to the principal who would then conduct an investigation. The principal told the teacher’s aide that they could not do anything about the harassment without having actually caught the student in the act.

Doe was propositioned again and reported it to the teacher’s aide. The teacher’s aide suggested accepting the offer so they could catch CJC in the act and have evidence to give to the principal. The teacher’s aide proposed this plan to one of the assistant principals who then allegedly ratified the sting operation. At this point the teacher’s aide thought someone else was handling the situation.

The teacher’s aide was worried about the plan and asked other teachers to check out restrooms to find the students. A teacher saw two pairs of feet in one bathroom stall but was uncomfortable with the idea of confronting them alone. He left the bathroom and asked another teacher for assistance. After the teachers found both students, CJC claimed they were making out consensually.

Both students were questioned by the school administration and the girl was taken to the hospital. Medical records from the examination were consistent with rape. At an expulsion hearing, CJC was sentenced to alternative school “pending investigation” of the rape. Based upon the investigation, CJC was allowed to return to school after two months. The incident was recorded in the school’s sexual harassment electronic database, iNOW, as an out-of-school suspension for a sexual offense due to inappropriately touching a female in the boy’s bathroom.

Doe filed a complaint with the district court alleging a violation of Title IX against the board and violations of section 1983 of the Equal Protection Clause and Substantive Due Process Clause against the board, principal, assistant principals, and teacher's aide.

The court of appeals found in favor of the board on the Title IX student-on-student sexual harassment claim.

During the trial, the board admitted to knowledge of CJC's disciplinary record containing multiple incidents of sexual harassment. The administrators were aware that CJC had been propositioning multiple female students for sex in a bathroom for several weeks. The court found that the board and administrators effectively participated in Doe's sexual harassment when the assistant principal ratified the sting operation.

The appellate court held that the board was deliberately indifferent to the sexual harassment. The school's only response to the incident was the decision to discontinue a one-day sexual harassment training workshop for school administrators. The appellate court held that a reasonable juror would find the school's lack of action in response to the rape was clearly unreasonable. The school continued their records retention policy of shredding student disciplinary paper documents each summer; the school continued to entrust the school secretary with iNOW database entries that were often terse and lacked detail; the school continued its policy of assigning suspected sexual harassers to janitorial duty that was often unsupervised.

The school's lack of policy change combined with the failure to offer any assistance to Doe to help her deal with her trauma and refusal to acknowledge the rape led the appellate court to determine that it was not unexpected for Doe to withdraw from the school. The court reasoned that her withdrawal did not bar a reasonable juror from finding that the board denied Doe an opportunity to receive an education at that school.

The appellate court reversed the decision of the trial court as it found that Doe satisfied all five elements needed to prove a violation of a Title IX claim.

Section 1983 Equal Protection Claims

The appellate court affirmed the summary judgment on the equal protection claims for the board and one assistant principal, and reversed the summary judgment for the principal, the other assistant principal, and the teacher's aide.

The court found that "Defendants violated her federally guaranteed right to equal protection by subjecting her to sexual harassment. Defendants exhibited deliberate indifference by failing to adequately prevent and respond to CJC's sexual harassment."

The appellate court concluded, however, that the board may not be held liable under section 1983 as it was not actually responsible for the sexual harassment. Under section 1983, a causal link between the board's actions and CJC's rape of Doe must be shown. The appellate court found that the board could not have foreseen a rape-bait scheme resulting from the "catch in the act" policy or its sexual harassment training policies.

The appellate court affirmed the grant of summary judgment to one of the assistant principals, as she was entitled to state-agent immunity under Alabama law. The assistant principal had no part in the actions resulting in the rape of the student, she was not responsible for the school's sexual harassment policies, and, unlike the principal, she could not dictate a response to CJC's rape of Doe.

The appellate court reversed the grant of summary judgment to the principal due to his deliberate indifference. He knew of CJC's history of sexual harassment and the only change he made to school policy in response to the rape was to discontinue sexual harassment training. The court reasoned that any reasonable state agent would have reformed school policy in light of clearly established law. The appellate court held that the principal was not entitled to state-agent immunity because he had fair warning that his actions were in violation of the Equal Protection Clause.

The appellate court reversed the trial court's decision to grant the teacher's aide summary judgment for the same reason as the assistant principal. While the assistant principal approved the plan, the teacher's aide created it.

Hill v. Cundiff, 11th Cir.No. 5:10-cv-02593-TMP, 2015 WL 4747048 (Aug. 12, 2015).

How this affects your district:

Ohio law regarding state-agent immunity differs from Alabama but the message is clear: school administrators who effectively participate in the sexual harassment of a student will likely lose their state-agent immunity. Perhaps more important is the guidance that a failure to enact policy reform after an incident may result in a violation of Title IX and section 1983 of the Equal Protection Clause.

This case also stresses the importance of staying up-to-date on sexual harassment training, maintaining an effective records retention policy and records of alleged student sexual harassment incidents, properly following investigation procedures, and properly disciplining students found to have violated student-on-student sexual harassment policies.

Legal Update: Changes to Educator Evaluations and Value-Added Safe Harbor

The New Alternative Framework

While the Budget Bill (Am. Sub. H.B.64) did not significantly impact the OTES/OPES model of teacher and principal evaluations, changes in the bill included modifying the alternative framework, which remains an option for school districts. Under the "new" alternative framework, the final summative rating will be comprised of at least fifty (50%) teacher performance, at least thirty-five percent (35%) student growth measures, and fifteen percent (15%) of one or a combination of alternative measures.

Since the requirements for the alternative framework in the statute previously provided a series of unpopular and little-used options (student surveys, teacher self-assessment, etc.), a fifth choice was added. The new fifth choice, "any other component determined by the Board," likely will be the focus of evaluation committees. We believe the implementation of choosing the new option must be, "in consultation with" district teachers. Note that this alternative component may include the option to increase the value of teacher performance or student academic growth measures and/or combinations of both.

Recent guidance from the Ohio Department of Education suggests that the alternative measure should be comprised of something other than teacher performance or student growth. However, in our discussions with Department personnel, it has been conceded that the discretion given to boards of education (i.e., “any other component”) by the legislature does not preclude utilizing either teacher performance or student growth measures to “fill” the 15% option. Our belief is that most districts will, at least initially, utilize the new option to use teacher performance data as part of all of the 15% portion of the alternative measures.

Two Year Prohibition for Use of Value-Added Data

In addition, the legislature added an un-codified provision to the budget bill, which prohibits a board of education from using the value-added progress dimension rating obtained from assessments administered during the 2014-2015 and 2015-2016 school years either for evaluations or when making major employment decisions including dismissal, promotion, tenure, and compensation for both teachers and principals.

The law also creates an exception to the prohibition. School districts have the authority to enter into a memorandum of understanding collectively with teachers and/or principals that specifying that the data will be used for evaluations or employment decisions.

Finally, the provision states that for teachers who teach in a grade level for which value added data is gathered, the teacher's evaluation shall be based solely on performance *if no other measure is available* to determine student growth (emphasis added). ODE has recently released guidance on stating districts will have two options for teacher and principals if there is no agreement to use value-added data. Districts may use other student growth measures such as student learning objectives (SLOs), vender-assessments for the entire student growth measure (SGM), or the remaining proportion that normally would be comprised of value-added data. Alternatively, districts may elect not to use *any* data for the SGM and instead use only the teacher performance rating. ODE recommends that districts utilize an option that includes student growth measures when possible.

Not included in the statute is any guidance regarding how the prohibition will impact collective bargaining agreements and memoranda of understanding that were in effect prior to September 29th, 2015, the effective date of the bill. It appears that any agreements in effect prior to September 29th for teachers will remain as is and control for the use of value-added data until the agreement expires, unless otherwise modified through the collective bargaining process.

We believe that districts wishing to keep value added as a component of their OPES process should meet with principals to determine if a collective consensus to do so develops. Any agreement reached should be memorialized in writing and signed by the parties.

Many districts already anticipated problems with the viability of value-added data and provided a “safe harbor” of sorts through policy and/or a memorandum of understanding. Most of those agreements, however, did not anticipate the total prohibition on the use of value added data in the budget bill. We anticipate that teacher groups will ask districts to negotiate agreements to incorporate the more comprehensive limitations on the use of that data rather than seek to extend the use of value-added data in current agreements.

OTES for Guidance Counselors

Another change of note in the budget bill regarding employee evaluations is a new statute that mandates annual evaluations for guidance counselors. Under R.C. 3319.113, the State Board of Education is directed to develop a standards-based evaluation framework for guidance counselors that does all of the following:

- Aligns with the standards for school counselors adopted by the Educator Standards Board
- Requires counselors to demonstrate their ability to produce positive student outcomes using metrics, including those from the school or district's report card
- Requires annual evaluations for all school counselors except those considered high-performing, and also that a written report be provided to counselors
- Provides for professional development of staff
- Results in final summative score of Accomplished/Skilled/Developing/Ineffective

Each local board of education must adopt a standards-based school counselor evaluation policy by September 30th, 2016. It will be implemented at the expiration of any CBA covering school counselors that is in effect on or before September 29th, 2015, or immediately during the 2016-2017 school year for those counselors not included in a bargaining unit. There will also be a reporting requirement for ODE, which presumably will be completed through eTPES or another similar system.

The Ohio School Counselor Association has developed a model guidance counselor framework. Although not officially endorsed by the State Board, it may provide insight into what the State Board's framework will be comprised of. You can view the framework at <http://www.ohioschoolcounselor.org/page-1611028>.

Evaluation Committee Work – A Full Agenda

School districts should consult with teachers and principals in the next few months to address important evaluation committee work, as districts will have a limited period of time to begin implementing any changes agreed upon at the start of the upcoming school year. The following items should be considered for committee work:

1. Consultation should address the “third” dimension of the alternative framework (15%) for those districts who are considering implementation of that option. This is so even if your current agreement has not yet expired, nothing prevents you from reaching consensus on adopting the new framework earlier.
2. If your district is intending on retaining the use of value-added data for the “safe harbor” years, the evaluation committee might develop the basis for a memorandum of understanding to that effect. If an MOU is developed, it could also be utilized as a template for a possible agreement with principals.
3. Finally, committees should also begin to look at the development of a standards-based school guidance counselor evaluation policy. The policy must be completed on or before September 30, 2016. The State Board will likely provide additional guidance on this as the year progresses.

If you have any questions regarding the recent changes to evaluations, please do not hesitate to contact us.

Upcoming Dates

As your school district prepares for the next couple of months, please keep in mind the following upcoming deadlines. For questions about these requirements, please contact an Ennis Britton attorney.

- **September 1** – Last day to verify whether the district has uncollected taxes and request the county auditor to certify the information concerning the district’s property values and taxes for the second preceding tax year (RC 3317.0211); Last day for the department to make the initial determination of satisfactory achievement and progress (RC 3317.40)
- **September 7** – Labor Day
- **September 15** – Last day for teachers who have completed training qualifying them for a higher salary bracket to file with the treasurer of the board of education of the completion of such additional training (RC 3317.14); Last day to file non-contributing employees salary report to SERS (RC 3309.55)
- **September 30** – Last day to file resolution specifying district’s intent not to provide career-technical education to students enrolled in grades seven and eight in order for the department to waive the requirement (RC 3313.90); Last day for the department of education to compute and pay additional state aid for preschool special education children to each city, local, and exempted village school district (RC 3317.0213)
- **October 1** – Last day for Board to adopt annual appropriation measure (RC 5705.38); Last day to provide emergency medical authorization form to the parent of every student (RC 3313.712)
- **October 5** – Last day for candidates for school board to file financial disclosure forms with the Ohio Ethics Commission (RC 102.02)
- **October 12** – Columbus Day
- **October 15** – Last day for certification of licensed employees to State Board of Education (RC 3317.061); Last day to file salary schedule and list of job classifications and salaries in effect (RC 3317.12); Last day to report immunization records of new students to director of health (RC 3313.67)
- **October 22** – Last day for pre-general campaign finance reports to be filed by candidates, political action committees, caucus committees, and political parties detailing contributions and expenditures from the last day reflected in the previous report through October 14, 2015 (RC 3517.10)
- **October 31** – End of first ADM reporting period (RC 3317.03, 3317.036)

Upcoming Presentations

SAVE THE DATE! 2015-2016 Administrator’s Academy Seminar Series

October 8, 2015 – Discrimination: What Administrators Need to Know

Webinar and Columbus, Ohio

January 7, 2016 - Ohio Sunshine Laws

Webinar and Youngstown, Ohio

April 7, 2016 - Special Education Legal Update

Webinar and Cincinnati, Ohio

July 14, 2016 - 2015-2016 Education Law Year in Review

Webinar only

Other Upcoming Presentations

September 17 – Special Education Law, NBI-Cleveland

Presented by: Jeremy Neff

October 27 – Law Related Education and Truancy, OSROA

Presented by: Giselle S. Spencer

October 1 - OASPA Boot Camp

Presented by: John Britton, Bill Deters, and Bronston McCord

October 27 – HR Essentials, OASBO

Presented by: Bill Deters

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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, send your request to Pam Leist at pleist@ennisbritton.com or 513-421-2540. Archived topics include:

- Managing Workplace Injuries & Leaves of Absence
- Special Education: Challenging Students, Challenging Parents
- Fostering Effective Working Relationships with Boosters
- Effective IEP Teams
- Cyberlaw
- FMLA, ADA and Other Types of Leave
- Levies & Bonds
- OTES & OPES Trends & Hot Topics
- Tax Incentives
- Prior Written Notice
- Advanced Topics in School Finance

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