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School Law Review

Two Separate Bills Seek to Restrict Board of Education Rights to Participate in the Board of Revision Process

June 2015

School districts are invited to voice their opposition to two recent bills that seek to severely restrict a board of education's ability to participate in the property valuation board of revision process.

SB 85:

Senate Bill 85 is yet another attempt by Senator Bill Coley to prohibit boards of education from filing original complaints against the value of real property. Senator Coley has proposed similar bills on a least two occasions. The prior bills never gained any traction but he is renewing his attempt. If successful, this bill will greatly harm Ohio's school districts and residential taxpayers.

As most of you know, Ohio school districts have the ability to file complaints contesting the value assigned to real property by the county auditor. In the vast majority of situations, school districts file these complaints when a sale occurs involving commercial property and the sale price is significantly higher than the auditor's current value. After all, Ohio law provides that the price paid in an arm's length transaction shall be the value for real property tax purposes, so it is only fair that property owners pay real property taxes based on a recent sale price.

Senator Coley seeks to prohibit a board of education from filing original complaints to increase property values to the amount that a willing buyer and seller agreed to. The affect of this will allow commercial taxpayers to escape taxation and not pay their fair share of real property taxes. This will also result in all residential taxpayers paying an increased real property tax rate.

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Two Separate Bills Seek to Restrict Board of Education Rights, Cont.

Please contact your local senators as well as Senator Coley (http://www.ohiosenate.gov/coley/contact, 614-466-8072) and his co-sponsors of this bill, Senator Bill Seitz (http://www.ohiosenate.gov/seitz/contact, 614-466-8068) and Senator Joe Uecker (http://www.ohiosenate.gov/uecker/contact, 614-466-8082), to voice your opposition.

HB 231:

House Bill 231 is sponsored by Representative Cheryl L. Grossman and Representative Jeff McClain. It seeks to impose unnecessary hurdles to a school district's ability to file complaints against property values.

This bill would require a school district to pass a resolution approving the complaint. The resolution must identify the parcel subject to the complaint, the name of the owner of the parcel, and the change in valuation being sought. It must also include the name and address of the legal representative of the school district and the fee charged by the legal representative.

This bill is unnecessary and overly burdensome. All complaints filed by a board of education are already public records that are readily accessible to the public. The complaints contain every piece of information that the proposed resolution is required to contain except for the fee paid to a school district's representative. However, that fee could also be found in other public records that are readily available to the public.

The impact of this bill will be to make it much more difficult for a board of education to file original increase complaints within the timeframe set forth under the law. Like Senator Coley's bill, any impediment that prevents a board of education from filing original increase complaints against commercial property will allow commercial taxpayers to escape taxation and result in residential taxpayers paying an increased real property tax rate.

Please contact your local representatives as well as Representative Grossman (http://www.ohiohouse.gov/cheryl-l-grossman/contact, 614-466-9690) and Representative McClain (http://www.ohiohouse.gov/jeff-mcclain/contact, 614-644-6265), to voice your opposition to this bill.

EEOC Proposed Rule Changes Employer Wellness Programs

The Equal Employment Opportunity Commission (EEOC), in an effort to join the goals of both the Americans with Disabilities Act and the Health Insurance Portability and Accountability Act (HIPAA), has proposed a new rule that limits the way employers can use information from employee wellness programs. The new rule would limit the medical information employers may seek, particularly regarding employees' disabilities. It would also limit the penalties an employer may impose on those employees who choose not to participate in wellness programs.

Employer wellness programs became popular after HIPAA banned employers from discriminating against individuals based on health factors through the use of health status underwriting, but allowed employers to offer incentives or penalties to employees based on their participation in group health benefit programs. The Affordable Care Act (ACA) later increased the incentives for employees choosing to participate, or penalties for choosing not to participate, in group health benefit plans to 30% of the cost of premiums. The proposed rule would extend the 30% cap to participation-based programs and would eliminate provisions based on outcomes. The 30% limit would also extend to non-participants.

While this proposed rule would reduce an employer's ability to promote employee participation by penalizing those who do not participate, a key provision of the proposal affects disability-related inquires or medical examinations, such as asking a question (or series of questions) that is likely to produce information about a disability**.** The proposed rule relates to all biometric, outcomes-based incentives where a participant has to disclose medical information, thereby limiting these participations. While an employee may be asked to respond to a disability-related inquiry or undergo a medical exam under the proposed rules, employees could not be required to participate and could not be denied health coverage or disciplined if they refuse to participate. Further, the information gained from a wellness program must be "reasonably likely" to promote health or prevent disease. Employers may not see any individual's medical information that it collects and must provide notice to employees that describes what medical information will be collected, with whom it will be shared, how it will be used, and how it will be kept confidential. Further, the proposed rule makes clear that those wellness programs may not be used to discriminate based on disability and that individuals with disabilities must be provided reasonable accommodations that allow them to participate in wellness programs and to earn the incentives offered by the employer.

The proposed rule was approved by a bipartisan vote and is open for public comment through Friday, June 19. You may submit comments, identified by *RIN number* 3046-AB01, by going to the Federal eRulemaking Portal at *http://www.regulations.gov* and follow the instructions for submitting comments.

Exclusion of Student Deemed Safety Risk from School Grounds

Can a student with a disability who has repeatedly shown to be a safety risk to others be banned from school property and prohibited from attending school?

A Michigan student with a disability who had become physically violent on multiple occasions while attending an alternative high school was told to leave the building and not return after he attacked the school's security liaison. This 6-foot, 250-pound high school student had previously kicked, punched, and spit on students and staff members, threatened to rape a female staff member, and threatened to stab two staff members with a pen.

Prior to the final attack, his attendance was reduced to one hour a day by the IEP team. On the day of the final incident, he tried to force his way back into the building and four staff members were needed to hold the door shut to prevent his forceful re-entry. The student continued to threaten to bring guns to school, made racist comments to staffers, and punched the school's director in the face.

The District Court granted the Michigan district's motion for an injunction that temporarily banned the student from school grounds and agreed that the district could educate the student through an online charter school program.

In this case, an administrator's statements that a student had become physically violent on multiple occasions while attending an alternative high school in Michigan convinced the U.S. District Court that the district could temporarily ban the student from school grounds. Since the student had threatened to bring guns to school, made racist comments to staffers, and punched the school's director in the face, his presence created an unacceptable risk of serious bodily injury. The court agreed that education through an online charter school program satisfied FAPE.

Wayne-Westland Cmty. Schs. V. V.S. and Y.S., 64 IDELR 139 (E.D. Mich. 2014).

How this affects your district:

In Ohio, violent behavior alone, without serious bodily injury, may not be a sufficient reason to remove a student with a disability from school for more than ten consecutive days. Under IDEA, if the student's conduct is a manifestation of the student's disability, the student must be returned to the placement from which he or she was removed (except when the behavior involves weapons, drugs, or serious bodily harm), unless the parent and the district agree to an educational change of placement. However, these situations are challenging due to the competing rights of the student and the need to maintain the safety of others. Although it should not be the first resort, involving law enforcement may be an option for violent students who are near or have exceeded 11 days of removal and removal under IDEA is not an option. Additionally, districts have the option of filing an expedited due process hearing.

Supreme Court Denies Certiorari of Two First Amendment Cases

Recently, the United State Supreme Court declined to review appeals in two contentious education cases dealing with the First Amendment. One case involved the restriction of student speech on school property, while the other dealt with a church's right to use a public school building for religious services on the weekend.

In *Dariano v. Morgan Hill Unified School District*, several high school students in California wore American flag shirts during their school's celebration of Cinco de Mayo. Citing an incident between white students and those of hispanic descent the previous year, and in an attempt to reduce tension and hostilities between the two groups of students, the principal told the white students to either reverse their shirts or leave school property. After the incident, the students and their parents sued the school district claiming a violation of free speech.

In their appeal, the students cited *Tinker v. Des Moines Independent Community School District*, a 1969 Supreme Court decision that upheld students' rights to wear black armbands in protest of the Vietnam War, with the qualification that the school not be substantially disrupted. The plaintiffs in *Tinker* have since become advocates for student free expression and claim that the Supreme Court "has never squarely returned to the question of student political speech at school." However, since its decision in

Tinker, the Supreme Court has further restricted student's rights to free speech. In 1983, the Supreme Court allowed a principal to censor a student newspaper which had articles about pregnancy and divorce, stating that those issues did not comport with the school's values or educational mission. In 2002, the Supreme Court again allowed educators to suppress student speech at a school event that was contrary to the school's compelling interest in deterring illicit drug use by students.

Prior to the appeal to the Supreme Court, the Ninth U.S. Circuit of Appeals denied the student's free speech claims, stating the principal's actions "were tailored to avert violence and focused on student safety." In March 2015, the U.S. Supreme Court justices refused to hear the students' appeal without comment, which, in effect, allows the decision of the Ninth Circuit to stand.

The second case, *Bronx Household of Faith v. Board of Education of the City of New York*, addressed a church's right to use a public school building for weekend worship services.

The two issues in this case were whether a government policy expressly excluding "religious worship services" from a broadly open forum violated the Free Exercise Clause and Establishment Clause; and second, whether a government policy expressly excluding "religious worship services" from a broadly open forum violated the Free Speech Clause. The congregation argued that New York City allowed a variety of groups to meet in their public schools and, therefore, should not expressly disallow religious worship services.

A panel of the U.S. Court of Appeals for the Second Circuit in New York City ruled that the church was not entitled to a grant from the New York City school district for a subsidized place to hold religious worship services under the First Amendment's free exercise clause. The Court of Appeals went on to say that the city school system "has substantial reasons for concern that hosting and subsidizing the conduct of religious worship services would create a substantial risk of liability." This liability arises under the First Amendment's prohibition against government establishment of religion.

The Supreme Court justices also denied this appeal, which marks the third time that the justices have refused to get involved in a dispute between a small church congregation and the country's largest school system over the use of the schools for church services.

Dariano v. Morgan Hill Unified Sch. Dist., 767 F.3d 764 (9th Cir. 2014) *cert. denied sub nom. Dariano ex rel. M.D. v. Morgan Hill Unified Sch. Dist.*, 135 S. Ct. 1700 (2015).

Bronx Household of Faith v. Bd. of Educ. of City of New York, 750 F.3d 184 (2d Cir. 2014) *cert. denied*, 135 S. Ct. 1730 (2015).

How this affects your district:

The Supreme Court's denial of the *Dariano* case indicates that *Tinker* and its prodigy remain good law. Schools have authority to restrict student's free speech in instances when the free speech is likely to incite violence or disruption, or is adverse to the school's educational mission, and the restriction is focused on student safety.

Although not binding precedent, the *Bronx Household* case illustrates that in at least some federal circuits, it may be allowable for public school districts to deny religiously based groups access to their public buildings for purposes of religious worship unless state law or district policy states otherwise. However, districts may not discriminate by denying some religious activities, such as community worship services, while allowing other religious activities, such as community prayer groups.

Records Relating to Threats to a Public Office are Not Public Records Under Ohio Law

The Ohio Supreme Court has held that security records, specifically records of threats made to a public office, are not public records and therefore do not have to be released.

In this case, a journalism company sent a public records request to the Department of Public Safety requesting an investigation report of threats that were made against the Ohio Governor. The Department refused to produce any records out of concern for the safety of public officials, stating that detailed information on "protective measures and procedures, personal threats and their analysis" were not public records under ORC § 149.43. The journalism company filed an action to require the Department to produce the requested records.

In support of its argument, the Department cited ORC § 149.433 (A)(3). This subsection states that information directly used for protecting a public office; information prepared to prevent, mitigate, or respond to acts of terrorism, including response plans; and emergency management plans are security records and may be withheld from public disclosure.

Further, a public office is more than the building and the physical facilities. A public office also includes the officeholder and the employees who work in the office. Thus, records that contain information directly used to protect and maintain the security of the officeholder will also be used to protect and maintain the security of the office itself. The public disclosure of threats, even those that are not credible, would increase the risk to the safety of the Governor and others. Additionally, documents relating to security planning, response plans, techniques and the treatment of threats are used to protect or maintain the security of a public office and are also considered security records.

The Court agreed that the report was a security or infrastructure record and found that the journalism company did not prove that it was entitled to the report because a security record or infrastructure record kept by a public office is not a public record under ORC § 149.43 and is therefore not subject to mandatory release or disclosure.

State ex rel. Plunderbund Media v. Born, 141 Ohio St.3d 422 (Ohio Supreme Court 08/27/14).

How this affects your district:

Although this case involved a threat to the Governor, it is applicable to records pertaining to threats to public schools and their employees, particularly when such threats involve the details of emergency management plans. Emergency management plans are designed to protect both the physical facilities of the school district and the people in them. Both students and staff are placed at risk if this type of information regarding threats is disclosed to the public. Therefore, such information, plans, and protocols are considered protected documents and exempt from public records laws.

When in doubt as to whether a requested record is a public record or a security record exempt from disclosure, consult an Ennis Britton attorney.

OHSAA Guideline on Student Athletic Eligibility

In addition to local and state mandated requirements, students maintain athletic eligibility by complying with the Ohio High School Athletic Association (OHSAA) standards. The following provides guidance on recent changes to OHSAA eligibility requirements beginning in the 2015-2016 school year.

Seventh and eighth graders are eligible to participate in interscholastic athletic programs under OHSAA so long as they meet the requirements of the scholarship bylaw. The scholarship bylaw states that a student must be currently enrolled in a member school and have received passing grades in a minimum of five of the classes in which the student is enrolled in the immediately preceding grading period. Home educated, non-public, community and STEM school students participating under state law must also comply with these requirements.

Beginning ninth graders must have passed a minimum of five of all the subjects in which the student was enrolled in the immediately preceding grading period (in eighth grade). For the remainder of ninth grade through twelfth grade, a student-athlete must have received passing grades in a minimum of five one-credit courses, or the equivalent, in the immediately preceding grading period.

Eligibility Calculation

Under OHSAA, eligibility is determined by the grades received in the grading period immediately preceding the grading period for which the student-athlete is seeking eligibility. The grading period is defined as the school's board-adopted calendar, which may be a six week, nine week, twelve week, or semester long period. Interim, biweekly, or weekly evaluations are not considered grading period for purposes of OHSAA eligibility, and a student's eligibility cannot be restored after these evaluations. Additionally, the OHSAA has no minimum grade point average requirement but requires student-athletes to pass their courses in order to receive credit towards eligibility; GPA requirements are strictly a local school district matter.

To determine credit equivalency:

- The multiplication factor used is determined by the duration of the course.
  - Full-year courses equal a factor of 1.
  - Semester courses equal a factor of 2.
  - Twelve-week courses equal a factor of 3.
  - Nine-week courses equal a factor of 4.
- First, multiply the course credit earned by the appropriate multiplication factor.
  - Failing grades do not result in credit.
- Then, sum the products of the course credit and multiplication factor.
- To be eligible, the sum must be greater than or equal to 5.

Example:

Subject	Grade	Credit/Duration	Factor	Credit Equivalency
English	C	1 credit - all year	1	1
Spanish	B	1 credit - all year	1	1
Health	D	¼ credit - semester	2	½
Algebra	F	1 credit - all year	1	0
Computers	A	½ credit - semester	2	1
Social Studies	A	½ credit - semester	2	1
Total Credits				**4.5 = not eligible**

The calculation for credit equivalency for those students participating in the College Credit Plus (CCP) program has also changed. Eligible students selecting to participate in CCP must be certain of the following: (1) the faculty members at the post-secondary institution understand that they will need to provide grades or a progress report at the time when the high school's grading period is over; and (2) the student-athlete is taking enough post-secondary course work exclusively or between the postsecondary institution and the high school combined to be equivalent to five one-credit courses. Under these new guidelines, it is acceptable for a student athlete to take all their courses in CCP. CCP courses that are three or more semester hours of credit earn one Carnegie unit. CCP courses that are less than three semester hours of credit will be awarded fractional Carnegie units. Post-secondary institutions that are on the semester system will multiply the Carnegie units by a factor of two.

Student-athletes considering transferring schools should be made aware that transferring may affect their eligibility. If a student transfers at any time after the fifth day of the student's ninth grade year or after having established eligibility by playing in a contest up until the one year anniversary of the date of enrollment in the school to which the student transferred, the student shall be ineligible for all contests until after the first 50% of the maximum allowable regular season contests in those sports in which the student participated during the twelve months immediately preceding the transfer have been completed.

How this affects your district:

School counselors, principals, and athletic administrators should be knowledgeable of the OHSAA standards and stay apprised of changes in order to promote eligibility amongst their student-athletes. When reviewing class schedules, school staff should insure that student-athletes, or students that may become athletes, are taking enough courses to meet the eligibility requirements.

Upcoming Deadlines

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.

- June 1—Deadline to provide notice of nonrenewal for teachers (RC 3319.11), nonteaching staff, except municipal employees (RC 4141.29), and administrators (3319.02)
- June 30—End of ADM reporting period (RC 3317.03)
- July 1—Deadline to notify teachers and nonteaching staff of succeeding year salaries (RC 3319.12, 3319.082)
- July 1—Deadline for administrators to review emergency mangagement plan and cerfity to ODE that the plan is current and accurate (RC 3313.536)
- July 1 of School Year Agreement is in Effect—Deadline to file agreement entered into between a city or exempted village and an ESC to ODE (RC 3313.843)
- July 1—Deadline for Treasurer to cerfify available revenue in funds to county auditor (RC 5705.36)
- July 10—Deadline for teacher to terminate contract without board approval (RC 3319.15)

- July 15—Deadline for Treasurer to report the names and duration of attendance of children attending the district pursuant to 3313.64 (C)(2) and (3) and 3313.65, including the district responsible for tuition, to the superintendent of public instruction (RC 3313.64)

- July 21—Deadline to submit certification for November conversion levy to tax commissioner (RC 5705.219)

- July 27—Deadline to submit cerfitication for November income tax levy to Ohio Dept. of Taxation (RC 5748.02)

Upcoming Presentations

SAVE THE DATE! 2014-2015 Administrator's Academy Seminar Series

July 16 – 2014-2015 School Law Year in Review (webinar only!)

Other Upcoming Presentations:

June 26—Student Discipline, Ohio State Bar Association
Presented by: Ryan LaFlamme

June 30—2015 School Law Update, Ohio School Resource Officers & D.A.R.E. Officers Annual Conference
Presented by: Bill Deters

August 4—Law Related Education and Truancy, OSROA
Presented by: Giselle S. Spencer

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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
- Student Residency, Custody and Homeless Students
- Student Discipline
- Media and Public Relations

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