



# Ennis Roberts Fischer SCHOOL LAW REVIEW



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November 2013

## Legislature Proposes Attempt to Void Common Core Standards

One of the hot topics this year in the Ohio General Assembly involves discussion about the Common Core standards. The Common Core are a set of standards denoting what students should know and be able to do in the subjects of math and English. They are not a list of textbooks or lesson plans that teachers are required to use, but instead more rigorous standards to emphasize critical thinking over rote learning in classrooms to better prepare students for the future. Ohio adopted the Common Core standards in 2010, along with forty-five states nationwide to be effective the 2014-1015 school year.

If passed, House Bill (HB) 237 would repeal the Common Core standards in Ohio, and void any actions taken towards their adoption or implementation. If passed, the bill would:

- prohibit the State Board of Education from implementing the Common Core standards;
- prohibit the use of Partnership for Assessment of Readiness of College and Careers assessments;
- forbid state officials from relinquishing any control over academic content standards;
- require public notice from the State Board re-

garding any proposed adoption or revision of the standards; and

- require a hearing in every congressional district before changing the academic standards.

The Ohio School Boards Association (OSBA), Buckeye Association of School Administrators (BASA), and Ohio Association of School Business Officials (OASBO) have joined in opposition of HB 237. Executive directors from the three organizations have also distributed an article stating the organizations' position that is available on the OSBA BillTracker page.

Their position rests on the notion that higher standards in Ohio are necessary in order for Ohio students to compete in a global marketplace, and that each student's future depends on a better education. Over the past few years, Ohio has paired with other states to explore a more rigorous set of education standards that will prepare students to meet, and surpass, the new expectations of their generation. They comment that the rigor of the standards for what students must know and be able to do must change as the large-scale stakes do. The standards serve as framework to allow districts to know what students at their schools must be capable of achieving in order to be prepared for the future, and do not substitute

the school board's responsibility for adopting curriculum and providing resources to ensure student achievement.

In addition, OSBA has recently sent out a call to action asking school board members, superintendents, and treasurers to contact legislators and express their opposition and dissatisfaction towards the bill.

HB 237 is currently pending in the House of Education Committee.

### How this Affects your District:

Although not required to align curriculum to the Common Core until next fall, 2014, many schools are already teaching the new standards in Ohio. In addition, schools that receive federal Race to the Top grants are presently required to work to align their lessons to the Common Core standards. There is no state law requiring schools to align their curriculum currently.

Since the Common Core was adopted in 2010, much work has been done to prepare schools for implementation in the 2014-2015 school year. It is unclear how the bill will affect schools that are already teaching the Common Core, and what will become of all the hard work that has been put into the preparation. Therefore, it remains a hot topic to follow.

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Ennis, Roberts & Fischer's School Law Review has been developed for use by clients of the firm. However, the review is not intended to represent legal advice or opinion. If you have questions about the application of an issue raised to your situation, please contact an attorney at Ennis, Roberts, & Fischer for consultation

## Free Speech: Facebook “Likes”

### ***Bland v. Roberts*, 2013 U.S. App. LEX-IS 19268 (4th Cir. 2013).**

One of the first major opinions by a Federal Court of Appeals that addresses social media activities has recently declared that “liking” a page of Facebook is considered “a form of speech protected by the First Amendment.”

On Wednesday, September 18, 2013, the United States Court of Appeals for the Fourth Circuit reviewed the issue, which involved a sheriff running for re-election. Preceding the election, the sheriff noticed that two of his deputies had “liked” the Facebook page of his opponent for the position. The sheriff went on to win his campaign for re-election. However, due to his dissatisfaction with his deputies’ Facebook activities, the sheriff removed the deputies from their positions.

The deputies sued the sheriff, claiming that the act of “liking” something on Facebook was free speech and protected by the First Amendment. The lower court disagreed. In-

stead, they found insufficient speech to constitute First Amendment protection in the mere click of a mouse button to “like” a page.

The Fourth Circuit refused to accept this justification and unanimously held that “liking” a Facebook page does, in fact, merit constitutional security. They described how when the deputies “liked” the Facebook campaign page for the opponent, the campaign page name and photo appeared on the deputies’ personal Facebook profile along with a link to the page, an announcement regarding the “like” appeared in the newsfeed of each deputy’s Facebook friends, and that each deputy’s name and photo was added to the campaign’s Facebook page list of “People [Who] Like This.” Thus, the Court described that “liking” a Facebook page is the “Internet equivalent” of displaying a political sign, or a substantive statement about the user’s opinion about a particular topic.

#### **How this Affects your District:**

Although significant advice can be gleaned from the Court’s ruling, *Bland*

is not controlling law in Ohio. However, the decision reminds public employers that certain First Amendment free speech protection, especially in the form of political speech, may be enjoyed by their employees. In addition, this case strongly suggests that conduct on other social medial platforms such as re-tweeting or clicking “favorite” on Twitter, clicking the “heart” icon on Instagram, or “Sharing” a video from YouTube will likely be treated as speech under the First Amendment, similar to a Facebook post.

This case does not mean that all “likes” on Facebook are automatically protected for all purposes. The right of free speech for public employees must still be balanced against the legitimate interests of the governmental entity.

Lastly, it is important to note that the case does not involve the use of public resources for political activity. Under the Ohio Revised Code § 9.03, public resources (including school networks and e-mail) are forbidden from supporting ballot issues or candidates.

## Calculating School Hours: Upcoming Changes

### **Minimum Hours of Instruction:**

Beginning in the 2014-2015 school year, districts must transition to the state’s new statutory requirements for minimum school “hours.” The Ohio Budget Bill changed the minimum school year requirement for city, exempted village, local and joint vocational school districts from “days” to “hours.” Districts must be open for instruction at a minimum of 455 hours for half-day kindergarten; 910 hours for full-day kindergarten; 910 hours for grades 1-6; and 1,001 hours for grades 7-12.

### **“Instruction” Counting Towards Minimum Hours:**

With these changes, the state set restrictions on the types of instruction/activities that can count towards instructional hours of operation. Instructional hours of operation include time

spent during scheduled classes, supervised activities, and approved education options, but exclude lunch and breakfast periods as well as extracurriculars. In addition, instructional hours may also include the following: an equivalent of 2 days per year for parent-teacher conferences, an equivalent of 2 days per year for professional development of teachers, and morning & afternoon recess for grades K-6 not to exceed 15 minutes in duration per period. Therefore, if your district’s kindergarten has a 30 minute recess period in the morning and a 30 minute recess period in the afternoon, only 30 minutes of the total 60 minutes of recess time would count towards the state’s minimum instructional hours of operation.

### **Public Hearings:**

The new law requires a board of education to communicate with the

public regarding the district’s school calendar. The board must hold a public hearing not later than thirty (30) days prior to adopting the school calendar to address at a minimum the following: the total number of hours in the school year, the length of the school day, and the beginning and end dates of instruction. Additionally, the board must formally adopt a resolution before it can reduce the number of hours of operation in any school year from that which was offered the previous school year.

Because the law does not go into effect until July 1, 2014, it is unlikely that districts will be required to hold a public hearing prior to the 2014-2015 school year. Without a public hearing prior to adopting the school calendar for the 2014-2015 school year, a district’s calendar should not fall below the minimum hours of operation established for the 2013-2014 school year.

## Calculating School Hours: Upcoming Changes, Cont.

### Elimination of Calamity Days:

With the elimination of minimum school “days,” the legislature also eliminated state excused calamity days. Any missed instructional time is only relevant when determining whether the district met the statutory minimum hours. Therefore, if a district is delayed or cancelled due to inclement weather, the district does not have to make up the days or hours, as long as the hours of instruction missed do not drop the district’s instructional hours of operation below the statutory minimum requirements. Merely falling below the district’s approved hours, per the public hearing, does not require the district to make-up hours. Although it is likely that most districts exceed the minimum requirements and will not have to make up hours due to a small number of calamity days, the elimination of state excused calamity days should be taken into consideration when determining the district’s schedule and hours of operation. It is also possible that only a particular building of students, or potentially seniors on a reduced schedule, may fall below the statutory minimum due to calamity days, in which case that particular group of students may have to make up hours to meet the statutory minimum based on the grade level of the students in question.

### Collective Bargaining Agreements:

When addressing how these changes may impact collective bargaining agreements, the statute indicates that restructuring of the minimum school year does not apply to any collective bargaining agreement executed prior to July 1, 2014, but any collective bargaining agreement or renewal executed after that date must comply with those changes.

### Compatibility with JVSD:

Each city, exempted village and local school district must consider the compatibility of any changes to the hours or days in which high school is open for instruction with the needs of

any joint vocational school district (JVSD) currently serving any of its students. The Board must specifically consider any impact on (1) student access to instructional programs offered by the JVS; (2) incentives for students to participate in career-technical education; (3) transportation; and (4) the timing of graduation. The board must provide the JVSD advance notice of the proposed change and the two boards must enter into a written agreement prescribing reasonable accommodations to meet the scheduling needs of the JVSD prior to implementation of any change.

### Compatibility with Community Schools:

Prior to making any changes to hours or days in which any school in the district is open for instruction, the board must consider the compatibility of the proposed change with the scheduling needs of any community school formed under Chapter 3314 to which the district is required to provide student transportation. The board must specifically consider the impact on (1) student access to instructional programs offered by community school; (2) transportation; and (3) timing of graduation. The board must also provide advance notice to the governing authority of the community school, and the board and governing authority must enter into an agreement prescribing reasonable accommodations to meet scheduling needs of the community school prior to implementation.

### Consultation with Nonpublic Schools:

Before changing hours or days of instruction for any school, the board must consult with any chartered nonpublic schools to which the district is required to provide transportation to students. The Board must consider the effect of the proposed change(s) on schedules of transportation for any of the aforementioned students. Likewise, the governing board of a nonpublic must consult with the public school district board before implementing

changes to hours or days it is open for instruction.

### Hours Lower than Expected

Districts are not expected to hold public meetings or collaborate with JVSD, community schools, or nonpublic schools due to a reduction in hours caused by calamity days. Although the statute does not specifically address this point, these collaborative activities appear to be related to anticipated reductions in hours, not due to unexpected situations.

### How this Affects Your District:

**Calculate Current Hours:** To begin planning for the 2014-2015 school year, districts can use their current school calendar to determine the number of instructional hours received for students at each grade level based on the 2013-2014 school year. Be sure to keep in mind the specific requirements for “instructional” hours of operation.

**Determine Alternatives:** If the number of instructional hours falls below the new statutory minimums that will be required for the 2014-2015 school year, begin to consider alternatives to increase the instructional hours to meet the statutory minimums.

**Plan Ahead:** Due to the elimination of state excused calamity days, districts may prefer to schedule additional hours of instruction beyond the minimum requirements to avoid having to make up instructional hours at the end of the school year.

**Collective Bargaining:** Keep in mind that any collective bargaining agreement executed on or after July 1, 2014 must comply with the minimum school year provisions.

**Legal Advice:** As questions and concerns arise with the minimum school year requirements, consult legal counsel for guidance on statutory interpretation and requirements.

## Profanity Forbidden On and Off the Court

The New Jersey State Interscholastic Athletic Association (NJSIAA) says that “the days of taunting, baiting, and trash-talking during high school sporting events are over.” New rules have been adopted in New Jersey that require game officials to eject players competing in high school athletics based on taunts, profanity, or biased language.

Under the rules, referees are required to react to and enforce a list of banned words. The player’s use of such language will result in ejection from the game. Officials are also required to report the athlete in violation of the rules to the state governing body for high school sports, should language cross the line from competitive banter to profanity. Since implementation in September, the rules have resulted in 20 student disqualifications from play.

One occurrence involved the use of a racial slur.

The use of racial, sexist, or homophobic slang will not only result in ejection, but may also be referred to the state attorney general’s civil rights office for additional action against the student.

Biased language and profanity is forbidden in all classrooms across the nation. NJSIAA states that “interscholastic sports are an extension of the classroom and thus that language must not be tolerated in the fields, on the courts, on the mats, on the rinks, wherever high school sports are played.”

California, New York, and Florida are also considering similar bans on overboard trash-talking, and members

of the National Federation of State High School Associations believe that New Jersey’s stringent new policy could serve as an excellent model.

### How this Affects your District:

No similar rules have been adopted by the state of Ohio. However, issues of harassment, intimidation, and bullying in public schools, including incidents occurring online and at school-sponsored events, including athletic competitions, are growing concerns. Increasing the stringency of rules in athletics could help districts combat the problem. Since New Jersey’s new rules were implemented as part of an anti-bullying initiative, the rules could serve as a model for not only Ohio as a state, but for districts’ individual bullying policies to follow.

## Reminder to Exercise Caution When Distributing Seasonal Treats

### *Mystic Valley Regional Charter School, 40 IDELR 275 (SEA MA 2004).*

While “Fun size” candies, cookies, or treats may seem like an innocent gesture, they can pose a serious scare to parents of children with severe food allergies, especially when handed out at school.

In *Mystic Valley Regional Charter School*, the parents of a first-grader with a life-threatening peanut allergy succeeded in the 504 claim that the school had failed to accommodate the son’s disability. One of the occurrences described in the parents’ complaint involved the practice of handing out candy. Every Friday, the student’s bus driver distributed candy to the children on her route. One week, a mini bag of M & M’s was given to each student. The warning labels on bags of M & M’s state that they are manufactured in a plant that processes peanuts.

Luckily, the parents were able to confiscate the candy before any potential harm to the student could occur. However, the seemingly harmless distribution of treats could have lead to tragic consequences. The Court later found that the medical evidence and

the student’s history warranted a classroom ban on peanut products. Because the district failed to demonstrate that the nut ban in the classroom would “fundamentally alter the nature of [the school’s] educational program,” and that the current situation was discriminatory against the student, the Court determined the student was entitled to the protections of Section 504.

### How this Affects your District:

This case serves as a reminder that IEPs and 504 plans extend to aspects of the school that are outside of the classroom walls. Given the potential risks of distributing candy on the school bus (involving more than allergies, but also choking, etc.), a district may choose to ban the practice altogether.

If a district does not ban the practice, and instead allows drivers or aides to distribute candy to students as a Halloween, holiday, or seasonal treat, it should:

- inform transportation personnel about IEPs and 504 plans;
- avoid treats containing common allergens; and

- have a response plan for accidental exposure or medical emergencies.

Districts are required to inform all transportation providers of their specific responsibilities for implementing students’ services, as well as specific accommodations necessary to service particular students. Therefore, if a student has an allergy, the bus driver must be made aware of the allergy along with any accommodations the student might need. Even if the driver does not herself distribute the treats, there is always the possibility that another student has received candy from school or from home and brought it onto the bus. Therefore, districts with a ban should still train drivers on how to handle a child’s accidental exposure and provide them with the medications or equipment noted in the child’s IEP or 504 plan so they can respond to an unexpected reaction.

As a resource, many websites provide lists of allergen-free candies. If districts allow candy distribution, it may be worthwhile to direct personnel to these venues in order to avoid future liability.

## Update on the Minimum Wage Increase in Ohio

On January 1, 2014, Ohio's minimum wage will increase to \$7.95 an hour for non-tipped employees and \$3.98 an hour for tipped employees. The new wages will apply to employees of businesses that annually bring in more than \$292,000 per year in gross receipts.

The constitutional amendment passed by Ohio voters in November 2006 required the minimum wage in Ohio to increase each year by the rate of inflation on January 1. Because the Consumer Price Index (CPI) rose 1.5% over the previous 12 month period, an increase in minimum wage is necessary.

For 14 and 15-year olds, and employees at companies with annual gross receipts of less than \$292,000 per year, the minimum wage will remain \$7.25 an hour. The state wage for these employees is determined by the federal minimum wage, and would require an act of the U.S. Congress and the president's signature, to change.

## Arbitration Award Must Not Modify Plain and Unambiguous Language

### **Chardon Local School Dist. Bd. Of Edn. v. Chardon Edn. Assn., 2013-Ohio-4547.**

In the present case, a teacher was convicted of vehicular assault, a fourth degree felony. The teacher was found to have driven on the wrong side of a divided highway, causing a serious automobile accident that resulted in serious injuries to the driver of the vehicle hit. The event occurred after the teacher consumed two and one-half alcoholic beverages at dinner.

After the accident, the teacher returned to work, taught summer school, and her teaching contract was renewed for the following school year. However, following her guilty charge of vehicular assault, the District placed her on administrative leave with full pay and benefits. After the sentencing hearing, the District suspended her without pay, later terminating her teaching contract for "good and just cause" under R.C. 3319.16.

The teacher's employment was governed by a collective bargaining agreement (CBA). The CBA set forth a grievance procedure which concluded in binding arbitration. The issue de-

termined at arbitration was whether the district properly and with "good and just cause" suspended without pay and ultimately terminated the teacher's employment. Disagreeing that "good and just cause" was the sole determining factor, the Arbitrator determined that the teacher should be compensated for the "back pay" period.

On appeal, the district court vacated the arbitration award. The lower court determined that the arbitrator had exceeded his authority in interpreting the relevant portions of the CBA by adding terms or provisions to it. To do so, the court noted that the arbitrator concluded that the only factor stated in the CBA as warranting termination of the teaching contract during its term was not whether or not the teacher's conduct, under all the circumstances presented by the evidence amounted to egregious acts and/or behavior, and that this finding exceeded his authority.

The Ohio Court of Appeals agreed with the lower courts determination. They added that the CBA explicitly provided in part that "termination of a teacher's contract shall be according to Section 3319.16 and related provi-

sions of the Ohio Revised Code." Under the express section of the code, the contract of any teacher may not be terminated except for *good and just cause*. The code does not include any language relating to egregious conduct. Therefore, the exact, unambiguous language of the CBA clearly requires merely a "just cause" analysis.

Due to a proper "just cause" analysis, vacation of arbitrator's award of back pay to terminated teacher who had been convicted of vehicular assault was not error where express terms of the CBA stated that terminations are permitted for good and just cause, and teacher's actions need not be egregious.

### **How this Affects your District:**

When disciplining or terminating an employee, districts need to be careful to follow the language contained in their CBAs and Ohio laws, as applicable. Given the lack of a definition for "good and just cause" in the Ohio teacher termination statute, and the breadth of actions this term can cover, it is recommended that districts contact their legal counsel when facing termination decisions.

## Firm News

### **Jeremy Neff Selected CALL Fellow**

Jeremy Neff was recently selected for the 2013 Cincinnati Bar Association's Cincinnati Academy of Leadership for Lawyers (CALL). Each year, around 30 attorneys from various corners of the Cincinnati legal community are selected to participate. CALL strives to build a core of practicing attorneys with strong leadership, profes-

sionalism, and ethics that will lead now and in the future to make an impact in both the Cincinnati legal and wider communities.

Jeremy is excited to get started and to join colleague Bill Deters (2008 Fellow) as a CALL graduate.

### **2013 Adopt-A-Class Kicks Off**

ERF was very excited to get the 2013-14 Adopt-A-Class year underway this month! Last week, the firm met with their classroom and enjoyed bonding over an assortment of card games, puzzles, and book reading. In November, ERF plans to take students on a field trip to the Krohn Conservatory.

## Education Law Speeches/Seminars

### **SAVE THE DATE! 2013-2014 Administrator's Academy Seminar Series**

*Seminars will take place at the Great Oaks Instructional Resource Center or via live webinar from 9:00 a.m. to 11:30 a.m. unless otherwise noted.*

**Levies and Bonds – December 5<sup>th</sup>, 2013**

**Presented by Gary Stedronsky and Brad Ruwe, Partner at Peck Shaffer & Willams LLP**

**Special Education Legal Update – March 6<sup>th</sup>, 2014**

**Presented by Bill Deters, Jeremy Neff and Erin Wessendorf-Wortman**

**OTES and OPES Trends and Hot Topics – June 12<sup>th</sup>, 2014**

**Presented by Bill Deters and Bronston McCord**

**Education Law Legal Updates 2013-2014 – July 10<sup>th</sup>, 2014 (Webinar ONLY, from 8:00 a.m. to 12:00 p.m.)**

### **Other Upcoming Presentations**

Jeremy Neff

November 1, 2013

Xavier University—School Nurse Workshop

Bill Deters

November, 11, 2013

OSBA Capital Conference—504 & Diabetes

Gary Stedronsky

November 11, 2013

OSBA Capital Conference—Case Law Update: What You Should Know

Erin Wessendorf-Wortman

November, 11, 2013

OSBA Capital Conference—Making Booster Groups Work For You

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### Webinar Archives

Did you miss a past webinar or would you like to view a webinar again? To obtain a link to an archived presentation, send your request to Pam Leist at [pleist@erflegal.com](mailto:pleist@erflegal.com) or 513-421-2540. Archived topics include:

- Education Law Legal Update - Including SB 316
- Effective IEP Teams
- Cyberlaw
- FMLA, ADA and Other Types of Leave
- Tax Incentives
- Prior Written Notice
- Advanced Topics in School Finance
- Student Residency, Custody and Homeless Students
- Ohio Budget Bill/House Bill 153
- Student Discipline
- Media and Public Relations
- Gearing Up for Negotiations

## Need to Reach Us?

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## ERF Practice Teams

### Construction/Real Estate

*Construction Contracts, Easements, Land Purchases  
 and Sales, Liens, Mediations, and Litigation*

**Team Members:**  
 Bronston McCord  
 Ryan LaFlamme  
 Gary Stedronsky

### Workers' Compensation

*Administrative Hearings, Court Appeals, Collaboration  
 with TPA's, General Advice*

**Team Members:**  
 Ryan LaFlamme  
 Pam Leist  
 Erin Wessendorf-Wortman

### Special Education

*Due Process Claims, IEP's, Change of Placement,  
 FAPE, IDEA, Section 504, and any other topic related  
 to Special Education*

**Team Members:**  
 Bill Deters  
 Pam Leist  
 Jeremy Neff  
 Erin Wessendorf-Wortman  
 Michael Fischer

### School Finance

*Taxes, School Levies, Bonds, Board of Revision*

**Team Members:**  
 Bill Deters  
 Bronston McCord  
 Gary Stedronsky  
 Jeremy Neff