



Court rules in favor of transgender student in public school case

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A federal district court of appeals ruled that a transgender student’s claim under Title IX for discrimination on the basis of sex was improperly dismissed, sending the case back to the district court with instructions to proceed using the correct evidentiary standard. The court also has granted a preliminary injunction to allow the transgender student, G.G., to use the bathroom corresponding to his gender identity while the lawsuit is pending. This ruling reversed the federal district court’s initial refusal to grant the preliminary injunction.

G.G. is a biologically female student attending a North Carolina public school who has been diagnosed with gender dysphoria. She has been taking hormones, has changed her name to a more masculine name, and identifies as a male. She sought to use the boys’ bathroom, and her request initially was granted for seven weeks by the public school (she did not seek locker room access).

After that, community members began to object and spoke at two board meetings, after which a board resolution was passed that would have provided access not to a male or female restroom, but to an “alternative appropriate private facility.”

The Office of Civil Rights (OCR) interprets the Title IX regulations and issued an opinion letter January 7, 2015, which states: “...a school must generally treat transgender students consistent with their gender identity.”

The trial court had dismissed the Title IX claim, noting that the regulations specifically allow schools to provide separate male and female restrooms and the OCR letter was not entitled to deference.

However, the court of appeals disagreed, finding that the OCR letter interpreting the regulations was entitled to deference because the

Cincinnati: 1714 West Galbraith Road • Cincinnati, OH 45239 • (513) 421-2540 • Toll-Free Number: 1 (888) 295-8409

Cleveland: 6000 Lombardo Center • Suite 120 • Cleveland, OH 44131 • (216) 487-6672

Columbus: 300 Marconi Boulevard • Suite 205 • Columbus, OH 43215 • (614) 705-1333

www.ennisbritton.com | www.twitter.com/EnnisBritton | www.linkedin.com/company/ennis-britton-co-lpa

the regulation itself was ambiguous, since it did not clarify what it means as it relates to transgender students. The court said that even though OCR's interpretation on how Title IX regulations apply to transgender individuals was new, that does not mean the interpretation of the rule was not entitled to deference. OCR has enforced its position consistently since 2014, the court noted, and also conforms to the regulations of other federal agencies.

The court noted that a subsequent administration may change policy, or Congress could explicitly revise Title IX to remove the ambiguity. Until that time, the interpretation of OCR is entitled to deference. The court noted that its role is not policymaking, which is reserved to the agencies to interpret regulations.

The court noted that there was no evidence that the transgender student's use of the boys' bathroom presented a safety issue.

G.G. v. Gloucester County School Board, (C.A. 4, 2016) No. 15-2056

How this Decision Impacts Your District:

This case demonstrates once again that the law with regard to transgender students is in a state of flux. Many school districts in Ohio have taken steps to accommodate transgender students. These issues may become controversial in your community and may lead to litigation. Planning ahead and talking about the issues, including carefully crafting solutions based on individual circumstances, are key components to successful outcomes. Districts should also contact legal counsel when issues first arise to discuss the latest developments in the law.

Employees fired over posters protesting company policy on sick time

Six Jimmy John's workers were fired and three more were given "final written warnings" for being part of an effort to display a poster near ten Jimmy John's restaurants, protesting the company policy of not providing paid sick time. The posters showed two sandwiches, stating that one sandwich was made by a healthy employee and one was made by a sick employee, and that there was no visible difference between the two. It stated, "We hope your immune system is ready because you're about to take the sandwich test."

The union trying to organize the ten stores filed three unfair labor practice charges before the National Labor Relations Board (NLRB). A 2-1 majority of the NLRB found that the poster was protected activity because it was related to an ongoing labor dispute and that the posters were not "so disloyal, reckless or maliciously untrue" as to lose the protections of the National Labor Relations Act ("the Act"). The company also had removed union literature from unrestricted employee bulletin boards. After the NLRB ruled in favor of employees who were fired by finding that the actions of the company constituted an unfair labor practice, the company challenged the ruling in federal district court.

The company argued that (1) the employees who participated in the sandwich poster campaign's activities were not protected, (2) asking other employees to remove posters from public places around town did not violate the Act, (3) supervisors and a co-owner of the company posting negative comments about a union supporter on Facebook did not violate the Act, and (4) removing union literature from the bulletin board did not violate the Act.

The federal court noted that maintaining national labor policy is delegated to the NLRB and not the courts. The court held that there was substantial evidence to support the board's finding that the words of the poster made it clear that the purpose was to obtain paid sick leave through protected activity. The posters were not designed to humiliate or degrade, and the court deferred to the NLRB, finding that the posters were not so disloyal as to lose protection under the Act.

The court also upheld that the co-owner's action of posting on Facebook to encourage employees to take down any posters they saw did violate the Act, because it reasonably interfered with the employees' exercise of rights to engage in protected union activity under the Act. The Facebook posts of supervisors were an unfair labor practice, one of which – a post with a fired employee's cell phone number and the message "F*ck you, David. Forever." – denounced the union supporter in front of other employees, directed offensive words against him due to his support of the union, and would cause an objective, reasonable employee to feel coerced, intimidated and harassed by the post.

Finally, the manager's removal of the posters and other union postings on unrestricted employee bulletin boards was upheld as an unfair labor practice, because the company could not selectively ban union postings since it allowed access to the bulletin board without restrictions.

All of MikLin's (Jimmy John's) challenges to the NLRB ruling were denied by the court.

MikLin Enterprises, d/b/a Jimmy John's v. National Labor Relations Board, Industrial Workers of the World, (C.A. 8, 2016), No. 14-3099

How this Decision Impacts Your District:

This case continues to muddy the water as it relates to Facebook postings and employee discipline. This case was particularly concerned with union activity and expression and employer actions to single out individuals for engaging in protected activity, union literature being removed by managers (or encouraging employees to do so), and firing employees for engaging in protected union activity. Employers should be careful with anti-union statements on a public platform (such as Facebook) that may tend to be viewed as intimidation or harassment.

Bus driver nonrenewal results in continuing contract

A court of appeals in Trumbull County ruled that a bus driver, who was reemployed after entering into a grievance settlement, was entitled to a continuing contract from Lakeview Local Schools according to the contract sequence found in R.C. 3319.081.

The bus driver had a contract for one year upon initial employment and was renewed for a two-year contract. At the end of the two-year contract, the board nonrenewed the contract. The driver filed a grievance after that, and the settlement provided that the board would employ the driver for a one-year contract. After he served the one-year contract provided by the settlement, the board reemployed him for another one-year contract.

The bus driver then filed a mandamus action in court, alleging he was entitled to a continuing contract. The trial court denied the mandamus action and dismissed the case, and the bus driver appealed.

At issue before the court of appeals was whether he was entitled to the continuing contract and whether the collective bargaining agreement provided him with an adequate remedy at law.

The board argued that after the nonrenewal of the driver's contract and entering into the settlement agreement, they considered the driver a new employee, thus restarting the contract sequence of one-year, two-years and then continuing contract. The driver argued that he should have been given a continuing contract at the end of his first two-year contract.

The court of appeals found that because the settlement agreement did not specifically state that once reemployed, the bus driver would have the status of a newly hired employee, the board could not "reset the clock" by nonrenewal and then reemployment. The court found that the purpose of R.C. 3319.081 is to provide job security for nonteaching employees of school districts. It found that nonrenewals at the end of the two-year contract do not result in "new hires" restarting the contract sequence if reemployed.

The court also did not accept the board's argument that the driver voluntarily waived his right to a continuing contract by accepting the one-year limited contract pursuant to the settlement agreement.

The court found that the bus driver had pursued his claim that he was entitled to a continuing contract through the grievance process that ended in the grievance settlement, and was not awarded a continuing contract as he had sought. Therefore, he had no adequate remedy at law. Thus, the court ruled the mandamus action to compel the board to give him a continuing contract was proper. The court also found that the collective bargaining agreement did not specifically waive the provisions of R.C. 3319.081 on the nonteacher employment contract sequence.

Finally, reversing the dismissal of the mandamus action, the court sent the case back to the trial court for further proceedings consistent with its opinion.

How this Decision Impacts Your District:

This case is a good reminder to ensure your collective bargaining agreement supersedes any provisions of law necessary, and the importance of including specific language in grievance settlements that reflects the intent of the parties. Additionally, the practice of nonrenewing nonteaching employees and then reemploying them could result in unintended consequences regarding the contracts of those employees. Consult with counsel about implications and solutions for specific situations.

Brannon v. Lakeview Sch. Bd. of Edn., 2016-Ohio-1367

Legislation in the Works

HB 524, referred to as a placeholder to provide a platform for discussion and of the value-added progress measure, received testimony before the House Education Committee on April 26. ODE representatives answered questions from the committee about the value-added measure and how it works. The committee had several questions about whether the measure is producing valid ratings given the instability of the tests (PARCC, then AIR) used to calculate the measure. The variation in grades received by districts (from an A grade one year to a D grade the next) were discussed as well. The 11-line bill states that its purpose is to review the structure of the value-added progress measure, analyze its potential success and assess its transparency for schools and students.

Sub. HB 299, the autism scholarship bill that would allow a temporary, permanent or legal custodian of a child other than the natural or adoptive parent(s) to apply for the Autism Scholarship Program, passed the Senate 32-0.

What's inside the new barricade rules

The Ohio Board of Building Standards has finalized the barricade rules mandated by HB 64. Found in the Ohio Building Code, the rules address active shooter drills and emergency situations and establish conditions for the use of the temporary locking devices.

Generally, door handles are required to be accessible, meaning they should not require tight grasping, pinching or twisting of the wrist to operate. The new rules provide an exception to the building code for temporary locking devices. Doors also must require only one motion to unlatch a door, but an exception has been built into the code for barricade devices. The devices may not be permanently mounted to the door. Individual parts of the device, such as bolts, stops, brackets, pins, etc., that don't prevent ingress or egress through the door may be mounted permanently. If they affect the fire rating of a rated fire door assembly, they may not be permanently mounted.

To use the devices in compliance with the new code, a school district must have adopted and filed a school safety plan. The barricade devices may be used only in an emergency or during active shooter drills. Only a trained member of the school staff may use the devices for a finite period of time as determined by the school administrative authority according to the school safety plan. The district must provide training to school staff on the temporary locking device, keep records of the training, and provide those records to the fire official upon request.

The barricade device may not require more than one operation to be removed after it has been engaged. Two operations are permitted to remove the device only if the building has an automatic sprinkler system throughout.

The building code notes that the Americans with Disabilities Act may affect the use and operation of temporary locking devices like door barricades, but states that this potential issue is outside the scope of the rules.

The district must provide proof to the building official that the fire and police officials with jurisdiction over the school building have been notified of the placement of the temporary locking devices. The building official will approve the devices upon compliance with all rules and will note the same on the certificate of occupancy.

What the new rules mean for your district:

There are different vendors selling barricade devices, and not all of them may be compliant with the rules as outlined above. For example, the placement of the device (low, medium or high on the door) or devices that require more than one motion to remove once engaged may be problematic. Carefully consider the requirements before selecting barricade devices for your schools: we suggest working with your local fire officials. Consult counsel for specific questions.

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.

- **May 4** – Deadline to submit to board of elections for emergency, phased-in, current operating expenses, permanent improvement, operating, or continuing replacement levy for August election. Deadline for certification of resolution for income tax levy to board of elections. Deadline for district resolution of necessity, resolution to proceed and auditor certification for bond levy with board of elections for August election (also deadline for county auditor to certify school district bond issue terms for August election).
 - **June 1** – Deadline to act on and deliver written notice of nonrenewal to administrators, (except superintendent and treasurer) teachers and nonteaching employees.
 - **June 30** – School fiscal year ends.
 - **July 1** – Deadline for board to adopt appropriation/temporary appropriation measure. Deadline for salary notices for teachers and nonteachers.
 - **July 10** – Deadline for teachers to notify district of termination of contract without board consent.
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Upcoming Presentations

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

May 10 – Brown County/SOESC Legal Update

June 24 – SOESC Summer Retreat

June 28 – OSROA Annual Conference

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

Webinar or Archive ONLY!

*Participants must be registered to attend the webinar. The webinar will be archived for those who wish to access the event at a later time. You can register on our website at www.ennisbritton.com/client-resources/erf-administrators-academy/, contact Hannah Reichle at 614-705-1333, or send an email to hreichle@ennisbritton.com.



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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 Hannah Reichle at hreichle@ennisbritton.com or 614-705-1333. 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
- Gearing Up for Negotiations

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 helps you make competent decisions quickly and efficiently. These areas include:

Labor & Employment Law

Student Education & Discipline

Board Policy & Representation

There are times when you have a question in a more specialized area of education or public law. In order to help you obtain legal support quickly in one of these areas of law, 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 and Sales, Liens, Mediations, and Litigation

Team Members

Bronston McCord
Ryan LaFlamme
Gary Stedronsky

Workers' Compensation

Administrative Hearings, Court Appeals, Collaboration with TPAs, General Advice

Team Members

Ryan LaFlamme
Pam Leist
Giselle Spencer
Erin Wessendorf-Wortman

Special Education

Due Process Claims, IEPs, Change of Placement, FAPE, IDEA, Section 504, and any other topic related to Special Education

Team Members

John Britton
Lisa Burleson
Bill Deters
Michael Fischer
Pam Leist
Jeremy Neff
Hollie Reedy
Giselle Spencer
Erin Wessendorf-Wortman

School Finance

Taxes, School Levies, Bonds, Board of Revision

Team Members

John Britton
Lisa Burleson
Bill Deters
Bronston McCord
Jeremy Neff
Hollie Reedy
Giselle Spencer
Gary Stedronsky
Megan Bair Zidian

Attorney Directory

John Britton

6000 Lombardo Center, Suite 120
Cleveland, Ohio 44131
P: 216.487.6673
C: 216.287.7555
Email: jbritton@ennisbritton.com

Lisa M. Burleson

300 Marconi Boulevard, Suite 205
Columbus, Ohio 43215
P: 614.705.1331
C: 614.406.1969
Email: lburleson@ennisbritton.com

William M. Deters II

1714 West Galbraith Road
Cincinnati, Ohio 45239
P: 513.421.2540
C: 513.200.1176
Email: wmdeters@ennisbritton.com

J. Michael Fischer

1714 West Galbraith Road
Cincinnati, Ohio 45239
P: 513.421.2540
C: 513.910.6845
Email: jmfischer@ennisbritton.com

Ryan M. LaFlamme

1714 West Galbraith Road
Cincinnati, Ohio 45239
P: 513.421.2540
C: 513.310.5766
Email: rlaflamme@ennisbritton.com

Pamela A. Leist

1714 West Galbraith Road
Cincinnati, Ohio 45239
P: 513.421.2540
C: 513.226.0566
Email: pleist@ennisbritton.com

C. Bronston McCord III

1714 West Galbraith Road
Cincinnati, Ohio 45239
P: 513.421.2540
C: 513.235.4453
Email: cbmccord@ennisbritton.com

Jeremy J. Neff

1714 West Galbraith Road
Cincinnati, Ohio 45239
P: 513.421.2540
C: 513.460.7579
Email: jneff@ennisbritton.com

Hollie F. Reedy

300 Marconi Boulevard, Suite 205
Columbus, Ohio 43215
P: 614.705.1332
C: 614.915.9615
Email: hreedy@ennisbritton.com

Giselle Spencer

6000 Lombardo Center, Suite 120
Cleveland, Ohio 44131
P: 216.487.6674
C: 216.926.7120
Email: gspencer@ennisbritton.com

Gary T. Stedronsky

1714 West Galbraith Road
Cincinnati, Ohio 45239
P: 513.421.2540
C: 513.886.1542
Email: gstedronsky@ennisbritton.com

Erin Wessendorf-Wortman

1714 West Galbraith Road
Cincinnati, Ohio 45239
P: 513.421.2540
C: 513.375.4795
Email: ewwortman@ennisbritton.com

Megan Bair Zidian

6000 Lombardo Center, Suite 120
Cleveland, Ohio 44131
P: 216.487.6675
C: 330.519.7071
Email: mzidian@ennisbritton.com

Cincinnati Office: 513.421.2540

Cleveland Office: 216.487.6672

Columbus Office: 614.705.1333