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School Law Review



Employee Licensure Requirements

DECEMBER 2016

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School district employee licensure has come under recent scrutiny of the Ohio Department of Education (ODE) and the Ohio state auditor. The issue is whether employees have the proper licenses to perform their assigned job functions. Generally speaking, if a position requires a permit or a license but the employee does not have one, the employee may not legally work in that capacity; therefore, the school district may not pay them.

This scenario may result in not only a finding for recovery issued by the state auditor against the treasurer to recover salary and benefits paid to the unlicensed employee, but also a possible misconduct investigation by ODE’s Office for Professional Conduct under a charge of improper use of public funds.

Licensure in Schools

School districts employ a variety of positions that require licenses and permits, specifically with regard to the following:

- Educational aides, assistants, or paraprofessionals
- Teachers
- Coaches
- Administrators
- Pupil services employees
- Student monitors
- Career tech teachers
- Adult education instructors

In particular, the following three categories appear to frequently be the source of potential liability for districts.

Instructional Paraprofessionals

An employee with this job function may have one of many different titles, although RC 3319.088 uses the term “educational assistant.” Educational assistants typically include employees who assist a teacher by performing duties for which a teaching license is not required, such as the following:

- Provides one-on-one tutoring
- Assists with classroom management

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- Provides instructional computer assistance
- Provides support in the library or media center
- Provides instructional services under teacher supervision

Some specific examples are library/media aides, teacher aides, and other instructional assistants.

RC 3319.088 states that “nonteaching employees shall not serve as educational assistants without first obtaining an appropriate educational aide permit or educational paraprofessional license from the state board of education. ... No person shall receive compensation from a board of education for services rendered as an educational assistant in violation of this provision.”

Not included among educational assistants (i.e., instructional paraprofessionals) are translators, paraprofessionals who work *solely* on parental involvement activities, or nonteaching employees who assist a teacher but work *solely* on secretarial or clerical functions and do not perform any other duties.

Student monitor permits qualify an employee to perform assistant duties that do not involve assistance with instructional tasks, such as supervising children on the bus, on the playground, or in the cafeteria. A one-year permit may be issued at the request of an employing school or district to an individual who holds a high school diploma or the equivalent.

Teachers

No person without a license may receive any compensation for performing duties as a teacher in any public school. (RC 3319.30) Furthermore, until a teacher has filed the following with the treasurer, the treasurer may not compensate the teacher:

- A written statement from superintendent that teacher has filed with the treasurer:
 - a valid educator license or a true copy of such license
 - license applies to grades and subjects to be taught
 - dates the license is valid
- Any other reports required by state or local BOE or superintendent (RC 3319.36)

One exception that applies to teachers only is that treasurers are permitted to pay a teacher for the first 60 days of employment provided that the teacher holds a bachelor’s degree or higher *and* has filed an application with the state board of education for a provisional or professional license. (RC 3319.36)

Short- and long-term substitutes must also be licensed employees. (OAC 3301-23-44) An individual with a short-term substitute license may teach in a given classroom for no more than 5 days. Long-term substitutes can serve for longer periods of time but only in an area listed on the license.

Coaches

A coaching or pupil-activity permit is required for an individual to coach, supervise, or direct a pupil-activity program. A licensed teacher must obtain a permit for any activity he or she supervises that involves athletics, routine or regular physical activity, or activities with health and safety considerations. (RC 3319.303, 3313.53) There are additional requirements for a background check and successful completion of certain training programs prior to obtaining the permit. Permits may also be issued in some circumstances to nonlicensed employees. The permits must be obtained in advance by any nonlicensed individual who supervises a pupil activity. Further, the activity in the program of a nonlicensed individual may not include any course or class that is offered for credit and may not include any part of a class for credit.

Exception to Licensure Requirement

One exception to the general rule that a district may not compensate an individual not properly licensed is RC 119.06, which authorizes an employer to pay the salary of an individual who has “timely filed” an application for a permit or renewal of a permit or license. This statute specifically allows an employer to pay a salary for an individual who has submitted an application and is placed in “pending” status until ODE or another state agency approves the application. However, this statute may not provide an adequate defense if an employee indefinitely

remains in “pending” status, nor does it apply for any time period prior to the employee submitting the initial application for a permit.

When Issues Arise

Licensure issues typically arise for school district employees at two critical times. The first is at the time of hire, when an employee may not have yet applied for a license or permit or may have already applied but the application is in pending status. A snag in Ohio’s law is that the first step to apply for a coaching permit or an aide permit is to complete the hiring process! Admittedly, this creates a problem, and the solution is to resolve it with a change in Ohio’s law. But until then, treasurers and hiring employees must exert due diligence to ensure that licenses are valid before employees begin performing job duties and are compensated. The second critical time licensure issues arise is when an employee loses a license, such as for failure to renew the license or permit or even for a criminal conviction. Districts must respond immediately in these circumstances.

Indemnification of Treasurers

In many instances, a board of education may indemnify treasurers and other school board employees for activities that arise during the regular course of business. However, RC 3313.203(B) specifies that “findings for recovery in an audit report pursuant to section 117.28 of the Revised Code” are an exception to this indemnification rule. Therefore, treasurers may not be indemnified for a finding of recovery if the auditor’s office determines a recovery is appropriate because of a licensure issue.

Next Steps

Districts should take the following steps to avoid future liability and remedy any outstanding licensure issues. Districts should review licensure for all employees assigned to positions that require a license or permit and confirm that all are valid and up-to-date. Districts should also evaluate current operations to ensure that a process is in place to continuously monitor licensing for all employees and new hires in the future. If an employee is not in compliance with the law, districts should consult with legal counsel and must take immediate steps to remedy the oversight to remain in accordance with the Revised Code.

Efforts for a Legal Remedy

Many industry leaders are seeking legislative and administrative remedies as this situation unfolds. Legislative changes may include changes such as issuance of a finding for recovery against other responsible parties. Another proposed solution would be to change the permit process. We encourage clients to connect with us and other industry professionals to explore ideas and support these efforts. In the meantime, please contact us if you have licensure questions.

New Graduation Requirements

Beginning with the class of 2018, Ohio’s graduation requirements are sure to change. Recent data indicate that 10–60 percent of juniors by district are not on track to meet the new requirements for graduation. This has sounded many alarms across the state, as school and industry leaders consider the great number of students who may not earn a high school diploma in the years to come.

On November 22, superintendents from across the state gathered at the statehouse to protest the new requirements. Superintendents and other industry leaders specifically seek modification of the new requirements, or at the least, more time to implement the changes.

In addition to the state’s academic curriculum requirements, which have not changed, students will be required fulfill an additional requirement to earn their high school diploma. Students have three options to choose from to fulfill this additional requirement. (Note: The Ohio Graduation Tests are still in use for the class of 2017; however, these students may use the new end-of-course tests to satisfy the testing requirement.)

1. Ohio's State Tests

Meet the minimum number of points on end-of-course tests

According to the current plan, students must accumulate at least 18 total points on the seven state tests, with a minimum number of points in each of the three subject areas. The points given for each test range from 1 (*limited performance level*) to 5 (*advanced performance level*).

Subject Area	Courses Tested	Number of Tests	Minimum Points Required	Points Possible
English	English I	2	4	10
	English II			
Math	Algebra I or Intermediate Math I	2	4	10
	Geometry or Intermediate Math II			
Science and Social Studies	Biology (or Physical Science – 2018 only)	3	6	15
	American History			
	American Government			
Additional points required from <i>any</i> of the above tests			4	
Total Points			18	35

This option gives students flexibility in which subject areas to earn points – as long as the minimum number of points is met in each subject area. Thus, a high score in one subject area can help to offset a lower score in another subject area.

Retakes: Students may retake any test anytime during the student's academic career within the testing window offered by ODE.

Alternatives for Science and Social Studies tests: Instead of taking the state's end-of-course tests in Science and Social Studies, the following alternative options are available:

- Advanced Placement or International Baccalaureate courses: The tests offered in these courses will substitute for the end-of-course tests.
- College Credit Plus courses: The grade earned in the college course will determine the number of points credited to the test.

However, the State Board of Education is considering reducing the number of points to 15 for the graduating classes of 2018 and 2019, then increasing the points by 1 each year until reaching 18 points for the class of 2022. A final decision is expected to be made in December.

2. College Readiness Tests

Meet the minimum score on the ACT or SAT test

In lieu of the end-of-course tests, students may meet or exceed the minimum score requirement on the ACT or SAT tests. (Note: These minimum scores are known as "remediation-free" scores, which are set by Ohio's college and university presidents; therefore, they are subject to change.)

ACT		SAT	
Subject Area	Minimum Score	Subject Area	Minimum Score
English	18	Writing	430
Math	22	Math	520
Reading	22	Reading	450

3. Industry Credential and Work Readiness

Earn an industry credential and meet the minimum score on the WorkKeys test

Under the credential option, students graduate high school ready to enter the workforce with a job skill that Ohio employers need right now. Students must earn a minimum of 12 points from an approved, industry-recognized credential or group of credentials in a single career field, and then score 13 or greater on a job-skills test, WorkKeys, which shows their work-readiness in that job.

Students can choose from 13 career fields:

- Agriculture
- Arts and Communications
- Business and Finance
- Construction
- Education and Training
- Engineering
- Health
- Hospitality and Tourism
- Human Services
- Information Technology
- Law and Public Safety
- Manufacturing
- Transportation

WorkKeys Test	
Subject area	Minimum Points Required
Reading	3
Applied Mathematics	3
Locating Information	3
Additional points required from <i>any</i> of the above areas	1 (class of 2018 and 2019) 2 (beginning class of 2020)
Total Points (Note that these equal more than the minimum; therefore, additional points are needed in the subject areas.)	13 (2018/2019)
	14 (2020)

Court Injunction Blocks New FLSA Overtime Rule until Further Review

A federal judge in Texas has granted a nationwide temporary injunction in response to a lawsuit filed by 21 states, including Ohio, to challenge the new Fair Labor Standards Act (FLSA) overtime rule. The court agreed with the plaintiff states that the new rule could cause irreparable harm if it was not stopped before it was scheduled to go

into effect on December 1, 2016, concluding that the Department of Labor (DOL) exceeded the authority delegated by Congress in issuing this overtime rule.

Under the new overtime rule, “white collar” salaried employees not otherwise exempt from overtime pay would be eligible for overtime pay if their weekly salaries are less than \$913, which equals \$47,476 when calculated on an annual basis – doubling the previous salary threshold.

What Does the Temporary Injunction Mean to Your School District?

Although application of the new rules has been stayed, school districts should continue to track eligible employees’ hours and maintain meticulous payroll records. They should also require that employees submit time records.

Districts should be mindful that the new rule would affect only the salary threshold component of the overtime-exemption test – a two-part test that requires that employees meet the salary threshold as well as perform duties that are exempt under FLSA. Therefore, until a final decision is reached, employees who meet or exceed the lower salary threshold (\$23,660 annually) must also perform exempt duties in order to not be eligible for overtime. Employees who perform nonexempt job duties are eligible for overtime pay regardless of their salary.

Ennis Britton attorneys are available to help with any questions regarding the overtime rule, the injunction, which employees are affected, how to maintain payroll records, and how the two-part salary–duties test applies.

School Board Not Required to Arbitrate with Education Association

On November 21, an Ohio appellate court decided that the Tolles Career and Technical School Board of Education is not required to arbitrate with the Tolles Education Association regarding the school board’s use of teacher attendance data in teacher evaluations. Ennis Britton filed an amicus curiae brief in this case on behalf of the Ohio School Boards Association, the Ohio Association of School Business Officials, and the Buckeye Association of School Administrators, supporting the position that management has the discretionary right to decide the criteria used in evaluations, absent language in an applicable collective bargaining agreement (CBA) prohibiting its use.

In 2015, the Tolles Education Association filed a grievance on behalf of four teachers whose attendance data was included in their teacher evaluations. The school board denied the grievance and then filed a complaint with the trial court requesting declaratory judgment and an order that the union withdraw its request for arbitration. After the trial court decided that the school board must arbitrate, the board appealed, citing that the trial court had failed “to recognize the express limitations agreed by the parties on arbitrability” and had “failed to recognize the management right and responsibility of the public employer to evaluate employees.”

In this case, both the school board and the education association agreed that the CBA was silent regarding the use of attendance data in evaluations. The school board then pointed to two CBA provisions, one noting that professional judgment in evaluations is not subject to arbitration, and another noting that the teacher’s performance rating may include standards based on professional responsibility and growth from “Ohio Standards for the Teaching Profession” (i.e., Standard 7).

The appellate court held that the school board did not give away its right to evaluate its employees or its right to consider attendance data in evaluations in this language. Further, in agreement with the position taken in the amicus brief, the court found that the school board has the right to evaluate its employees and to include the factors that may be considered in evaluation – except for those that are expressly limited in a CBA.

What This Means for Your District

Districts and their evaluators need to be aware of what their CBAs or memorandums of understanding (MOUs) state regarding employee evaluations and what, if any, limitations the CBAs or MOUs place on an evaluator’s

ability to include specific factors in the evaluation. Absent language to the contrary in the CBA or MOU, boards of education may decide upon the important criteria for their organization and comment on the same in their employee evaluations.

– *Tolles Career and Technical School Bd. of Edn. v. Tolles Edn. Assn.*, 2016-Ohio-7835.

Legislation in the Works

The final weeks of the two-year Ohio House session typically prompt a flurry of legislative activity. During this time – the lame duck session – the legislature is working to pass bills before the new General Assembly begins in January, when any bills that didn't pass both chambers either die or start the legislative process over again. Many of the bills under discussion are significant for school districts. Below are highlights of recent changes to these bills.

Bills Expected to Pass Soon

HB 89, Medicaid School Program: The Senate Education Committee approved a substitute bill clarifying that occupational and physical therapists, audiologists, and speech pathologists can make referrals. Witnesses testified that therapists such as these are already ordering services and that the bill simply established clear federal compliance with the Medicaid School Program, as Ohio could lose up to \$72 million in federal reimbursements if these allowances are not clearly specified in the state law. This bill passed in the Senate Education Committee and is awaiting the full Senate vote.

HB 410, Truancy: The Senate Education Committee has held five hearings on this bill, most recently on November 29, when they discussed amendments, including the following:

- Tolling of suspensions during summer – community service may be imposed during summer break; remaining community service may not be made up by imposing suspension when the school year begins.
- School districts may allow make-up homework during suspensions at their own discretion.
- Pilot council to study absences and develop recommendations for future use.
- Districts with a chronic absenteeism rate of less than 10 percent are exempt from assigning habitually absent students to absence intervention teams and may develop their own district strategies; however, if their strategies fail, the attendance officer shall file a complaint. (This exemption may, however, be dropped before the bill is passed.)
- Deadline for officer to file a complaint changed from 60 days to 61 days.

Witnesses from school districts and juvenile courts were supportive of the possibility of eliminating suspension for truancy but expressed concerns that the bill could strain their already scarce resources, placing additional burdens on schools without funding or bringing about significant improvement. The Education Committee will discuss this bill again at its next hearing, December 6.

SB 3, Education Deregulation: More than 24 amendments have been added, “cleanup stuff” for education policy changes provided for in the budget bill (HB 64). Under SB 3, the top-performing districts in the state – about 120 districts – would be exempt from certain requirements, such as some testing and reporting requirements, and may employ industry professionals without educator credentials to teach. The bill also contains changes related to ESSA and would change how textbooks are paid for in the College Credit Plus program. This bill is a priority for the lame duck session and is expected to pass and be signed into law by the end of 2016. The next hearing is in the House Education Committee on December 5.

SB 235, Property Taxes: The House Finance Committee accepted a substitute bill, which has several changes to the original bill that proposes to exempt from property tax the increased value of property for commercial or industrial development until the completion of the facility. The substitute bill allows the exemption for only 6 years instead of 10 years, and it includes a recoup provision that goes back 3 years if no development occurs and the property is sold when the value increases. The sub bill also changes how the proposed exemptions would interact with existing tax increment financing agreements. OASBO, OSBA, and BASA provided written testimony opposing the bill. The next hearing is December 6, when the committee will again hear all testimony and is expected to vote on the bill.

SB 252, Cardiac Arrest: Athletic coaches and trainers will be required to annually participate in a training course designed to help them recognize symptoms of sudden cardiac arrest, the leading cause of death among student athletes. Before participating in sports, student athletes must submit a medical history form and a signed authorization form regarding sudden cardiac arrest. The bill was amended to grant civil immunity to coaches and will be known as Lindsay's Law. It passed the House vote 86-4 on November 16, and the Senate concurred with House amendments 33-0 on November 29. This bill is now awaiting Gov. Kasich's signature.

Updates to Other Bills

HB 546, School Patrol Volunteers: Introduced in the Ohio House in May, this bill would allow boards of education to contract with current or retired law enforcement officers to patrol a school to prevent or respond to a mass casualty event. Such an officer would be provided with civil immunity. This bill is currently in the House Ways & Means Committee.

HB 583, Collective Bargaining: Originally in the House Finance Committee, which heard from the sponsor (Rep. John Becker of Union Township) on November 16, this bill has now been referred to the House Committee on Commerce and Labor. It's going nowhere, very slowly.

SB 126, Open Enrollment: Still in the Senate and continuing the first hearing from its sponsor, this bill would require a comprehensive study of open enrollment, which began in 1989 and has continued since then without examination.

SB 136, Seclusion in Schools: This bill would prohibit the use of seclusion in public schools. Currently in the Senate Education Committee, the first hearing was on November 28, when the committee heard from the bill's sponsor.

Firm News

We are very pleased to announce that four Ennis Britton attorneys have been named as SuperLawyers Rising Stars for 2017!



Jeremy Neff



Gary Stedronsky



Erin Wessendorf-Wortman



Megan Bair Zidian

Jeremy Neff is a shareholder who has been with Ennis Britton since 2005, when he began serving as a law clerk. As a member of Ennis Britton's Special Education Team and School Finance Team, he has represented school districts across Ohio on a number of issues including labor relations, special education, employment matters, and more. He is a published author and frequent presenter on many education-related topics.

Gary Stedronsky is a shareholder who has been with Ennis Britton since 2003. He started as a law clerk while attending law school. As a member of Ennis Britton's Construction and Real Estate Team and School Finance Team, he provides counsel to school districts throughout Ohio on matters related to property issues, public finance matters, tax incentives, and more. He is a published author and frequent presenter on many education-related topics. This is Gary's fourth year in a row to receive this prestigious award!

Erin Wessendorf-Wortman is an Ennis Britton attorney. As a member of Ennis Britton's Worker's Compensation Team and Special Education Team, Erin represents school districts across Ohio on a variety of matters including labor and employment issues, civil rights, special education, public records, and more. She is a published author and frequent presenter on many education-related topics.

Megan Bair Zidian is an Ennis Britton attorney who advises school districts on a variety of education law matters. As a member of Ennis Britton's Special Education Team and School Finance Team, Megan represents boards of education on collective bargaining, student discipline, board policy, and much more. Megan is located in both the Cleveland and Mahoning Valley offices.

SuperLawyers is a national rating service that publishes a list of attorneys from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement.

To qualify as a Rising Star, an attorney must score in the top 93rd percentile during a multiphase selection process that includes peer review and independent evaluations. A SuperLawyers rating is considered a very prestigious designation in the legal field, and we commend Jeremy, Gary, Erin, and Megan for their continued achievement!

Visit the SuperLawyers [website](#) to learn more.

Upcoming Dates & 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.

- **December 16:** Deadline to submit [Restraint and Seclusion Survey](#) to ODE (O.A.C. 3301-35-15)
- **December 31:** Last day for treasurers to canvass the board to establish a date of the organizational meeting (RC 3313.14)
- **January 15:** Deadline for boards of education of city, exempted village, vocational, and local school districts to meet and organize (RC 3313.14); last day for boards of education of city, exempted village, vocational and local school districts to adopt tax budgets for the coming school fiscal year (RC 5705.28(A)(1))

- **January 17:** Last day to submit certification for May conversion levy to tax commissioner (RC 5705.219(B)) (105 days prior to election)
- **January 20:** Last day for boards of education to submit fiscal tax-year budget to county auditor (RC 5705.30)
- **January 23*:** Last day to submit certification for May income tax levy to Ohio Department of Taxation (RC 5748.02(A)) (100 days prior to election)
- **January 27:** Last day to submit May emergency, current operating expenses, or conversion levy to county auditor for May election (RC 5705.194, 5705.195, 5705.213, 5705.219) (95 days prior to election)
- **January 27:** Deadline to submit 2017 Federal Quota Registration of Blind Students to the Ohio Center for Autism and Low Incidence (OCALI)
- **January 31:** Deadline for educational service center (ESC) governing boards to meet and organize (RC 3313.14); annual campaign finance reports must be filed by certain candidates, political action committees, caucus committees (legislative campaign funds) and political parties (by 4:00 p.m.) detailing contributions and expenditures from the last day reflected in the previous report through December 31, 2016 (RC 3517.10(A)(3))

Upcoming Presentations

2016–2017 ADMINISTRATOR’S ACADEMY SEMINAR SERIES

Tackling Issues in Student Discipline – Archive Available

September 29, 2016

School Employee Leave and Benefits Update

January 26, 2017

Live video webinar

Special Education Legal Update

April 20, 2017

Live seminars in Cincinnati and Cleveland

2016–2017 Education Law Year in Review

July 13, 2017

Live video webinar

Ennis Britton has listened to the valuable feedback from our clients! This year, we will offer the Administrator’s Academy seminars in a different format from previous years. The September and April presentations will be provided at live seminar locations in both Cincinnati and Cleveland as well as in a live audio webinar option. The other two presentations will be offered via a live video webinar professionally produced by the Ohio State Bar Association. As always, we will offer an archive for all presentations.

Participants must be registered to attend each event. All four webinars will be archived for those who wish to access the event at a later time. You can register on our [website](#) or contact Hannah Reichle via [email](#) or phone at 614-705-1333.

OTHER UPCOMING PRESENTATIONS

December 6: Brown County ESC & Southern Ohio ESC – Bill Deters and Jeremy Neff

January 20: OASPA Winter Camp: Collective Bargaining & Negotiations

– John Britton, Bill Deters, Bronston McCord

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Want to stay up-to-date about important topics in school law?

Check out Ennis Britton's [Education Law Blog](#).

Webinar Archives

Did you miss a past webinar or would you like to view a webinar again? If so, we are happy to provide that resource to you. To obtain a link to an archived presentation, contact Hannah Reichle via [email](#) or phone at 614-705-1333. Archived topics include the following:

- Managing Workplace Injuries and 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 and Bonds
- OTES & OPES Trends and 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 help you make competent decisions quickly and efficiently. These areas include:

Labor & Employment Law

Student Education & Discipline

Board Policy & Representation

There are times when you 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 & Sales • Liens •
Mediations • Litigation

Team Members:

Ryan LaFlamme
Bronston McCord
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 •
any other topic related to Special Education

Team Members:

John Britton
Bill Deters
Michael Fischer
Pam Leist
Jeremy Neff
Hollie Reedy
Giselle Spencer
Erin Wessendorf-Wortman
Megan Bair Zidian

School Finance

Taxes • School Levies •
Bonds • Board of Revision

Team Members:

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