



Ennis Britton Co., L.P.A.  
Attorneys at Law

Cincinnati • Cleveland • Columbus

ENNIS BRITTON

# School Law Review



## MAY 2017

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## Ohio Supreme Court Prevents District from Collecting Voter-Approved Taxes

In November 2015, voters in Delaware County, Ohio, approved a tax renewal levy for the Delaware Joint Vocational School District. The vast majority of the district population – 98.4 percent – is in Delaware County, with the remaining 1.6 percent spread out in four adjacent counties in central Ohio. Ohio law requires that certain levies, such as this one, be voted on in all applicable counties. However, the county's board of elections made a seemingly simple mistake that caused a series of unfortunate events for the school district.

Under Ohio law, a school district must report a levy to the board of elections of the district's most populous county. This board of elections then notifies the other counties' boards of election so that the levy can be placed on all of the appropriate ballots. In this case, the Delaware Joint Vocational School District notified the Delaware County Board of Elections of the levy renewal. Unfortunately, the board of elections failed to notify the four other counties. As a result, the renewal levy did not appear on the ballots in the four other counties, and therefore those voters were unable to vote on the issue.

After Delaware County voters approved the renewal levy, the board of elections submitted the election results from only Delaware County to Ohio's tax commissioner, Joseph Testa, on a form that indicated no overlapping counties. When multiple counties are involved, a different form is used to indicate election results from all applicable counties. Testa questioned whether the tax was authorized because he did not have proof of election results from the four adjacent counties. Therefore, he refused to apply the reduction factors and calculate the tax rates for this levy.

The Delaware County Joint Vocational District filed a mandamus action with the Ohio Supreme Court. A mandamus action is a request that a court require an official to carry out his official duties. The levy had passed in Delaware County by a vote of 28,457 to 17,813, which means that it would

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have passed by nearly 10,000 votes even if all of the 1,026 district voters in the four adjacent counties had voted against it. Despite this, the court held that the tax was not “authorized to be levied” because not all voters had voted on it, and therefore Testa could not be required to do what he has no legal duty to do – to calculate a tax that is unauthorized.

Interestingly, the majority of the court’s justices – four of seven – concurred in the court’s opinion, but the other three justices issued a dissenting opinion regarding the court’s legal premises and decision. The minority contended that the form Testa’s office received is acceptable and that the tax commissioner has no statutory authority to require the missing form. Therefore, the minority said, the court should require Testa to calculate the taxes for collection.

Although this seems like the type of administrative mistake that should have a simple solution, the Ohio Supreme Court’s decision means that Delaware Joint Vocational School District will not receive these voter-approved funds unless a legislative solution can be reached or the district submits the levy at another election.

### **What This Decision Means for Your District**

It is unfortunate that the district did everything correctly but still, as of yet, cannot collect this tax revenue. The takeaway from this case is that anytime an issue goes to voters and multiple counties are involved, the district should follow up with all relevant boards of election to ensure that procedures are carried out correctly and the levy is placed on all the appropriate ballots.

– *State ex rel. Delaware Joint Vocational School Dist. Bd. of Edn. v. Testa*, Slip Opinion No. 2017-Ohio-796.

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## **Arbitrator Finds District Did Not Violate CBA in Hiring Dispute**

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In a recent arbitration decision, a school district was found in compliance with a collective bargaining agreement when it hired the teacher it deemed most qualified for a vacant high school guidance counselor position, even though the winning candidate’s license was not yet effective.

The collective bargaining agreement included the provisions that the board of education would notify employees of open positions; give preference to qualified teachers already employed by the board; and fill vacancies according to (1) teacher certification, (2) individual qualifications, and (3) seniority if the previous two factors are equal. Accordingly, a key matter in this dispute is the certification. The district listed one of the qualifications for the guidance counselor position as a State of Ohio Counselor License. The grievant, an experienced elementary teacher in the district with a bachelor’s degree and three master’s degrees, including one in school counseling, has a valid Ohio counselor’s license. The person awarded the counselor position was an intervention specialist with experience in grades K–12, including helping students prepare for life, jobs, and education after high school.

The Eastern Local Classroom Teachers’ Association alleged that Eastern Local Schools Board of Education had violated, misapplied, or misinterpreted the collective bargaining agreement by failing to award the position to an association member. The bargaining member applicant, the association said, held a valid and effective license; however, the winning candidate’s license, although issued during the interview process, was not effective until after the time of the job offer. Based on this technicality, the union argued that the winning applicant was not qualified for the job to begin with and therefore should not have been considered for the position.

The district, on the other hand, contended not only that the winning candidate’s qualifications were superior to the grievant’s, but also that nothing requires applicants to hold a certification at the time they make application for a licensed position or in order to participate in interviews. The district requires only that the person possess a valid

license at such time as the job duties begin. Therefore, the district does not require applicants to currently hold a certification before applying for a job.

After weighing both sides of the argument, the arbitrator denied the grievance and found for the school district, noting that nothing shows that interested applicants must have their license effective upon application for a position. The arbitrator stated that applicants “would be hard-pressed to obtain employment or advancement, if they are precluded from making application while awaiting the effective date” of their license. Furthermore, he noted that it is not logical for the effective date of a license “to foreclose an interested applicant from seeking employment or advancement through a vacancy that is not yet to begin until the start of the subsequent school year.” This licensing issue “is a technicality that simply does not prove beneficial to anyone seeking either initial employment or advancement.”

### **What This Decision Means to Your District**

This arbitration dispute highlights the importance of knowing not only what a collective bargaining agreement says but also what it *does not* say. Teacher and counselor licensing issues present a constant struggle for districts. Ohio routinely designates licenses as effective July 1 to coincide with the new school year, when in actuality they are often issued months beforehand or even months after. This decision is likely consistent with the common practice when hiring recent graduates and therefore can be used to support similar practice with existing employees.

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## **District’s Failure to Timely Evaluate Student Is a Denial of FAPE**

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In a special education case, a federal court in South Dakota found that a school district had failed to timely evaluate a seventh grader for special education services and therefore denied the student a free, appropriate public education (FAPE).

A student with no history of behavioral or disciplinary issues had a number of behavioral incidents during her first month in seventh grade. Her guardian requested an evaluation to see whether she was eligible for special education services. About a week later, the school held a teacher assistance team meeting, which is the equivalent to a response to intervention (RTI) team meeting. A psychologist in attendance at the meeting (a friend of the guardian) explained that the student suffered from post-traumatic stress disorder. After this meeting, the team developed a written plan. For the remainder of the school year, the student’s attendance was very sporadic, as the following table illustrates.

<b>Present in School</b>	<b>Absent from School</b>
After meeting, attended school – 1 week (October)	Enrolled in adolescent behavioral health program – 10 days
	Resided in a chemical dependency treatment facility – 45 days
	Home from school due to sickness – 1 day
Attended school – 2 days (December)	Absent from school again – 1 week, then winter break
After winter break, attended school – 2 weeks (January)	Suspended for assault and threats – 5 days
Attended school – 2 days (February)	Suspended for bringing a dangerous weapon (knife) to school – remainder of year

South Dakota’s RTI implementation guide states that schools can initiate referrals for special education anytime during the RTI process. Although the district began RTI during the first month of school, the student had repeated behavioral issues and still had not been evaluated by February, when she was suspended. During her suspension,

she did not receive any form of educational services, which led the guardian to file a complaint against the school district under the Individuals with Disabilities Education Act (IDEA), alleging that the district had deprived the student of FAPE. The guardian requested a complete evaluation, an individualized education plan, and compensatory education. The district offered a settlement, which the guardian denied, partly because it lacked compensatory education services.

At the hearing, the district contended that the evaluation was delayed because the guardian never provided a written medical diagnosis to the school district, refused to sign a medical release, and removed the student from school for several long periods of time. The hearing officer determined that the district had denied the student FAPE and ordered the district to complete a full evaluation and to implement any services determined necessary. However, compensatory educational services were not awarded to the student, leading the guardian to appeal to federal court for compensatory services during the student's suspension.

The federal court took note that the hearing officer had observed it would be inappropriate to order specific services before determining whether the student was in fact eligible for services. The district had since fulfilled the evaluation requirements, finding the student eligible for special education services for emotional disturbance and specific learning disability. As the student was currently receiving special education services, the federal court found no basis to overturn the hearing officer's decision and order additional services.

### **What This Decision Means to Your District**

Under IDEA, one of the ways a district might be considered to have knowledge that a student has a disability is if the parent or guardian requests an evaluation. Furthermore, the absence of a medical diagnosis does not excuse a district from completing a full evaluation if it suspects a disability. Students suspected of having a disability who have been suspended or expelled from school are entitled to certain protections under the IDEA as if they were already identified. In such cases, it is advisable to conduct an expedited evaluation to determine appropriate services for the student.

– *Artichoker ex rel. D.D. v. Todd County Sch. Dist.*, 69 IDELR 58 (D.S.D. 2016).

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## **Ohio House Proposes Changes to Budget Bill**

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For the past couple of months, Ohio's House of Representatives has been working away at the budget bill – one of their top priorities. Their work has resulted in hundreds of amendments to the bill, many of them affecting schools. These amendments have not yet been passed in the House, but they are well on their way, as the House hopes to pass its version of the bill during the first week in May.

### **Current House Substitute Bill Provisions**

**School funding:** The proposed changes will increase the amount that Gov. Kasich had initially allotted for schools by about \$90 million during the next two years. The core funding formula would be similar but does include some changes, such as follows:

- The maximum funding increase would be 5.5 percent (instead of the governor's proposed 5 percent).
- The base per-pupil funding amount would increase 0.3 percent, from \$6000 to \$6020.
- The number of districts to receive decreased funding would be 350 (instead of 390 under the proposed formula).
- High-performing ESCs would receive \$25 per student; others would receive \$23 per student.
- Multiple changes to lotteries and gaming that would result in more educational funding.

Although \$90 million sounds like a lot of money, this amount is spread out over two years and more than 600 school districts. That amounts to less than \$75,000 per district, with some receiving more and others less.

**School board members:** The governor's provision for three nonvoting members from the business community on a school board would be removed from the bill.

**High school graduation requirements:** The House has made no changes to the high school graduation requirements in its substitute bill, but changes may possibly still come from the Senate. Peggy Lehner, Senate Education Committee Chair, said she is working on legislation to introduce for that purpose very soon, with hopes of adding it to the budget bill. The governor's initial provision to allow high school students to earn credit for work experience is reportedly still in the bill.

**Teacher externships:** Gov. Kasich's highly criticized provision for teachers to gain work experience at local businesses as a condition of license renewal would be removed from the bill.

**College Credit Plus (CCP):** Several changes are in the works for this relatively new program. The Chancellor of Higher Education would be required to study the outcomes of the CCP program. CCP credit would not be awarded unless the student receives a grade of C or better in the class. IHEs would be limited to paying for one assessment for the CCP program; additional assessments would be the responsibility of the student. IHEs would pay 50 percent of the cost of textbooks or an amount agreed to with the school district. Home-schooled students would pay 50 percent. Minor labor laws would not apply to CCP pre-apprenticeship programs.

**Career tech education (CTE):** Vocational agricultural programs in Cincinnati and Cleveland would receive an increase of \$162,000 per year. The amended bill would remove the proposal that CTE Level I licensed applicants have five years of experience and that Level II applicants must complete a specific college program.

**Board of Revision:** Ohio's ten most populous counties would get an extra 90 days to decide board of revision complaints.

### **Next Steps for the Budget Bill**

The House Finance Committee met throughout April and hopes to vote on the omnibus amendment during the first week of May. After the committee accepts the bill, the next step will be a House floor vote, and from there it will move on to the Senate for further consideration – and more changes.

Although none of these provisions is final, Ohio's legislature is getting closer to the final biennial budget bill. After the full House and Senate votes, the final stop is Gov. Kasich's desk for his signature. The governor always has line-item veto power, so he can veto specific provisions of the bill while passing the rest. His line-item veto power does not enable him to add or revise any provisions in the bill, but he can strike any of them down.

Ennis Britton will keep school districts informed of changes to the budget bill in anticipation of the June 30 deadline for the budget.

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## **Teacher Nonrenewal Refresher: Procedures and Hearings**

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Unless a collective bargaining agreement provides otherwise, a board of education that wishes to nonrenew a teacher must evaluate the teacher in accordance with R.C. 3319.111. Below are important dates and procedures regarding this statute and R.C. 3319.11 on nonrenewal. Check your CBA for any additional requirements or timelines that must be met.

## Important Dates

- **May 1:** Teacher evaluations must be completed
- **May 10:** Teachers receive a written report of their evaluation results
- **June 1:** Written notice of intent to nonrenew must be provided

## Nonrenewal Procedure: Timeline

The nonrenewal process begins when the board of education passes a resolution not to renew a contract and the treasurer sends notice of the decision to the teacher.

Within 10 days of receipt of the notice of nonrenewal, a teacher may file with the treasurer a written demand for a description of the circumstances that led to the board's decision to nonrenew the teacher.

Within 10 days of receipt of the written demand, the treasurer must provide the teacher with this written statement of circumstances. This statement sets forth the substantive basis for the nonrenewal and must also expressly state the reasons for the nonrenewal.

Within 5 days of receipt of the statement of circumstances, the teacher may file with the treasurer a written demand for a hearing before the board of education.

Within 10 days of receipt of written demand for a hearing, the treasurer must provide the teacher with a written notice of the time, date, and place of the hearing. The hearing must be conducted within 40 days of the date on which the treasurer received the demand for a hearing (see below for more on the hearing).

Within 10 days of the hearing, the board must issue a written decision to the teacher either affirming or vacating its intention not to renew.

Within 30 days after receipt of the written decision, the teacher may file an appeal in the court of common pleas.

## Nonrenewal Hearings

A nonrenewal hearing before the board of education must be conducted by a majority of the members of the board of education. The statute does not permit a designee to conduct the hearing. The hearing must be held in executive session unless both the board and the teacher agree to hold it in public. The board members, teacher, superintendent, assistant superintendent, legal counsel for the board, legal counsel or other representative of the teacher, and any person designated to make a record of the hearing may attend the hearing held in executive session.

The content, purpose, and procedures for the hearing are not addressed in the Ohio statute. However, the Ohio Supreme Court has held that the hearing should be more than an informal opportunity for the teacher to express objections to the board's decision. Therefore, the nonrenewal hearing should contain, at a minimum, the presentation of evidence, the examination of witnesses, and a review of the parties' arguments. Other Ohio courts have held that evidence is not limited to the current school year but may include that from previous school years as well. Based on the hearing, the board will either affirm or vacate its intention not to reemploy the teacher.

## Appeals

If the board affirms its intention to nonrenew, the teacher may appeal the board's decision to the court of common pleas. The court of common pleas is generally limited to determining if the district made procedural errors during the nonrenewal. The teacher may not challenge the board's decision, and the court may not consider the merits of the board's reasons. Therefore, the court may order that the teacher be reinstated *only* if it finds that the evaluation procedures were not followed or that the teacher was not provided with written notice of intent to nonrenew by June 1. If the court finds that either of these violations has occurred, it *may* reinstate the teacher but is not required to do so.

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## Upcoming Deadlines

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

- **May 1:** Deadline for teacher evaluations to be completed (RC 3319.111(C)); Deadline to submit certification for August income tax levy to Ohio Department of Taxation (RC 5748.02(A))
- **May 2:** Special election day, primary election day (RC 3501.01)
- **May 5:** Deadline to submit August emergency or current operating expenses levy to county auditor for August election (RC 5705.194, 5705.195, 5705.213)
- **May 10:** Deadline for written report of evaluation results to be submitted to teachers (RC 3319.11); Deadline for county auditor to certify school district bond levy terms for August election (RC 133.18(C)); Deadline for the following to board of elections for August election:
  - Submit resolution of necessity, resolution to proceed, and auditor's certification for bond levy (RC 113.18(D))
  - Submit continuing replacement, permanent improvement, or operating levy (RC 5705.192, 5705.21, 5705.25)
  - Certify resolution for school district income tax levy (RC 5748.02(C))
  - Submit emergency levy (RC 5705.195)
  - Submit phased-in levy or current operating expenses levy (RC 5705.251(A))
- **May 15:** Deadline for certain board members and administrators to file financial disclosure forms with the Ohio Ethics Commission (RC 102.02)
- **June 1:** Deadline for notice of nonrenewal of contracts for administrators other than superintendents and treasurers – teachers, classified staff, other administrators – (RC 3319.02); Deadline for written notice of intent not to reemploy teachers and nonteaching employees (RC 3319.11(D), 4141.29(I)(1)(f))
- **June 30:** End of 2016–2017 school year (RC 3313.62); End of third ADM reporting period (RC 3317.03(A))

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## Upcoming Presentations

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### 2016–2017 ADMINISTRATOR'S ACADEMY SEMINAR SERIES

**Tackling Issues in Student Discipline – Archive Available**

September 29, 2016

**School Employee Leave and Benefits Update – Archive Available**

January 26, 2017

**Special Education Legal Update – Archive Available**

April 20, 2017

**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 via [email](#) or phone at 614-705-1333.

### OTHER UPCOMING PRESENTATIONS

#### **May 8–9: Ohio Association of EMIS Professionals Annual Conference**

May 8 – Hollie Reedy, "Custody, Attendance, and the Law"

#### **May 9: Brown County ESC & Southern Ohio ESC Legal Update**

– Pamela Leist and Gary Stedronsky

#### **June 1: Cincinnati Paralegal Association**

– Pamela Leist

#### **June 23: Ohio School Boards Association Sports Law Workshop**

– Bill Deters and Pamela Leist

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Want to stay up-to-date about important topics in school law?  
Check out Ennis Britton's [Education Law Blog](#).

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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, contact Hannah via [email](#) or phone at 614-705-1333. Archived topics include the following:

- Supreme Court Special Education Decisions
- 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
- School Employee Licensure
- 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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