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Public Entities and Website Accessibility

In 2016, the U.S. Department of Education’s Office for Civil Rights (OCR) opened more than 350 complaints against school districts nationwide regarding website accessibility issues for individuals with disabilities. At that time, the U.S. Department of Justice (DOJ) made known its intent to establish agency rules regarding website accessibility that would be applicable to state and local government entities. However, the following year, under a different presidential administration, the DOJ announced that it would not proceed with proposed agency rulemaking regarding website accessibility.

In June of 2018, the U.S. House of Representatives wrote a letter to the DOJ to urge the department to provide agency rules regarding website accessibility standards for public entities under the ADA. The letter highlighted concerns about the number of complaints being filed and said that absent clear and final rules, legal action “is unfair and violates basic due process principles.”

In September, the DOJ rejected this request, indicating no regulations would be forthcoming. The DOJ emphasized that places of public accommodation retain the flexibility to control how their websites can communicate to all members of the public without discriminating against those with a disability. Absent a formal regulation, the failure to meet a specific industry standard, such as WCAG or WAI-ARIA, is not necessarily proof of an ADA violation, according to the DOJ.

Meanwhile, OCR also revised its Case Processing Manual in March 2018 and again in November 2018. Following the March release, OCR dismissed hundreds of complaints, including a vast majority of website accessibility complaints that were filed by just a few filers. Several groups banded together and filed a lawsuit against OCR in May to challenge the revisions in the updated manual. As a result, OCR released the November update to the manual and announced that it will conduct investigations of the complaints it had dismissed under the March version of the manual. Additionally, the appeals process for complainants (Section 306), which was removed in the March revisions, has been restored in the November manual. The new changes also direct investigators not to consider each complaint for evidence of systemic discrimination but look for evidence of broader discrimination “only where it is appropriate to do so in light of the allegations or based on facts ascertained in the investigation.” OCR will undertake a systemic investigation when the facts of the case warrant one.

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

What This Means for Your School District

Even though DOJ has declined to create clear rules regarding website accessibility for school districts and other public entities, school districts still need to ensure that their websites are accessible to people with disabilities. OCR is no longer dismissing complaints as it was earlier this year, and previously dismissed complaints will be under investigation again. School districts may see more complaints filed regarding website accessibility. While the DOJ may temporarily stop looking for systemic discrimination in school districts when not mentioned in a complaint, expect that complaining parties may become more detailed in their complaints to trigger DOJ investigations.

Concussion Case Involving Former Athlete Allowed to Proceed in Court

Ennis Britton first reported on this case in the [May 2018 issue](#) of our newsletter, [School Law Review](#), as it has implications for school districts and athletic organizations. Since then, this case has continued in court, and the Ohio Supreme Court has now weighed in as well.

Steve Schmitz was an NCAA athlete who, during the course of his football career in the 1970s, exhibited several symptoms related to repeated concussions. He was diagnosed with CTE in 2012 and alleged that this was the first time he knew he had suffered a bodily injury. He filed a lawsuit in 2014. Since his death in 2015, his widow has continued the lawsuit.

Initially, the Cuyahoga County Court of Common Pleas dismissed the case based on the statute of limitations, as more than two years had passed since the bodily injury occurred.

Generally, a cause of action for a bodily injury generally accrues from the time the wrongful act that caused the injury was committed. Most often, the bodily injury and the wrongful act occur at the same time; in these cases, the statute of limitations clearly begins to toll from the date of injury. However, in some cases, such as this one, a person is not aware of a bodily injury at the time of the wrongful act. A court must therefore determine whether the time frame to file a complaint should be extended.

A similar case previously decided by the Ohio Supreme Court relied on the “discovery rule” for cases of latent bodily injury, holding that the statute of limitations began tolling on the “date a competent medical authority” informed the man of his specific bodily injury. *Liddell v. SCA Servs. of Ohio*, 70 Ohio St. 3d 6 (Ohio 1994).

In the Steve Schmitz case, the Ohio Supreme Court unanimously decided on October 31, 2018, that the lower court had dismissed the case prematurely and that the case should continue. The Supreme Court again relied on the discovery rule for cases of latent bodily injury, when the injury develops after the incident that caused it. The opinion stated, “[e]ssentially, the statute of limitations begins to run when the plaintiff knows or, in the exercise of reasonable diligence, should know that he has suffered a cognizable injury.”

– *Schmitz v. Natl. Collegiate Athletic Assn.*, Slip Opinion No. 2018-Ohio-4391.

Failure to Timely Enter Final Grades Constitutes Just Cause for Teacher Termination

An Ohio court recently affirmed a teacher’s termination after she failed to timely enter her students’ final grades. The school district provided the court with evidence that the teacher had a history of violating board policy that amounted to incompetence; insubordination; neglect of duty; acts of misfeasance, malfeasance, or nonfeasance in office; and other good and just cause. Despite appeals that resulted in two administrative hearings and two court trials, every officer and judge who presided over each of these proceedings found that the teacher’s failure to timely enter final grades was good and just cause for termination.

At the first hearing, the school district brought four claims before the hearing officer: in addition to failing to enter final grades, the school district indicated that the teacher criticized staff members, refused to cooperate with building administrators, and failed to perform the basic and essential functions of her job. The hearing officer found insufficient evidence for just cause termination regarding the latter three claims, but he held that her failure to timely enter third-quarter final grades was a serious matter and amounted to good and just cause to terminate her teaching contract.

The teacher then requested an additional hearing. At this hearing she testified that she did not know how to use the school's system to post grades when the interim grades were due, she had reached out to other staff members and administrators stating that she did not know how to use the system, and she did not submit the final grades because she still did not know how to use the system. However, evidence showed that the system had been in use for six years, the recent update was minor, two people had trained the teacher on the system, and no other teachers had difficulty using the system. Despite several reminders on when grades were due, the teacher still did not submit the students' final grades. Again, the hearing officer recommended that she be terminated effective immediately. The school board accepted the referee's determination and terminated her contract.

The teacher then appealed to the common pleas court, which agreed with the hearing officer's determination. She again appealed, this time to the Second District Court. The teacher alleged that the school board violated her due process rights and therefore the trial court erred when it found no violation. She also alleged that the trial court erred in finding that the failure to input the third-quarter grades was good and just cause for termination. The appellate court found no violation of her due process rights and also concluded that the trial court correctly found the teacher was experienced in entering grades in the school system. The court noted that the teacher knew when the third-quarter final grades were due and how critical these final grades were, yet she made little effort to learn how to input the grades on time. Therefore, her failure to timely enter the final grades was good and just cause for termination.

What This Decision Means for Your District

The sole "good and just cause" standard for terminating the employment of teachers is still a relatively new standard. This case shows, yet again, that boards of education have the power, so long as it is not exercised unreasonably, arbitrarily, or capriciously, to set expectations about job duties and performance for its employees. As demonstrated by this case, a teacher's ability to enter grades for students is an inherent part of a teacher's job. As a result, a teacher's failure to enter final grades may be considered good and just cause for termination when clear expectations and requirements are set.

– *Thomas v. Dayton Pub. Schools Bd. of Edn.*, 2018-Ohio-4231.

Special Education Spotlight: Applying the Andrew F. Standard in Compensatory Education

The Sixth Circuit Court of Appeals recently held that although a school district in Michigan denied a student a free appropriate public education (FAPE) because his individualized education program (IEP) was inadequate, the student's progress was sufficient to stave off the parents' request for additional compensatory education.

The parents of a Michigan high school student with autism, ADHD, Tourette syndrome, and OCD filed a complaint during his fifth year of high school. His previous IEP had terminated because it was written with the assumption that he would graduate from high school in four years. The school amended his previous IEP without making any substantive changes. Compounding this mistake, the school made a series of other errors, which resulted in a failure to provide FAPE, as determined by the U.S. District Court in the Eastern District of Michigan.

Prior to the due process hearing, the school presented the parents with a settlement offer proposing to determine whether the student was entitled to compensatory education and, if so, to provide the necessary compensatory

education. The parents countered, requesting \$7195 in cash plus attorney fees. No settlement was reached, so the case proceeded to an administrative due process hearing. The hearing officer concluded that the IEP did not violate any procedural requirements nor the requirement for the least restrictive environment; however, the goals were not measurable as required by the Individuals with Disabilities Education Act (IDEA) and the transition plan was inadequate. Furthermore, the school had not complied with the IEP's requirements for assistive technology and a specified class schedule. Therefore, the school was ordered to develop and adhere to a compliant IEP. At this time, the school was not ordered to provide any compensatory education.

The parents then filed a complaint in district court, claiming that their son was entitled to compensatory education and that the school had violated procedural requirements for the IEP. The district court affirmed the hearing officer's finding of no procedural violation of the IDEA and the denial of FAPE; however, the district court found that the student was entitled to compensatory education. A bench trial was later held to determine the appropriate amount of compensatory education. The court found that the student had made "some advancement" in school and ordered 1200 hours of tutoring and one year of postsecondary transition services, plus more than \$208,000 in attorney fees and nearly \$2000 in expenses.

The school district then filed an appeal to the Sixth Circuit Court of Appeals, arguing that the lower court had no basis for awarding 1200 hours of tutoring and one year of postsecondary transition services; the parents contended that their son's progress of "some advancement" ran counter to the *Andrew F.* decision. Regarding the school's contention, the court found that although the school presented no evidence regarding the amount of services needed to remedy the inadequate IEP, the parents provided the court with evidence on the student's educational deficits; therefore, the district court's compensatory education award was appropriate.

The court of appeals explained that the student's progress was not considered when determining whether his IEP was IDEA compliant but only when determining what the appropriate amount of compensatory education should be. The Circuit Court judge wrote, "The *Andrew F.* standard has no application to this task because the issue in that case was whether an IEP complied with the IDEA, not whether a student was entitled to compensatory education." In the end, the appeals court upheld the district court's conclusion that the student's progress merited the award of 1200 hours of tutoring and one year of postsecondary transition services.

What This Decision Means for Your District

The *Andrew F.* standard requires school districts to provide students with disabilities IEPs that are designed to provide an appropriate educational benefit in light of the students' circumstances. *Andrew F.* did not establish a standard for determining when and how much compensatory education should be awarded in situations when a school district has failed to provide FAPE to a student. In making a compensatory education determination, courts are free to consider the student's progress, even in spite of an insufficient IEP

– *Somberg ex rel. Somberg v. Utica Cmty. Schs.*, 118 LRP 45495 (6th Cir. 11/05/18).

Legislation in the Works

House Bill 58: Cursive Handwriting

This bill passed in the House in June and is currently in the Senate Education Committee. The bill had its second hearing in the Education Committee on November 28, when an amendment was added that would require the Department of Education to "include supplemental instructional materials in cursive handwriting in the English language arts model curriculum" rather than a separate curriculum. The bill does not include a mandate that school districts provide instruction in cursive handwriting. The bill passed in the Senate Committee and is up for Senate floor vote next.

House Bill 343: Property Valuation Complaints

This bill passed in the House back in March. On November 28, the Senate Ways and Means Committee accepted a substitute version of the bill, which would require boards of education to pass a single resolution for each property valuation challenge, naming the properties and owners; all resolutions could be adopted with one vote. The substitute bill would also prohibit boards of education from challenging property values on residential property, permitting only counter-complaints on these properties by school boards. The sub bill would also increase the threshold for filing counter-complaints from \$50,000 to \$100,000 and would require that these provisions be effective on January 1, 2019, retroactively from the effective date of the bill (which is on the 91st day following the governor's signing of the bill).

Barbara Shaner of the Ohio Association of School Business Officials has asked for support by requesting school administrators to contact their senators in opposition to the bill, send a letter of opposition to the Senate president, and copy the Senate Ways and Means Committee members. The legislature will be winding down in early December, so now is the time to reach out.

House Bill 428: Religious Liberties

This bill passed in the House in June and is currently being heard by the Senate Education Committee. The bill would provide students with the same right to religious expression as they have with other activities. Schools would not be permitted to limit times, places, and methods for religious expression unless the acts are obscene, vulgar, or lewd.

House Bill 477: General School Provisions

Having passed in the House in June, HB 477 had a second hearing in the Senate Education Committee on November 28. Sen. Peggy Lehner has indicated that she may move the committee's proposed graduation requirements as an amendment into this bill during the first week in December. The graduation options will likely remain the same for the class of 2019 as they were for 2018, with some revisions for the class of 2020. See more information below under HB 630.

House Bill 491: Pupil Service Personnel Licenses

This bill creates a license for eight categories of pupil services personnel. The bill passed in the House in June and had its first hearing in the Senate Education Committee on November 28.

House Bill 502: Youth Suicide

The House passed a substitute bill in June. This bill would require that public school educators complete training regarding youth suicide. Currently in the Senate Education Committee, the bill had a second hearing on November 28.

House Bill 630: Graduation Requirements

This bill proposes to extend last year's graduation requirements for another two years; however, the bill has had only one hearing in the House Committee on Education and Career Readiness on November 27. During the heated discussion, one representative asked the sponsor of the bill, Rep. Tavia Galonski, if she would support an amendment that would prevent the General Assembly from changing the graduation requirements for students after they enter grade 9. She responded that she would be comfortable with such a change. However, the committee chair, Rep. Andy Brenner, cut off Galonski as she stated that the legislature is holding back this year's seniors. He then abruptly ended the hearing.

As it is now highly unlikely for this bill to pass both the House and Senate before the end of the calendar year, the Senate Education Committee has proposed graduation requirements to be amended into another bill, likely HB 477.

In October the State Board of Education adopted a resolution to extend the graduation requirements that were applicable to the class of 2018 through the class of 2021, with a new proposal beginning with the class of 2022.

House Bill 708: Retire-Rehire

House Bill 708 was introduced in June but not referred to House Committee until November 13. The bill replaces the reemployment penalties that currently apply when an employee retires under a state retirement system and is subsequently employed by a public employer with a new penalty.

The new penalty would mandate that all rehired public employee retirement system members – including PERS, STRS, SERS, and OP&F – who retire after the effective date of the bill would forfeit the employer-funded portion of their retirement allowance until the month following termination of reemployment. Furthermore, the employee-funded portion would be suspended beginning on the first day of the month following the month when reemployment begins and continue until the first day of the month following the month in which reemployment ends.

The new penalty applies whenever a retiree is reemployed regardless of the type of employment, whether the employee works full- or part-time, and the length of time of reemployment. This new penalty would apply to all retirement system members, including elected officials.

During employment, neither the employer nor the employee may contribute to the retirement system (current law requires them to).

Senate Bill 82: School Absences

SB 82 would require public schools to call parents within two hours if a child is absent without legitimate excuse. The bill passed in the Senate in April and is being heard in the House Education and Career Readiness Committee.

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.

- **December 31** – Deadline for treasurer to canvass the board to establish a date of the organizational meeting (RC 3313.14)
- **January 15** – Deadline for boards of education to meet and organize (RC 3313.14); Deadline for boards of education to adopt tax budgets for the coming school fiscal year (RC 5705.28)
- **January 20** – Deadline for boards of education to submit fiscal tax-year budget to county auditor (RC 5705.30)
- **January 28** – Deadline to submit certification for May income tax levy to Ohio Department of Taxation (RC 5748.02)
- **January 31** – Deadline for ESC governing boards to meet and organize (RC 3313.14); Deadline (4:00 p.m.) for annual campaign finance reports to be filed by certain candidates, political action committees, caucus committees, and political parties, detailing contributions and expenditures from the last day reflected in the previous report through December 31, 2017 (RC 3517.10)

Upcoming Presentations

SAVE THE DATE!

2018–2019 ADMINISTRATOR’S ACADEMY SEMINAR SERIES

December 6, 2018: Employment Law Update

Stay up-to-date on important issues and changes with FMLA, ADA, employee leave, and other employment-related topics.

April 18, 2019: Student Privacy

Keep current on FERPA, CIPA, COPPA, and other federal and state laws that impact student – and staff – privacy issues in your district.

July 11, 2019: 2018–2019 Education Law Year in Review

Find out the new education-related laws that passed in the budget bill and other legislation, as well as important court decisions and other changes that affect Ohio schools.

You spoke, and we listened! Based on client input regarding the preferred format for Ennis Britton’s Administrator’s Academy Seminar Series, these presentations will now be offered via a live video webinar professionally produced by the Ohio State Bar Association. As always, an archive will be available also.

Participants must be registered to attend each event. All three webinars will be archived for those who wish to access the event at a later time. You may register on our [website](#) or contact Nancy via [email](#) or phone at 513-674-3451.

OTHER UPCOMING PRESENTATIONS

December 4: Brown County ESC & Southern Ohio ESC

– Ryan LaFlamme and Hollie Reedy

December 7: Southwest Ohio Personnel Administrators

– Erin Wessendorf-Wortman

SAVE THE DATE! Ennis Britton Client Webinar

December 19: Lobbying and the Legislative Process

– Hollie Reedy

More information to come

January 25: Ohio Association of School Personnel Administrators – Winter Camp

– Collective Bargaining Workshop

– Human Resources Legal Update for Support Staff

January 31: DRI Conference: Civil Rights and Government Liability Seminar

– 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](#).

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 Nancy via [email](#) or phone at 513-674-3451. Archived topics include the following:

Labor and Employment

- School Employee Nonrenewal
- Employee Licensure
- School Employee Leave and Benefits
- Managing Workplace Injuries and Leaves of Absence
- Requirements for Medicaid Claims
- Discrimination: What Administrators Need to Know

Student Education and Discipline

- New Truancy and Discipline Laws – HB 410
- Transgender and Gender-Nonconforming Students
- Student Discipline

School Finance

- School Levy Campaign Compliance

School Board Policy

- What You Should Know about Guns in Schools
- Crisis, Media, and Public Relations
- Low-Stress Solutions to High-Tech Troubles
- Ohio Sunshine Laws

Special Education

- Three Hot Topics in Special Education
- Supreme Court Special Education Decisions
- Special Education Scramble (2018)
- Special Education Legal Update (2017)
- Special Education Legal Update (2016)
- Effective IEP Teams

Legal Updates

- 2017–2018 Education Law Year in Review
- 2016–2017 Education Law Year in Review
- 2015–2016 Education Law Year in Review

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
Giselle Spencer
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:

Megan Bair
John Britton
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:

Megan Bair
John Britton
Bill Deters
Ryan LaFlamme
Bronston McCord
Jeremy Neff
Hollie Reedy
Giselle Spencer
Gary Stedronsky

Attorney Directory

Megan Bair

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

John Britton

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

Cincinnati Office: 513.421.2540

Cleveland Office: 216.487.6672

Columbus Office: 614.705.1333