



**March 2020**

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## Special Education Spotlight: District Did Not Violate IDEA When Failing to Evaluate Child

The District Court for the Northern District of Ohio recently upheld an administrative decision that a school district did not violate the IDEA’s child find requirement when the parents of the student prohibited the district from assessing the student or communicating with the staff members of the student’s private school. *Dougall ex rel. A.D. v. Copley Fairlawn City Sch. Dist. Bd. of Educ.*, 120 LRP 3077 (N.D. Ohio 01/28/20).

In this case, the parents of a ninth-grade student filed due process, claiming the district should have initiated an evaluation prior to their child’s expulsion from school and also failed to complete an initial evaluation after the parents effectively revoked consent, in violation of the IDEA.

Specifically, the parent argued that the District knew or should have known that their child had a disability when the parents informed the District that the child had “special needs” and provided a copy of a private doctor’s evaluation that diagnosed the child with autism, depression, and anxiety. The district countered that they did not violate IDEA’s child find requirement because there were no clear signs to suspect the child had a disability. To support this argument, the District relied on the child’s “exemplary academic performance” throughout the child’s academic career as well as a lack of any significant behavior concerns in school.

The district court acknowledged that the potential qualifying disabilities applicable to the child were autism, serious emotional disturbance, and other health impairment. In order to qualify for services under the IDEA, each of these definitions expressly requires the disability to adversely affect the child’s educational performance. However, as the district argued, the record in this case showed that the child’s grades were consistently high. Further, until the disciplinary incident which triggered the expulsion, the student had not demonstrated significant behavior concerns. Thus, the court ultimately concluded the District did not violate IDEA’s child find requirement.

The parents also argued the District improperly terminated the student’s initial evaluation when the District incorrectly concluded that the parents had revoked their consent to the evaluation itself. The District argued that the parents’ actions resulted in a clear revocation of their consent to the student’s evaluation. When conducting an evaluation, the IDEA requires school districts to use a variety of assessment tools, strategies, and information in determining whether the child is a child with a disability. As part of the evaluation, the District must review existing data that

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includes class-room based observations and observations by teachers and related services providers, among other things. The district must obtain parental consent to conduct an evaluation as well.

The district court held that the record clearly showed the parents' emails served to revoke consent to conduct any classroom observations of the child or to interact with any of the teachers at the child's current placement at a private school. The court stated that by revoking consent to perform the proper assessments and observations and by attempting to control the evaluation process, the parents prevented the district from conducting the evaluation in accordance with the IDEA. Therefore, the parents' actions "amounted to a revocation of consent to the evaluation itself." Thus, the district court ultimately held that the school district did not violate the IDEA.

### **What this means for your District:**

Although grades should not be the sole factor in determining whether a child may have a disability, they certainly are an important factor in supporting the conclusion that there is no reason to suspect a disability that triggers an obligation to evaluate a child with strong academic performance. This case also demonstrates that a parent may effectively revoke consent for an evaluation by attempting to restrict access to a student or dictate the type of assessments that may be used to such an extent that the evaluation no longer meets IDEA requirements.

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## **Professor Refused to Use Preferred Pronoun for Transgender Student**

A Sixth Circuit federal district court recently considered the issue of a professor who refused to address a transgender student by their preferred pronoun. The professor referred to the student by their last name only, while he addressed other students using "Mr." or "Ms." with their last name. The university had an anti-discrimination policy, and it disciplined the professor by issuing a written warning. The professor filed a grievance, but it was denied. The professor then sued the university alleging violations of his constitutional rights.

The claims included violations of his constitutional right to free speech, including content and viewpoint discrimination, compelled speech, and retaliation, and alleged violations of his right to free exercise of religion, violations of the Due Process Clause, and Equal Protection Clause. He alleged similar claims under the Ohio Constitution. He sought removal of the discipline against him and an order preventing the university from enforcing its non-discrimination policies.

The federal district court ruled against the professor, dismissing his federal claims. The court found that his right to free speech did not include protection for the manner in which he addressed the student. The court also found he did not plead facts sufficient to establish free exercise of religion, due process or equal protection claims. The court also declined to exercise jurisdiction over the state Constitutional claims.

### **What this means for your District:**

This decision may be appealed, so stay tuned. The federal district court interpretation of this issue in our Circuit is important, as it represents the development of the law on how legal issues concerning transgender identity, academic freedom, and First Amendment free speech rights will be interpreted. Keep in mind the U.S. Supreme Court is considering a trio of cases on Title VII and whether sex discrimination includes sexual orientation and related issues of gender identity. The decision is expected in June of 2020 and may advance our understanding of this topic.

*Meriwether v. The Trustees of Shawnee State University, et al.*, (S.D. Ohio, 2020) No. 1:18-cv-753

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## **National Initiative to Address Sexual Assault in Schools**

Last week, U. S. Secretary of Education Betsy DeVos announced plans for a new compliance review and data collection initiative to address the rise in sexual assaults in K-12 education, this time targeting the actions of adult

employees toward school students. Among other things, the new initiative will implement provisions to prohibit public schools from reassigning employees accused of sexual assaults against students.

Asserting that “No parent should have to think twice about their child’s safety while on school grounds,” DeVos directed the Office for Civil Rights to lead the initiative to examine sexual assault through several avenues, including the following:

- OCR will focus on raising public awareness of the issue of sexual assault in K-12 schools, including making information on the issue available to educators, school leaders, and families.
- OCR will conduct nationwide compliance reviews to examine how sexual assault allegations are handled under Title IX, with special emphasis on sexual incidents involving teachers and school staff. It will then become OCR’s job to work with districts to correct any compliance concerns.
- OCR will conduct Data Quality Reviews (DQRs) of the sexual offenses data including sexual assaults, as submitted by school districts through the Civil Rights Data Collection (CRDC). In doing so, OCR will partner with the National Center for Education Statistics (NCES) and support districts in accurately recording and reporting incidents of sexual assault/sexual offenses through the CRDC.
- For the 2019-2020 data collection, OCR has proposed collecting more detailed data on sexual assault. The proposed data collection includes incidents perpetrated by school staff or school personnel. If adopted, the inclusion of this data would make the CRDC collection the first universal collection to gather such data systemically for individual schools.

This is the second nationwide initiative announced by the OCR within the last 13 months. The present announcement comes in the wake of OCR’s recent resolution of two sexual harassment complaints involving Chicago Public Schools. However, Secretary DeVos insists the issue is widespread, stating “We hear too often about innocent children being sexually assaulted by an adult at school.” Her declaration is supported by 2015-2016 CRDC reports recording more than 9,700 incidents of sexual assault, rape or attempted rape in public elementary and secondary schools. The Agency additionally reports the problem is “fifteen times greater than a decade ago.” The reporting as referenced does not break down the number of adults directly involved in such allegations but relate to a companion announcement by the Office of Elementary and Secondary Education that it will publish an extensive study on state and local measures to prevent the “pass the trash” phenomenon in dealing with adults accused of sexual offenses against students.

### **What this means for you district:**

School Districts in Ohio and throughout the country can expect greater scrutiny of CRDC reporting and possible OCR review if the district has been the subject of current or prior OCR complaints. Accordingly, it is imperative that all staff understand their legal and ethical responsibilities for supervising and protecting students. Finally, these announcements are a much-needed justification for a review of harassment reporting procedures, child abuse reporting mandates, and related professional development for all school staff.

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## **USDOE Guidance on Prayer and Religion in Schools**

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The U.S. Department of Education recently released guidance to provide information regarding religious expression in public schools. The Supreme Court has held that public school officials may not exhibit favoritism or hostility towards religious expression. This means that a school district must navigate the difference between government speech that endorses religion and purely private speech that is protected by the First Amendment.

For example, the Supreme Court previously held that public school officials, acting in their official capacities, may not lead their students in prayers or other religious activities. (*Engel v. Vitale*, 370 U.S. 421 (1962)). Additionally, school officials may not use their positions in an attempt to influence students to participate or not participate in certain religious activities. Though school officials may be prohibited from this kind of behavior, school officials do not lose all of their First Amendment rights. Speech that is categorized as private speech as opposed to government speech still enjoys protection by the First Amendment.

With that background, we will consider these principles in the context of certain prayer related situations.

### 1. Teachers, Administrators, and Employees

Teachers and school officials may not encourage or discourage prayer or actively participate in religious activities with students. However, teachers may participate in religious activities where the context makes it clear that the teacher is not acting pursuant to their official capacities. For example, teachers may partake in religious activities, even during the workday, if it is such a time that allows them to handle personal business. Additionally, teachers may meet, during lunch or after school, in order to engage in religious activities.

### 2. Student Expression During Instructional or Non-Instructional Time

School officials retain the right to impose rules and restrictions on student activities so long as they do not discriminate against students for partaking in religious activities. Students may partake in prayer during non-instructional time subject to the same rules and policies designed to prevent material disruption of the school educational environment that is applied to other activities. Additionally, during instructional time, school officials may excuse students from class when their participation in a religious activity materially disrupts the learning environment. Therefore, a student may be removed from a class for engaging in prayer if the activity creates a material burden for other students in the classroom.

### 3. Student Organized Religious Activities

The guidance makes clear that students are permitted to organize religious activities outside of school hours to the same extent that noncurricular student activities groups are permitted to do so. This means that the students must be given the same access to school facilities without discriminating against their religious beliefs. The guidance also acknowledges that school officials have great discretion in determining the content allowed in school media or newspapers. However, school districts may not discriminate on the basis of religious beliefs. For example, if nonreligious groups are permitted to advertise or announce their meetings, then school authorities may not prevent religious groups from doing the same. School districts may disclaim sponsorship of these groups or events, so long as they do so in a way that does not favor or disfavor any particular group.

### 4. Teaching About Religion

It is well known that public schools may not provide religious instruction to their students. However, public schools may teach their students about religion. Meaning that a teacher may discuss philosophical questions regarding religion or the history of religion and its role in the history of the United States. Additionally, a teacher may consider the influences that religion has had on the particular subjects taught in public schools.

You can review OCR's guidance at [https://www2.ed.gov/policy/gen/guid/religionandschools/prayer\\_guidance.html](https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html).

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## Legislation on the Horizon

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**House Bill 111** – HB 111 was introduced in February 2019 and reported by the House Primary and Secondary Education Committee in November 2019. The bill requires districts and nonpublic schools to transmit/transfer student records or give a statement that there are no records within five school days.

**House Bill 231** – HB 231 was introduced and referred to the House Primary and Secondary Education Committee in May 2019. If enacted, requires ODE to generate a list of providers for free epi-pens. However, also says a school can require training for food allergies. This may trigger special education findings if a district chooses not to utilize ODE's resources.

**House Bill 294** – HB 294 was introduced and referred to the House Primary and Secondary Education Committee in June 2019. If enacted, it makes a small tweak to the definition of bullying by using the word “either” rather than “both” for causes harm and is pervasive. Schools usually must take actions for “either” regardless of policy.

**House Bill 305** - HB 305 was introduced and referred to House Finance Committee in June 2019. If passed, the bill would provide a new financing system for school districts beginning in FY 2020. The bill would require the funding under this system to be paid directly to school districts, community schools, and STEM schools for the students they are educating. The funds would no longer be given to the resident district and then paid to the STEM or community schools in which the students are enrolled. Part of this bill or a subsequent effort should reduce or eliminate voucher programs and other efforts to divert public funds to private and poorly regulated charter programs.

**House Bill 310** – HB 310 was introduced in June 2019 and referred to the House Primary and Secondary Education Committee in September. The bill names and prohibits teachers and other school employees from engaging in bullying and makes offenses criminal. Makes it a requirement that districts create a policy and update it at least every three years. Districts already have robust policies on bullying with many requirements. ODE further has authority to regulate misconduct for licensed employees. It was introduced in July 2019.

**House Bill 321** – HB 321 was introduced in August 2019 and referred to the House Primary and Secondary Education Committee in November. This bill requires additional training for K-6 students regarding child abuse.

**House Bill 333** – HB 333 was introduced and referred to the House Primary and Secondary Education Committee in September 2019. The bill permits public schools to contract with third party vendors to store student records. Some acknowledgement might help with FERPA complaints and claims.

**House Bill 367** – HB 367 was introduced and referred to the House Primary and Secondary Education committee in October 2019. The bill requires ODE to recommend a guidance counselor job description and at least one staff member as a liaison to them.

**House Bill 378** – HB 378 was introduced and referred to the House Insurance Committee in October 2019. The bill allows workers on strike to participate in unemployment compensation.

**House Bill 432** – HB 432 was introduced and referred to the House State and Local Government Committee in December 2019. This bill allows an occupational licensing board to issue Ohio licenses for out of state candidates with good work experience. The senate has a bill like this as well.

**House Bill 436** – HB 436 was introduced and referred to the House Health Committee in December 2019. This bill requires training and requirements to test for dyslexia.

**House Bill 447** – HB 447 was introduced in December 2019 and referred to the House Primary and Secondary Education Committee in January 2020. This bill mandates creation of a school safety advisory committee.

**House Bill 459** – HB 459 was introduced in December 2019 and referred to the House Primary and Secondary Education committee on January 28th, 2020. This bill prohibits a coach or extracurricular advisor from restricting a student’s participation in another extracurricular.

**House Bill 493** – HB 493 was introduced on February 4th, 2020 and referred to the Primary and Secondary Education House Committee on February 11th. If enacted, it would allow a child, whose parents live in different school districts, to continue to attend school in the district in which they attended at the beginning of the school year, even if the child moves to a different school district after the school year has commenced.

**House Bill 494** – HB 494 was introduced on February 4th, 2020 and referred to the Primary and Secondary Education House Committee on February 11th. If enacted, it would establish a loan repayment program for eligible teachers in underperforming districts. Eligible teachers must meet the following criteria:

- An Ohio resident;
- Hold a valid educator license to teach grades 7-12;
- Be employed for the *first time* as a full-time classroom teacher;
- Hold a bachelor's degree awarded by any public or private institution of higher education in Ohio;
- Have outstanding student loans on the bachelor's degree described above; and
- Have made timely payments in accordance with the terms of the loan's repayment schedule.

The school the teacher is employed at full-time must meet both of the following criteria: 1) has persistently low performance ratings on the state report cards, and 2) has difficulty attracting and retaining classroom teachers who teach STEM classes with a valid educator license to teach grades 7-12. To receive the award the teacher must be employed for five consecutive years in STEM to students in grades 7-12. The amount will not exceed \$40,000 per teacher.

**House Bill 511** – HB 511 was introduced on February 18<sup>th</sup>, 2020. If enacted, it would authorize a school district to obtain, store, and administer glucagon in case of a diabetic emergency through injection or nasal spray form. One of the bill's sponsors, Rep. Tracy Richardson, said "By allowing schools to stock glucagon, and empowering nurses and trained professional to use the glucagon when necessary, emergency treatment will be more readily available when it is most needed." She said this legislation is "lifesaving, permissive, and common sense."

**Senate Bill 4** – SB 4 was introduced in February 2019. It passed in the Senate in March 2019 and informally passed and re-referred in the House. It increases funding for school facilities assistance by \$100k. This would provide additional funds for school facilities improvements.

**Senate Bill 16** - SB 16 was introduced and referred to the Senate Judiciary Committee in February 2019. The bill would require the State Board of Education to adopt a model curriculum for high school students on how to properly interact with peace officers during encounters. The bill would require school districts to use the State Board's curriculum in at least one of the courses required for high school graduation.

**Senate Bill 34** – SB34 was introduced and referred to the Senate Education Committee in February 2019. The bill modifies rules for the state board and districts regarding licensure and complaints of misconduct. It enhances penalty for some violations and broadens disqualification for diversion program participants. It enhances potential liability for schools if they provide any assistance to a person who may have violated rules in obtaining a new job.

**Senate Bill 89** - SB 89 passed the Senate on October 23, 2019 and just passed the House on February 5, 2020. The House has asked for committee of conference. If signed into law, the bill would require that a joint vocational school district be compensated at the same rate and under the same terms as a school district when a legislative authority enters into a compensation agreement with the school district for a loss of tax revenue. The bill will ultimately result in an increase in revenue for affected joint vocational school districts. The amount of the increase will be dependent on the specific compensation agreement.

**Senate Bill 216** – SB 216 was introduced on October 19, 2019. If passed, the bill would allow a board of education to grant a partial real property tax exemption to each homestead in the district that also receives a tax reduction under Section 323.152(A) of the Revised Code. In order to receive a tax exemption under 323.152(A), a person must fall into one of the following categories: i) a person who is permanently or totally disabled, ii) a person who is 65 years of age or older, or iii) a person who is the surviving spouse of a deceased person who was permanently and totally disabled or was 65 years of age or older when they applied for the reduction in taxes available in this section. If the board decides to grant a partial real property tax exemption under this section, they must also grant a

partial manufactured home in the district that receives the tax reduction under 4503.065 of the revised code. In order to receive a tax exemption under this section, you must be: i) a person who is permanently or totally disabled, ii) a person who is 65 years of age or older, or iii) a person who is the surviving spouse of a deceased person who was permanently and totally disabled or was 65 years of age or older when he applied for the reduction in taxes available in this section.

The bill also allows a board of education to designate a fixed-rate levy as an eligible levy. If the levy is then approved by the voters, the partial exemption allowed under this section shall apply with respect to that levy beginning in the same tax year in which the levy first takes effect.

**Senate Bill 218** – SB 218 was introduced and referred to the Senate Education Committee in October 2019. If passed, the bill would prohibit school districts from beginning the school day earlier than 8:30 am.

**Senate Bill 219** - SB 219 was introduced and referred to the Senate Education Committee in October 2019. If passed, the bill would require the creation of the career pathways apprentice program for high school students. The purpose of the program is to establish partnerships between schools, businesses, communities, government entities, and non-profit organizations in order to create career pathways for apprenticeships in several professions. These professions include manufacturing, IT, financial services, business operations, healthcare, and education. This bill might provide opportunities for CTCs that align with current operations.

**Senate Bill 225** - SB 225 was introduced and referred to the Senate Government Oversight and Reform Committee in October 2019. If passed, the bill would require that a sign containing a toll-free telephone number to report child abuse or neglect be posted in each school building under the Board of Education's control. The sign should be posted in such a way so that it is clearly visible and located in an area that is readily accessible to students. While this makes schools comply with an additional posting requirement, it also may be beneficial from the perspective that staff who are mandatory reporters will have easy access to number for reporting abuse.

**Senate Bill 226** - Senate Bill 226 was introduced on October 21, 2019. If passed, the bill would require transportation through twelfth grade and the following language would also be deleted. "In all city, local, and exempted village school districts, the board may provide transportation for resident school pupils in grades nine through twelve to and from the high school to which they are assigned by the board of education of the district of residence or to and from the nonpublic or community high school which they attend for which the state board of education prescribes minimum standards." This would effectively require districts to provide 9-12 transportation.

**Senate Bill 253** – SB 253 was introduced and referred to the Senate Finance Subcommittee on Primary and Secondary Education in October 2019. The bill permits a district to expel a student for one year who makes a credible threat of violence.

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## Upcoming Deadlines

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As your school district prepares for the next couple of months, keep in mind the following upcoming deadlines.

- **March 1** – Deadline to take action on and deliver written notice of nonrenewal of superintendent's contract (RC 3319.01); Deadline to take action on and deliver written notice of nonrenewal of treasurer's contract (RC 3313.22); Deadline to publish joint statement describing how district's business advisory council has fulfilled its responsibilities (RC 3313.821)
- **March 17** – Primary Election Day (RC 3501.01)
- **March 31** – End of second ADM reporting period (RC 3317.03)

- **April 27** – Deadline to submit August emergency or current operating expenses levy to county auditor for August election (RC 574802(A))
- **May 1** – Last day to submit August emergency or current operating expenses levy to county auditor for August election (RC 5748.02(A)) (100 days prior to the election).
- **May 5** – Last day for school districts to file resolution of necessity, resolution to proceed and auditor’s certification for bond levy with board of elections for August election (RC 133.18(D)). Last day for county auditor to certify school district bond levy terms for August election (RC 133.18(C)). Last day to submit continuing replacement, permanent improvement, or operating levy for August election to board of elections (RC 5705.192, 5705.21, 5705.25). Last day to certify resolution for school district income tax levy for August election to board of elections (RC 5705.195). Last day to submit phased-in levy or current operating expenses levy for August election to board of elections (RC 5705.251(A)) (90 days prior to the election).
- **May 15** – Last day for certain board members and all administrators to file financial disclosure forms with the Ohio Ethics Commission (RC 102.02(A)(4)(a)).

## Upcoming Presentations

### 2019–2020 ADMINISTRATOR’S ACADEMY SEMINAR SERIES

**April 16, 2020: Student Discipline Primer**

**July 9, 2020: 2019–20120 Education Law Year in Review**

Ennis Britton’s Administrator’s Academy Seminar Series is offered via a live video webinar professionally produced by the Ohio State Bar Association and is free of charge to clients.

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 Kayla via [email](#) or phone at 513-674-3451.

**March 16: NeoNet’s Annual NeoTech Conference**  
**“Student Privacy & Social Media,” and**  
**“We’re Under Attack, This Is Not A Drill”**  
 Presented by Robert McBride

**April 3: West Central OASBO Chapter**  
**Legal Update**  
 Presented by Erin Wessendorf-Wortman

**April 22: OASBO Annual Conference**  
**“Wait, What? FMLA Traps for the Unwary”**  
 Presented by Pamela Leist and Hollie Reedy

**April 22: OASBO Annual Conference**  
**“Avoiding Legal Pitfalls of Online Fundraising”**  
 Presented by Pamela Leist and Hollie Reedy

**April 28: State Support Team 12**  
**Special Education Legal Update**

Presented by Jeremy Neff & Erin Wessendorf-Wortman

**May 4-5: Ohio Association of EMIS Professionals**

Presented by Erin Wessendorf-Wortman

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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 Kayla 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
- Student Privacy

## 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  
Robert J. McBride  
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:

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

### School Finance

Taxes • School Levies •  
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