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School Law Review

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Ohio Joins Federal Lawsuit Regarding New Overtime Regulations

On September 20, 2016, Ohio joined with 20 other states in a federal lawsuit against the U.S. Department of Labor (DOL), Wage and Hour Division, and certain DOL officials regarding the federal government's new overtime regulation. On the same day, the U.S. Chamber of Commerce and more than 50 businesses filed a legal challenge on the same issue. The federal lawsuit against DOL alleges that the new overtime regulation is unconstitutional and overreaching for several reasons, including the following:

- Violates the Tenth Amendment
- Strains state budgets
- Imposes federal regulations on states
- Evaluates eligibility based on salary rather than duties
- Imposes increases every three years without regard to economy
- Infringes upon state sovereignty and federalism
- Commandeers, coerces, and subverts the states by mandating their pay structures and budget allocations

The complaint notes several negative effects that the new overtime rule will have on states and state residents:

- Will trigger reduction or elimination of some essential government services and functions to offset the new expense
- Certain infrastructure, services, and social programs may be reduced or cut
- Less discretionary funding will be available
- May have to increase the workload of employees who are exempt to new regulation
- May have to eliminate or alter some employment positions due to new budget constraints

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The Tenth Amendment reserves to the states the rights that are not specifically given to the federal government in the Constitution. The lawsuit cites the 1976 Supreme Court decision *National League of Cities v. Usery* (426 U.S. 833), which limited the power of Congress power under the Tenth Amendment to apply the Fair Labor Standards Act (FLSA) wage and overtime regulations to the states. The Supreme Court held:

> *One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime.*

However, the Supreme Court overturned *Usery* when it decided *Garcia v. San Antonio Metropolitan Transit Authority* (469 U.S. 528) in 1985. The present lawsuit asks the court to overrule *Garcia* to the extent possible.

The new FLSA regulations are expected to take effect December 1, 2016. The notable change is to the "white collar" exception, which excludes employees in a "bona fide executive, administrative, or professional capacity" from the overtime requirement of one-and-a-half times the regular rate of pay for work beyond 40 hours in a week. Under the new regulation, any white collar employees who earn a salary of less than the new requirement of $913 a week will in effect not be considered bona fide executive, administrative, or professional workers.

Originally, FLSA defined these jobs in terms of their job duties rather than their salaries, and FLSA applied only to federal workers, not to state workers. DOL admits that the FLSA regulations were changed "without specific Congressional authorization." The lawsuit requests that the court declare invalid and set aside the new regulations.

The lawsuit was filed in the U.S. District Court in the Eastern District of Texas, known as the "Rocket Docket" for moving cases along quickly. We will keep you posted on the outcome of this important case.

"Safe at Home" Bill Creates Issues for Schools

A bill that went into effect September 8, 2016, may cause some unanticipated issues for Ohio school districts. The bill, Sub. H.B. 359, allows victims of certain crimes to receive a confidential address from the Ohio Secretary of State, which must be accepted by political subdivisions and election boards for voting purposes, and may be accepted by private institutions.

Victims of rape, human trafficking, domestic violence, sexual battery, and menacing by stalking are eligible to apply for a confidential address. The application requires a notarized statement that the person fears for his/her own safety or that of a household member due to their status as a victim of one of the listed crimes. When the application is complete and approved, the person is called a "program participant" and will be given an address for mail to be received and forwarded to them by the Ohio Secretary of State.

After this, a program participant may request that a government entity (including a school district) use the address designated by the Secretary of State, and the government entity *must* accept this address.

Multiple problems arise in the application of this new law to school districts. In Ohio, students are entitled to a tuition free education but generally only in the district where the parent resides. (R.C. 3313.64) The residence of a parent and child is critical to determining which district is responsible for the payment of tuition, EMIS data submission for state funding and other documentation, and where the child may attend school. If a program

participant's residential address changes, this may affect where the child may attend school and which district is responsible for tuition.

And, there are significant practical issues if schools don't receive an accurate residential address in terms of communication. The school and parents need to communicate with each other regularly regarding school bus pickup and drop-off, notices to and from school and home, an injury or illness at school, and a number of other daily issues.

It is apparent that the legislation, which extensively addresses voter registration and voting, did not recognize the issues applicable to school districts. A confidential address, which the school must accept upon request by the program participant, renders schools unable to fulfill their obligations for attendance and tuition purposes and to the Ohio Department of Education through EMIS.

The solution for this issue could involve amendments to the legislation creating a carve-out for schools, providing the district with the residence address of a parent and child, but requiring it to keep such information confidential. For example, if another person asked for public records or the school produced a directory of information, the school would be required to keep the address confidential. This could include limiting access even within the school to those with a need to know.

There are some indications that legislators are aware of the issue, but nothing concrete has been announced on how it might be addressed going forward. Stay tuned, and contact Ennis Britton if you have questions about the application of the new law to a particular situation.

Court Weighs School's Ability to Regulate Off-Campus Speech

A school district's authority to discipline a student for off-campus speech is an increasingly relevant concern today for public schools. Inappropriate or offensive speech can cause lasting injury to victims and can trigger significant community backlash and unrest. The Ninth Circuit Court of Appeals recently addressed this issue in a case that arose out of Oregon.

The case was filed after a school district suspended a seventh-grade student named C.R. for harassing two other students from school. C.R. and some friends had been involved in an escalating series of encounters with two sixth-grade students, a girl and a boy, both disabled, first calling them vulgar names and later increasing to sexual taunting. On the day of the incident at issue, the students were traveling home from school through a public park adjacent to school property. About five minutes after school ended, C.R. and his friends circled around the two younger students, commenting and questioning them about sexual acts and pornography. A school employee rode by the students on her bicycle, noticed the group, and stopped to help the younger girl and boy. The girl reported that the encounter made her feel unsafe, and the employee walked the two students home.

After investigating the incident, school administrators concluded that C.R. was the "ringleader" of the group and that the conduct fell within the district's definition of sexual harassment. All of the boys were disciplined. C.R. was suspended for two days, not only because of the harassment but also because he had lied to administrators during the investigation and had disregarded their request not to discuss the interview with his friends.

C.R.'s parents filed a lawsuit a year after the incident, alleging that his First Amendment and due process rights had been violated and that the school lacked authority to discipline him. The school district moved for summary judgment, which was granted by the district court. The parents appealed the decision to the Ninth Circuit, which considered the following.

Was C.R.'s conduct sexual harassment? The school had a policy that defined sexual harassment, and the investigation had yielded evidence that C.R.'s behavior fit within that definition. The Ninth Circuit Court noted,

"Federal courts owe significant deference to a school's interpretation of its own rules and policies. We uphold a school's disciplinary determinations so long as the school's interpretation of its rules and policies is reasonable, and there is evidence to support the charge." Therefore, the court upheld the district's conclusion that C.R.'s behavior was considered sexual harassment.

Could the school regulate his speech and discipline him? The court first considered whether the school could permissibly regulate the student's off-campus speech *at all,* and then considered whether the school's regulation of the student's speech complied with the requirements of the First Amendment.

Regulation of students' *on-campus* speech is well established as constitutional; however, regulation of *off-campus* speech is another matter. Following a previous Supreme Court decision (*Tinker v. Des Moines,* 393 U.S. 503 (1969)), regulation of student speech is permissible if the speech "might reasonably lead school authorities to forecast substantial disruption of or material interference with school activities" or if the speech might collide "with the rights of other students to be secure and to be let alone." Speech that is merely offensive is not sufficient; however, sexually harassing speech is more than that. Sexually harassing speech, the court held, implicates other students' rights to be secure, threatening their sense of physical, emotional, and psychological security.

The age of the student who is being harassed also is relevant. The Supreme Court has noted that children younger than age 14 are less mature, and therefore overtly sexual speech could be more seriously damaging to them. For this reason, elementary schools may exercise greater control over student speech than secondary schools.

The court held that the school district did indeed have the authority to discipline C.R. for his harassing speech, even if it was off campus, for a number of reasons:

- All of the individuals involved were students
- The incident took place –
    - On the students' walk home
    - A few hundred feet from school
    - Immediately after school let out
    - On a path that begins at the school
- The students were together on the path because of school

Succinctly stated, the court held that "a school may act to ensure students are able to leave the school safely without implicating the rights of students to speak freely in the broader community."

Were C.R.'s due process rights violated? Again citing previous court decisions, the opinion noted that the Constitution allows informal procedures when a student suspension is 10 days or fewer. The school must provide the student notice of the charges but need not outline specific charges and their potential consequences or notify parents of the charges prior to the suspension. If the student denies the charges, the student then must have an opportunity to explain his side of the story. A school is not constitutionally required to inform the student of the specific rules or policies in question. For these reasons, the court held that the school did not violate C.R.'s procedural due process rights.

C.R. claimed that his substantive due process rights were violated when the school recorded the reason for suspension as "harassment – sexual," which allegedly deprived him of a good reputation. The court opined that C.R. did not have a genuine interest in maintaining a good reputation, as he had since stolen supplies from the school, and held that the school may record the reason for suspension, "however unsavory," so long as it applied appropriate procedural safeguards. Therefore, the school also did not violate his substantive due process rights.

Ultimately, the Ninth Circuit upheld the summary judgment that the district court had previously granted.

What This Decision Means for Your School District

Districts should address each incident involving inappropriate or offensive conduct on a case-by-case basis to determine an appropriate response. This case demonstrates that school districts have greater authority to control conduct that is offensive or threatening, even if it occurs after school hours or off of school property. The case also illustrates that schools should carefully consider whether a student's off-campus behavior may implicate other board policies beyond discipline, including anti-harassment and anti-bullying policies, and follow procedures that are required by each.

C.R. v. Eugene School District 4J, (C.A. 9, 2016), No. 13-35856

Kindergarten Teacher Denied Immunity When Child Abducted

In January 2013, a kindergarten teacher in Philadelphia allowed one of his students to leave the classroom with an adult who, against district policy, failed to produce identification that she was authorized to leave with the child. The adult sexually assaulted the child, who was found by a city sanitation worker in the early hours the following morning on a playground. The child's parent sued not only the school district but also the teacher in his individual capacity. The teacher claimed that the doctrine of qualified immunity was relevant to protect him from the lawsuit.

The doctrine of qualified immunity can be overcome when public officials violate clearly established constitutional rights of which a reasonable person should have known. Courts use a two-pronged test to resolve a claim of qualified immunity:

1. Whether the plaintiff sufficiently alleged the violation of a constitutional right; and
2. Whether the right was clearly established at the time of the official's conduct

The U.S. Supreme Court has held that the Constitution allows for protecting people from the State itself via the state-created danger theory (rather than for protecting people from one another). A legal claim of a state-created danger must satisfy four elements. For the purpose of brevity, we will look at only one of those four elements: the danger was created by a public official's *use of authority* rather than the official's *failure to use* authority. Important in this case, the kindergarten teacher, Littlejohn, argued that he failed to take action – he failed to follow district policy, he failed to obtain the woman's identification, he failed to verify that she was authorized to leave with the student.

Rather than battle between action and inaction, however, the court looked to the status quo. For the kindergarten environment to remain constant and unchanged, the student would have remained in the classroom, in a protected environment. The disruption to the status quo was that she was allowed to leave; therefore, the court determined that Littlejohn took action when he used his authority to allow the student to leave with the woman. The plaintiff also successfully proved the other three elements of the state-created danger claim; therefore, Littlejohn's actions constituted a state-created danger. Because the Constitution allows for protecting people from the State itself, the first prong of the qualified immunity claim was satisfied: the plaintiff sufficiently alleged a violation of a constitutional right.

The second prong is whether the violated constitutional right was clearly established at the time of the public official's conduct. To satisfy this test, the court considered whether the state of the law when the offense occurred gave Littlejohn "fair warning" that his alleged treatment of the student was unconstitutional.

The court was careful to define the constitutional right of which the plaintiff was deprived, and defined it as follows:

The right at issue here is an individual's right to not be removed from a safe environment and placed into one in which it is clear that harm is likely to occur, particularly when the individual may, due to youth or other factors, be especially vulnerable to the risk of harm.

The court concluded that the state of law in 2013 was sufficiently clear to put Littlejohn on notice that permitting a kindergarten student to leave class with an unidentified adult could lead to a deprivation of that student's constitutional rights. Therefore, the second prong was satisfied, and the plaintiff successfully overcame the kindergarten teacher's defense of qualified immunity.

The court succinctly state in its short conclusion: "Exposing a young child to an obvious danger is the quintessential example of when qualified immunity should not shield a public official from suit."

What This Decision Means for Your School District

The doctrine of qualified immunity is important to educators and school administrators because it protects them from civil liability in many situations. However, this case illustrates that the protection is not absolute. Teachers have the important role of not only educating children but also providing them with a safe environment in their classrooms and schools. A plaintiff in a lawsuit against a school official may be able to overcome the protection of immunity in situations where the teacher or other school official acts in a reckless way that directly results in harm to a student or a violation of a student's constitutional rights.

– *L.R. v. Sch. Dist. of Philadelphia*, No. 14-4640 (3d Cir. 2016)

Guidance on Title IX in Career Technical Education

On June 16, 2016, the U.S. Department of Education's Office of Career, Technical, and Adult Education (OCTAE) teamed with the Office for Civil Rights (OCR) to issue a "Dear Colleague" letter on the issue of gender equity in career and technical education (CTE). OCR presented it as "significant guidance," and it will be followed by more tools CTE districts can use to ensure they are in compliance with efforts to engage students of both genders in CTE programs and address underrepresentation in some CTE fields.

Generally, the guidance makes it clear that career technical districts must ensure all students have access to the full range of CTE programming, regardless of sex or gender. OCR is focusing on career fields in which individuals from one gender comprise less than 25 percent of individuals employed in the field, such as technology, IT, computer science, cybersecurity, and other emerging high-skill occupations.

For example, while less than 2 percent of women are plumbers, more than 90 percent of cosmetologists are women. For men, nursing and education are areas of much lower enrollment, with male teachers representing less than 3 percent of early childhood education teachers.

OCR views career technical education access from a civil rights perspective as a way to provide access to programs for both genders leading to jobs for which the wage premium is high, and improving economic mobility for people affected by gender wage gaps.

CTE districts are cautioned to conduct admission, recruitment, and counseling practices in a nondiscriminatory manner. If districts observe substantially disproportionate enrollment in programs, they should review their policies and practices regarding counseling of students and ensure that sex stereotyping is not occurring.

OCR noted the following areas of concern.

Recruiting a diverse pool of students

Recruitment teams should be composed of both sexes. Promotional efforts like career days should not be sex stereotyped, and material presented for promotional activities should not be sex stereotyped (show a female electrician and a male health care worker).

Examples of sex discrimination in recruiting: A career day presentation in which only male graduates are invited to speak, promotional material depicting only males and using male pronouns in the text, and promotional material given only to those who attend the career day and not to all the students at school. OCR explained that having male-only speakers and promotional materials depicting only men could contribute to a perception the program is only for males. OCR suggests promotional materials depicting females, distribution to all students, not just those who attended the career day, and inclusion of female graduates.

Admissions to programs

OCR cautions districts about quotas or numerical limits in programs on participation of one sex, separate rankings on the basis of sex, and any admission criteria that prefer one sex over another, including tests of other criteria that have a "disproportionately adverse effect on one sex." CTE programs and classes may not be offered on a single-sex basis in a coeducational school.

Counseling and assessing performance

Guidance for admission must be particularly careful not to direct or urge students to join a particular program or refrain from doing so, or to predict success in a field. Even "interest testing" or other types of tests may discriminate. If disproportionate numbers of one sex are present in a class or program, the CTC must assess whether sex discrimination may be occurring.

OCR suggests observing counseling sessions, reviewing appraisal materials, and observing all aspects of a program to determine if there are any implicit biases or sex stereotyping. (Example: "Women make the best nurses." "You have to be really strong to be in auto shop – girls probably wouldn't be able to loosen a lug nut.")

Pregnancy and parental or marital status

Rules of the institution may not discriminate on these bases, including in admissions (asking a student or applicant employee if she is pregnant). Pregnant students may not be excluded from participation in programs or activities on that basis.

Sexual harassment

Participation by students in programs in which their sex is underrepresented may increase the risk of sexual harassment. Sexual harassment may include name calling or humiliating conduct. Sexual harassment is actionable under Title IX if it deprives a student or employee of the benefit of participation in the school's programs and activities. Sexual harassment in CTE programs must be promptly investigated, and steps must be taken to end the harassment and remedy its effects, if necessary.

Other areas of discrimination that may be of concern include the administration of discipline, sponsorship of apprenticeships, or administration of courses.

CTCs must also:

1. Post a notice of nondiscrimination.
2. Publish an annual notice of nondiscrimination prior to the beginning of each school year to students, parents, employees, and general public

3. Notify all students and employees of the name, title, office address, phone, and email of the entity's Title IX coordinator. This should also be distributed to applicants for admission and employment. CTCs may post on their website and in e-publications and printed publications, and must be included in bulletins, announcements, catalogs, application forms, and recruitment materials.
4. Adopt grievance procedures for prompt resolution of complaints.

Additional tools and resources will be released in the coming months from OCTAE's Division of Academic and Technical Education website to assist CTE districts in these efforts.

Noteworthy HR Changes to School Districts under HB 113

House Bill 113 was signed on June 14, 2016, and became effective September 14. What started as a bill for CPR and automated external defibrillator (AED) training and instruction became a "Christmas tree" bill on which to hang other, unrelated amendments. Below is a list of the amendments applicable to school districts.

CPR and AED Training – ORC 3313.6023, 3313.717

- Public schools must provide students instruction in CPR and AED use, beginning with the 2017–2018 school year.
- Districts must train every district employee to use AEDs.
- This may be incorporated into in-service training.
- Training must be completed by July 1, 2018, and every 5 years thereafter.
- Placement of AED is to be "in each school under the control of the board."
- Qualified immunity: "Except in the case of willful or wanton misconduct or when there is no good faith attempt to activate an emergency medical services system … no person shall be held liable in civil damages for injury, death, or loss to person or property, or held criminally liable, for performing automated external defibrillation in good faith, regardless of whether the person has obtained appropriate training on how to perform automated external defibrillation…"

Bright New Leaders – ORC 3317.25(B)(9)

- Schools may spend state economically disadvantaged funds to employ **principals and assistant principals** who have successfully completed the Bright New Leaders for Ohio Schools program.
- Purpose of Bright New Leaders is for individuals to
    - Receive training and development in primary and secondary education and leadership
    - Earn degrees and obtain licenses in public school administration
    - Be placed in public schools with 50% or greater poverty

Upcoming Dates & Deadlines

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

- **October 1**: New homeless student guidance becomes effective
- **October 1**: Deadline for board to adopt annual appropriation measure (RC 5705.38(B))

- **October 7**: Deadline to complete ODE's ESSA survey in English
- **October 12**: Deadline for superintendents to appeal EMIS early learning assessments using FY 2016 Fall Early Learning Data Appeal form
- **October 13–15**: Rural Education national convention
- **October 14**: Deadline to complete ODE's ESSA survey in Spanish
- **October 15**: Deadline for certification of licensed employees to State Board of Education (RC 3317.061)
- **October 21**: Deadline for superintendents and treasurers to complete FY 2016 EMIS Data Review for Funding or appeal using FY 2016 Data Appeal for Funding
- **October 31**: End of first ADM reporting period (RC 3317.03(A))
- **November 1**: Deadline for classroom teachers to develop online classroom lessons ("blizzard bags") to make up hours for school closures (RC 3313.482)
- **November 8**: Election day
- **November 13–16**: OSBA Capital Conference
- **November 30**: Deadline to apply for U.S. Department of Education's Green Ribbon Schools

Upcoming Presentations

2016–2017 Administrator's Academy Seminar Series

Tackling Issues in Student Discipline – Archive Available
September 29, 2016
Live seminars in Cincinnati and Cleveland

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

October 4: Buckeye Association of School Administrators – Fall Conference
Public Records Litigation in 2016 – Hollie Reedy

October 17: Brown County ESC – Legal Update
Pamela Leist and Erin Wessendorf-Wortman

October 18: James G. Jackson Police Academy – School Resource Officer Training
Hollie Reedy and Giselle Spencer

October 20: Butler County ESC – Guidance Counselors
Erin Wessendorf-Wortman

October 21: Mahoning County ESC – School Law Seminar
John Britton, Bronston McCord, Hollie Reedy, Giselle Spencer, Megan Bair-Zidian

November 13–16: OSBA Capital Conference
November 14: Teacher Termination and Nonrenewal Update – John Britton
November 14: The Specter of Bullying in Schools – Pamela Leist
November 14: Transgender Students in Schools – Erin Wessendorf-Wortman and Todd Petrey
November 15: School Law Workshop – Legal Issues for Today's Hottest Tech Toys – Gary Stedronsky

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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

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Michael Fischer
Pam Leist
Jeremy Neff
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Erin Wessendorf-Wortman
Megan Bair Zidian

School Finance
Taxes • School Levies • Bonds • Board of Revision

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