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School Law Review



Ohio Supreme Court Rules on Workers' Comp Claim

JANUARY 2017

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The Ohio Supreme Court recently ruled that the Ohio Industrial Commission does not have authority to award an injured worker with permanent partial disability compensation when the worker has been previously found to be permanently totally disabled in the same claim.

Permanent partial disability (PPD) is a benefit award that compensates an injured worker who suffers permanent damage to a body part as a result of a work-related injury or an occupational disease. Compensation for PPD is paid as one lump sum and is determined through a calculation that takes into consideration the nature of the disability and the injured worker's average wages.

Permanent total disability (PTD) refers to the injured worker's inability to perform sustained employment due to the allowed condition(s) in the claim. PTD benefits compensate the injured worker for impairment of earning capacity. Compensation for PTD is payable for life.

In the case that the Ohio Supreme Court recently decided, the injured worker had a claim for both physical and mental conditions. The injured worker was awarded PTD benefits solely for the mental conditions of the claim. The injured worker subsequently filed for PPD benefits for the physical conditions of the claim.

The Industrial Commission granted the PPD benefits. The employer filed a mandamus action with the Tenth District Court of Appeals to compel the Industrial Commission to vacate its order. The action was denied, and the employer then appealed to the Supreme Court.

The Supreme Court reversed, finding no statutory authority to award permanent partial benefits in a claim where the injured worker has already received a permanent total benefits award. The court found this to be so even where the awards are based on separate allowed conditions as here,

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

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for separate mental and physical conditions. The court's analysis focused on the lack of express statutory authority to award concurrent benefits in this manner. The court found that since Chapter 4123 of the Ohio Revised Code contains express grants of authority for certain concurrent awards (e.g., permanent partial and temporary total disability), the lack of any authority to award both PTD and PPD means that it is not permitted.

The Court of Appeals reasoned that R.C. 4123.95 required the court to construe the statute liberally in favor of the injured worker. The Supreme Court agreed that this is a requirement in interpreting workers' compensation statutes, but it does not mean that a court can read something into the statutes that is not there.

What This Means for Your District

Workers' compensation can be a complex area of the law. If you believe that an injured worker has received a benefit to which they are not entitled, or if you have questions about any particular workers' compensation claim, it is best to contact legal counsel quickly to ensure that deadlines for taking any possible action are not missed. If you have questions about a workers' compensation claim or questions in general, please do not hesitate to contact an Ennis Britton attorney on the Workers' Compensation Practice Team.

Emergency Removals: A Primer

Under most circumstances, when a student suspension or expulsion is warranted, school administrators must provide the student with prior notice of the intended discipline and an opportunity to appear at an informal hearing before the suspension or expulsion can be imposed. However, under certain circumstances when the presence of a student poses a danger, the student may be removed immediately.

An emergency removal is an immediate, limited-duration removal from school and is warranted when a student poses continuing danger to people or property or an ongoing threat of disrupting the academic process. When this occurs, a superintendent, principal, or assistant principal may immediately remove the student from curricular activities or the school premises. A teacher may remove the student from curricular activities under the teacher's supervision. If the removal is conducted by a teacher, the teacher must, as soon as practicable after making the removal, submit the reasons for the removal to the building principal in writing.

Emergency removal does not require any due process prior to imposing the removal; however, some due process requirements must be met *after* the removal.

Students who are subjected to an emergency removal must be provided an opportunity for a hearing within three days of the removal. Written notice of the hearing must be provided to the parent and student prior to holding the hearing. The hearing shall be conducted just like a typical suspension hearing (i.e., a very informal hearing between the student and the principal) – unless the student will be subjected to an expulsion for the behavior that led to the removal.

If an expulsion will be imposed, the school must conduct a formal expulsion hearing (i.e., a formal hearing with the student, a parent or guardian, and the superintendent or designee). However, this hearing must be held within three days of the removal (as opposed to the three to five days after notice of intent to expel is given under normal circumstances). In any case, the person who ordered the removal of the student must be present at the hearing. If a student is reinstated to a curricular activity prior to the hearing, the teacher with whom the student is placed must be given reasons for the reinstatement if requested.

The above procedural requirements do not apply to a student who is removed from curricular activities for a period of less than a day and who is not subject to suspension or expulsion; in this situation, a student would not be entitled to any notice or hearing.

Additional procedural safeguards and considerations apply for students who qualify for special education. For example, emergency removals may count toward the 10 days of disciplinary removal that are available without the need for a manifestation determination review, without the provision of services and so forth.

Districts that take advantage of the emergency removals provision of the statute (R.C. 3313.66) must remember that the due process requirements for emergency removal, although minimal, must be followed if a student is removed from school without any prior notice or opportunity to be heard.

A Closer Look at “Education Deregulation” in Senate Bill 3

Ohio’s 131st General Assembly has concluded, but not before passing dozens of bills in the lame duck session. Sub. SB 3, which became a Christmas tree bill, contained a plethora of miscellaneous education provisions. The bill has been signed and will become effective mid-March. Below is a short summary of the provisions that will impact Ohio public school districts this year and beyond.

Time Spent on State Assessments

After July 1, 2017, boards of education must ensure that no student is required to:

1. Spend more than 2 percent of the school year taking state assessments in 3301.0710(A) and 3301.0712(B)(2) or any district-wide assessment in subject area or grade level.
2. Spend more than 1 percent of the school year taking practice or diagnostic assessments to prepare for assessments described above.

This limitation does not apply to students with disabilities or to students who don’t obtain a passing score on English language arts achievement assessments, substitute exams, or additional assessments to identify a student as gifted.

Boards may exceed these limits upon a resolution of the board after “at least one” public hearing on the proposed resolution.

The bill removed a requirement that districts report to the Ohio Department of Education (ODE) the amount of extracurricular services offered to students.

Education Deregulation Provisions

Districts that qualify are **exempt** from:

1. Teacher qualification requirements under the 3rd-grade reading guarantee of 3313.608. Teachers still must have a valid Ohio license in the subject area and grade level “determined appropriate by the board of education.”
2. The mentoring component of the Ohio teacher residency program, as long as there is a local approach to train and support new teachers.
3. Any statute, ODE rule, or standard on minimum or maximum class size.
4. Any Revised Code or ODE standard requiring teachers to be licensed specifically in the grade level they are teaching unless required by federal law. This does not apply to special education teachers. Teachers still must have a valid Ohio license in the subject area and “at least some grade level determined appropriate by the district board.”

Notwithstanding 3319.36 and 3319.30, a superintendent may employ a person not licensed but otherwise qualified based on experience to teach in the district, provided that the board of education approves employment and

provides mentoring and development opportunities as determined necessary. These employees must have criminal background checks and register with ODE during employment. ODE will enroll these employees in the retained fingerprint database. These employees are members of the State Teachers Retirement System. If arrested, ODE will notify the district, and the district may not employ anyone with an offense that would bar employment with the school as listed in R.C. 3319.31. Noncompliance with this section of the law will not disqualify this district from R.C. Chapter 3317 funds.

To qualify for these exemptions, districts must meet all the following benchmarks on the most recent report card:

1. At least 85 percent of total possible points for performance index score
2. An A on performance indicators on the state report card as defined in R.C. 3302.03
3. A four-year adjusted cohort graduation rate of 93 percent and a five-year adjusted cohort graduation rate of 95 percent

Districts that meet the qualifications on the most recent report card get these exemptions for three years, beginning with the year the qualifying report card is issued.

Competitive bidding: Sub. SB 3 contains a provision that raises the competitive bidding threshold from \$25,000 to \$50,000. Check your policy to see if it mentions the specific amount, and if so, revise the policy. Remember that this change will not take effect until the legislation effective date in mid-March, so continue to use the \$25,000 threshold until the bill becomes law.

Blizzard bags: Districts may still adopt a plan for the use of blizzard bags. However, the board-adopted plan no longer has to be approved by ODE. All other requirements are the same.

Nonpublic extracurricular activities: The superintendent *may* allow any student enrolled in nonpublic school to participate in district extracurricular activities if they are not offered at the nonpublic school and either of the following apply:

1. The extracurricular activity is not interscholastic athletics or interscholastic contests or competition in music, drama, or forensics, or
2. The activity *is* in an interscholastic athletic or contest or competition in music, drama, or forensics.

That is not a typo (see options above). The law says that for the second option to apply, students must seek to participate at either the district in which the student's nonpublic school is located or the district in which the student is entitled to attend school (understanding that the district in which the student's nonpublic school is located may not be the same as the district in which the child is entitled to attend school). As long as the chosen district offers the activity, if the student seeks to participate at the public school in which the student's nonpublic school is located, both of the following must apply:

1. The superintendent of the school in which child is entitled to attend shall certify that the student has not participated in any other extracurricular activities that school year, defined as interscholastic athletic events or interscholastic competition in music, drama, or forensics. If the student has participated that school year, the student is ineligible to participate in the district in which the nonpublic school is located.
2. Superintendents of both schools shall mutually agree in writing to allow the student to participate in the public school in which the student's nonpublic school is located.

Athletic participation for College Credit Plus (CCP) and STEM students: Students cannot be denied the opportunity to participate in athletics just because the student is in CCP or has been in CCP as long as the student fulfills all other academic/nonacademic/financial requirements not related to participation. This provision also applies to CCP students who attend STEM, community schools, nonpublic schools, or home instruction.

Seal of biliteracy: A new section of the Revised Code provides for the addition of a seal of biliteracy, attached or affixed to a high school diploma. The seal demonstrates a high level of proficiency in one or more languages in addition to English “sufficient for meaningful use in college and a career.”

Public schools, STEM schools, community schools, college preparatory boarding schools or nonpublic schools may, but are not required to, affix the seal of biliteracy to transcripts that meet requirements.

Districts must maintain records to identify students who have completed the requirements for the seal, and if the district has a policy of attaching or affixing the seal to transcripts, the district shall make a designation on the transcript.

The state board will establish requirements and criteria for earning the state seal, including foreign language assessments and English proficiency.

The state board will deliver an appropriate mechanism for assigning the seal to districts, provide any other information the state board considers necessary for districts, and adopt rules to implement this provision.

No fee is allowed for the seal, but students may be required to pay a fee to demonstrate proficiency in a language including the cost of a standardized test to determine proficiency.

Languages available for the biliteracy seal include modern languages, Latin, American Sign Language, Native American languages, and native languages.

Teacher evaluation: Beginning with the 2017–2018 school year, a board of education may elect *not* to evaluate a teacher participating in the teacher residency program under 3319.223 for the year during which the teacher takes, for the first time, at least half of the performance-based assessment prescribed by ODE for resident educators.

Legislative Update: Lame Duck Session

Many of the bills that survived the Ohio legislature’s lame duck session are significant for school districts. Below are highlights of recent updates to these bills as well as their status. The effective dates of the new laws will occur 90 days after the governor signs the bills, which for most of these will be in mid-March. If you have any questions about the provisions of the bills in this summary, please give us a call.

HB 48 / SB 199, firearms in safety zones: HB 48 contained provisions to remove concealed-carry prohibitions in certain areas including school safety zones, daycare facilities, college campuses, aircraft, and public areas of airport terminals. During the lame duck session, HB 48 was rolled into SB 199, which was signed by the governor on December 19.

HB 89, Medicaid school program: On December 19 Gov. Kasich signed this bill, which establishes that Ohio is in compliance with federal Medicaid regulations and may continue to receive federal reimbursements to the Medicaid in Schools program. It does this by clarifying that occupational and physical therapists, audiologists, and speech pathologists are defined as “licensed practitioners of the healing arts” for purposes of making referrals for services if they have a provider agreement. These therapists may be referring or ordering-only providers.

HB 410, truancy: The final version of this legislation was delivered to the governor for signature on December 27. After July 1, 2017, schools may not suspend, expel, or remove a student under the disciplinary code solely because the student has been absent from school without excuse. Truancy is handled as follows:

- The designation of “chronic truant” will no longer be used.
- The designation “habitual truant” will apply for any of the following unexcused absences:

- 30 or more consecutive hours
- 42 or more hours in a month
- 72 or more hours in a year
- Districts are required to provide written notice to parents within seven days of a child's unexcused absences of 38 or more hours in a month or 65 or more hours in a school year.
- Absence intervention teams consisting of an administrator, a parent, and a school staff member will be formed upon designating a student as a habitual truant. Written notice to the parents of the development of the plan will be provided within seven days.
- Truancy was removed from the statute that requires boards to adopt a zero-tolerance policy for violent, disruptive, or inappropriate behavior and from the reasons for Big 8 schools to send students to alternative schools.
- Districts with a truancy rate of 5 percent or less on the most recent report card are exempt from assigning habitually absent students to absence intervention teams and may develop their own district strategies.
- If the absence intervention plan or other alternatives fail, the attendance officer must file a truancy complaint on day 61 after the plan has failed and the student has refused to participate in or otherwise failed to make satisfactory progress on the plan.
- Extensive changes were made to juvenile court law regarding unruly and delinquent dispositions and diversion programs for truancy.
- Suspensions may not be carried over to the next school year for any type of student misconduct.
- Alternative punishments such as community service may be imposed during the summer for the number of hours equal to the remaining part of a suspension if fewer than 10 days of school remain when a suspension is imposed; however, any remaining community service may not be made up via suspension when the next school year begins. Other alternatives are permitted, and community service must begin during the first full week of summer break.
- Districts may allow students to make up missed homework during a suspension.
- Skipping school may not be punished by suspension.
- A pilot program will be created to study reasons for truancy and to evaluate interventions. The Ohio Family and Children First Cabinet Council will accept applications from districts to participate in the pilot program in 2017–18 and 2018–19.
- Districts must adopt a new or amended policy to guide employees in addressing student absences effective the beginning of the 2017–18 school year and must include applicable intervention strategies, including an absence intervention plan, truancy prevention mediation programs, requiring parents to attend parent involvement programs, filing a truancy complaint in juvenile court, and notifying the registrar of motor vehicles.

HB 438, public school teacher appreciation: This bill passed in the Senate 31-0 and was delivered to the governor for his signature on December 29. This bill designates the week prior to the week of Thanksgiving Day as “Ohio Public Education Appreciation Week.” Additional provisions require school health curricula to include instruction on the positive effects of organ and tissue donation, permit districts not evaluate to counselors on extended leave or retiring, and modify timelines for sale or lease of district property.

HB 512, water systems: HB 512 was signed in June and became effective in September. The new law provides grants for lead fixture replacement in eligible schools.

SB 3, education deregulation: See separate article.

SB 235, property tax exemption: This bill provides a property tax exemption for the increased value of property for commercial and industrial development until the facility is completed. A substitute bill passed in the Senate by a margin of 29-2. It allows the tax exemption for 6 years (instead of 10 years) and includes a recoupment provision that goes back 3 years if property is not developed but is subsequently sold when the value increases. Multiple amendments were added to the bill during the lame duck session, including several provisions from other bills that were not moving. The governor signed the bill on December 27; however, he used his line-item veto power to veto provisions that allowed tax breaks for oil and gas producers and for digital entertainment downloads.

- Tax-related amendments:
 - Allow land in a downtown redevelopment district to get tax increment financing
 - Allow the four highest-ranked projects (instead of top two) to get a catalytic certificate under the Ohio Historic Preservation Tax Credit Program (tax credit up to 25 percent of rehab costs, capped at \$5 million unless it's a catalytic project)
 - Allow a multi-year production (such as TV series) that gets Ohio's motion picture tax credit to be first for consideration of credit the next year
- Unemployment-related amendments:
 - Freeze benefits for unemployed workers from 2018–2019 while taxable wage base on employers will increase from \$9K to \$9.5K over the same time (from HB 620)
 - Repeal automatic tax increase on business if the state is forced to borrow from the federal government to cover the cost of high unemployment benefits (from HB 390)
- Other amendments:
 - Adopt recommendations of the Net Operating Loss Study Committee
 - Exempt small business investment companies from the Financial Activities Tax (from HB 592)
 - Update pawnbroker regulations (from SB 270)
 - Prohibit bestiality (from SB 195)
 - Increase regulations on cockfighting and bearbaiting (from HB 215)
 - Prohibit poultry from running onto neighboring properties
 - Clarify that rock-climbing walls are not state-regulated amusement rides
- Vetoed amendments – added by legislature but rejected by Gov. Kasich when he signed the bill:
 - (Vetoed) Exempt tangible personal property used for oil and gas manufacture from the sales tax
 - (Vetoed) Exempt digital jukebox downloads from sales tax

SB 252, cardiac arrest in student athletes, “Lindsay’s law”: Gov. Kasich signed this bill on December 13. Coaches and trainers are required to annually participate in a training course on recognizing the symptoms of sudden cardiac arrest. Before participation, student athletes must submit a medical history form and a signed authorization that they received or reviewed information on sudden cardiac arrest for each athletic activity in which they participate.

Students whose biological parent, sibling, or child has experienced sudden cardiac arrest may not participate in athletic activities until the athlete has been cleared by a physician. Students who have exhibited syncope or fainting prior to or following an athletic activity also may not participate until cleared by a physician and must be removed from participation if this occurs, until cleared. Schools must establish penalties for coaches that fail to enforce the requirements outlined above.

Civil immunity will be granted to coaches, school districts, board members, or employees (immunity provision also applies to nonpublic, charter, and STEM schools) for performing duties as outlined in the law, unless their conduct

or omission was willful or wanton misconduct. The Ohio Department of Health will approve a sudden cardiac arrest training course for coaches.

Required Postings in the Workplace

Back by popular demand! The following article was first published in the February 2007 *School Law Review* newsletter. We have had several requests for a reprint, and below you will find an updated list of requirements along with many weblinks for federal and state labor and employment law posters.

Does your district post all of the required state and federal labor and employment law posters in the workplace? Public entities, including school districts, must place the following posters in prominent locations throughout each building.

Federal Posters Required

- EEOC – [Equal Employment Opportunity Is the Law](#)
- Fair Labor Standards Act [Minimum Wage poster](#)
- Family Medical Leave Act [poster](#)
- Notice to Workers with Disabilities under Special Minimum Wage Certificates – [Special Minimum Wage poster](#) (if applicable)
- Occupational Safety and Health Act – [Job Safety and Health: It's the Law](#)
- Uniformed Services Employment and Reemployment Rights Act – [Your Rights under USERRA](#)

State Posters Required

- Fair Employment Practices Law
- Minor Labor Laws
- Ohio Minimum Wage Law
- Public Employee Risk Reduction Program
- Unemployment Insurance Notice
- Workers' Compensation [Notice to Employees](#)
- Workplace Domestic Violence

Note: The Employee Polygraph Protection Act is not applicable to public entities.

Districts may obtain and download federal posters from the U.S. Department of Labor's [FirstStep Poster Advisor](#). The Ohio Department of Administrative Services offers a list of [state-required postings](#). A [poster package](#) is available on the Ohio Department of Job and Family Services website.

And, don't forget [No Smoking](#) signs! These signs must be placed in every public place and place of employment where smoking is prohibited, including at each entrance.

Please contact us if you have any questions regarding required labor and employment notifications.

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.

- **January 15:** Deadline for boards of education of city, exempted village, vocational, and local school districts to meet and organize (RC 3313.14); last day for boards of education of city, exempted village, vocational and local school districts to adopt tax budgets for the coming school fiscal year (RC 5705.28(A)(1))
- **January 17:** Last day to submit certification for May conversion levy to tax commissioner (RC 5705.219(B)) (105 days prior to election)
- **January 20:** Last day for boards of education to submit fiscal tax-year budget to county auditor (RC 5705.30)
- **January 23:** Last day to submit certification for May income tax levy to Ohio Department of Taxation (RC 5748.02(A)) (100 days prior to election)
- **January 27:** Last day to submit May emergency, current operating expenses, or conversion levy to county auditor for May election (RC 5705.194, 5705.195, 5705.213, 5705.219) (95 days prior to election)
- **January 27:** Deadline to submit 2017 Federal Quota Registration of Blind Students to the Ohio Center for Autism and Low Incidence (OCALI)
- **January 31:** Deadline for educational service center (ESC) governing boards to meet and organize (RC 3313.14); annual campaign finance reports must be filed by certain candidates, political action committees, caucus committees (legislative campaign funds) and political parties (by 4:00 p.m.) detailing contributions and expenditures from the last day reflected in the previous report through December 31, 2016 (RC 3517.10(A)(3))
- **February 1:** Deadline for school districts to file resolution of necessity, resolution to proceed, and auditor's certification for bond levy with board of elections for May election (RC 133.18(D)); deadline for county auditor to certify school district bond levy terms for May election (RC 133.18(C)); deadline to submit continuing replacement, permanent improvement, or operating levy for May election to board of elections (RC 5705.192, 5705.21, 5705.25); deadline to certify resolution for school district income tax levy, conversion levy, or renewal of conversion levy for May election to board of elections (RC 5748.02(C), 5705.219(C) and (G)); deadline to submit emergency levy for May election to board of elections (RC 5705.195); deadline to submit phased-in levy or current operating expenses levy for May election to board of elections (RC 5705.251(A))
- **March 1:** Deadline to take action and deliver written notice of nonrenewal of superintendent's contract (RC 3319.01) and treasurer's contract (RC 3313.22); deadline for secondary schools to provide information about College Credit Plus to all students enrolled in grades 6–11 (RC 3365.04(A))

Upcoming Presentations

2016–2017 ADMINISTRATOR'S ACADEMY SEMINAR SERIES

Tackling Issues in Student Discipline – [Archive Available](#)

September 29, 2016

School Employee Leave and Benefits Update

January 26, 2017

Live video webinar

Special Education Legal Update

April 20, 2017

Live seminars in Cincinnati and Cleveland

2016–2017 Education Law Year in Review

July 13, 2017

Live video webinar

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

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

OTHER UPCOMING PRESENTATIONS

January 20: OASPA Winter Camp: Collective Bargaining & Negotiations

– John Britton, Bill Deters, Bronston McCord

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

Webinar Archives

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

- Managing Workplace Injuries and Leaves of Absence
- Special Education: Challenging Students, Challenging Parents
- Fostering Effective Working Relationships with Boosters
- Effective IEP Teams
- Cyberlaw
- FMLA, ADA, and Other Types of Leave
- Levies and Bonds
- OTES & OPES Trends and Hot Topics
- Tax Incentives
- Prior Written Notice
- Advanced Topics in School Finance
- Student Residency, Custody, and Homeless Students
- Student Discipline
- Media and Public Relations
- Gearing Up for Negotiations

Ennis Britton Practice Teams

At Ennis Britton, we have assembled a team of attorneys whose collective expertise enables us to handle the wide variety of issues that currently challenge school districts and local municipalities. From sensitive labor negotiations to complex real estate transactions, our attorneys can provide sound legal guidance that will keep your organization in a secure position.

When you have questions in general areas of education law, our team of attorneys help you make competent decisions quickly and efficiently. These areas include:

Labor & Employment Law

Student Education & Discipline

Board Policy & Representation

There are times when you have a question in a more specialized area of education or public law. In order to help you obtain legal support quickly in one of these areas of law, we have created topic-specific practice teams. These teams comprise attorneys who already have experience in and currently practice in these specialized areas.

Construction/Real Estate

Construction Contracts • Easements •
Land Purchases & Sales • Liens •
Mediations • Litigation

Team Members:

Ryan LaFlamme
Bronston McCord
Gary Stedronsky

Workers' Compensation

Administrative Hearings •
Court Appeals • Collaboration with TPAs •
General Advice

Team Members:

Ryan LaFlamme
Pam Leist
Giselle Spencer
Erin Wessendorf-Wortman

Special Education

Due Process Claims • IEPs • Change of
Placement • FAPE • IDEA • Section 504 •
any other topic related to Special Education

Team Members:

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

School Finance

Taxes • School Levies •
Bonds • Board of Revision

Team Members:

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

Attorney Directory

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

Megan Bair Zidian

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

Cincinnati Office: 513.421.2540

Cleveland Office: 216.487.6672

Columbus Office: 614.705.1333