



JULY 2018

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U.S. Supreme Court Rules Fair Share Fees Unconstitutional

On June 27, the U.S. Supreme Court ruled in *Janus v. AFSCME Council 31* that a public sector collective bargaining agreement which includes an agency fee clause (also referred to as “fair share” fee) requiring all employees of the unit to pay union dues is a violation of a public employee’s right to freedom of speech. As a result, employers and unions must immediately cease fair share fee collections.

This long-awaited decision overturns the 40-year-old framework established by the Court in *Abood v. Detroit Board of Education*, which permitted the collection of public sector agency fees from all unit employees as long as the fees covered costs related only to collective bargaining, contract administration, and grievances. 431 U.S. 209 (1977).

Effective immediately, fair share fees may no longer be lawfully collected from public sector employees. Agency fee arrangements that have been negotiated in a public sector collective bargaining agreement must cease immediately. Failure to do so may nullify any indemnity clauses in a collective bargaining agreement and may result in civil liability. This

Supreme Court decision takes precedence over any contractual bargaining language.

Prior to the *Janus* decision, 22 states plus Washington, D.C., allowed public sector unions to charge fees to nonmembers for collective bargaining activities.

It remains to be seen whether this landmark decision will trigger a significant change to the collective bargaining rights of public sector employees, or simply provide a public employee a choice to which the vast majority will respond by remaining dues-paying members.

What This Decision Means for Your District

Effective immediately, school districts must stop collecting agency fees from non-union members. The *Janus* ruling does not change the collection of dues from current union members. Dues from association members should continue to be collected without interruption. Union members who wish to make changes to their membership should follow the regular procedure of providing the union with their notification to withdraw.

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Sixth Circuit Finds Transgender Employees Are Protected from Discrimination

The Sixth Circuit Court of Appeals reversed a lower court's decision, holding that a funeral home discriminated against a transgender employee on the basis of her sex when she was terminated shortly after revealing her intent to transition from a male to a female. This is an affirmative decision from the Sixth Circuit that transgender discrimination falls under the broader category of sex discrimination, which is prohibited under the Civil Rights Act of 1964. The employee in this case was born biologically male and now identifies as female. Consistent with the court decision discussed in this article, the employee will be referred to using female pronouns.

After Harris Funeral Homes fired Aimee Stephens, she filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging that she was terminated as a result of unlawful sex discrimination. During its investigation, the EEOC discovered that the funeral home has a sex-specific dress code for its public-facing employees. The men are required to wear a suit and tie, and the women must wear skirts and business jackets. The funeral home provides its male employees with a clothing allowance but does not provide such allowance for the female employees.

On this point, the Sixth Circuit held that it would allow the EEOC to bring a claim against the funeral home for a discriminatory clothing allowance practice.

Stephens began working at Harris Funeral Homes in 2007. In July 2013, she provided her employer with a letter of her intent to have sex reassignment surgery and notification that she must live and work full-time as a woman for one year prior to the surgery. Until this time, she had presented herself as a man at work. Shortly after this, the owner of the funeral home terminated Stephens because "he was no longer going to represent himself as a man. He wanted to dress as a woman."

The owner, who "sincerely believe[s] that the Bible teaches that a person's sex is an immutable God-given gift," said that if he allowed Stephens to wear the uniform of a female, he would be complicit "in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift." Furthermore, he admitted that he did not fire Stephens for any performance-related issues.

In 2014 the EEOC determined that the funeral home violated Title VII of the Civil Rights Act when it terminated Stephens based on her sex and gender identity and when it failed to provide its female employees with a clothing stipend. After the EEOC and the funeral home were unable to resolve this dispute through mediation, the EEOC filed a complaint against the funeral home in district court.

The district court agreed with the funeral home, that transgender status is not a protected trait under Title VII, and therefore held that the EEOC could not sue for alleged discrimination based on Stephens's transgender or transitioning status. However, the district court determined that the EEOC had adequately stated a discrimination claim based on sex- or gender-based preferences, expectations, or stereotypes (i.e., her clothing did not conform to gender-based expectations for a biological male).

Nevertheless, in the end, the district court found that because of the Religious Freedom Restoration Act (RFRA), the EEOC could not bring a Title VII claim against the funeral home, as a less restrictive means of achieving the EEOC's goals would be to impose a gender-neutral dress code.

On appeal, the Sixth Circuit found that the district court was correct in determining that Stephens was fired because of her failure to conform to sex-based stereotypes; however, the district court erred in finding that Stephens could not bring a Title VII claim on the basis of her transgender and transitioning status, as this is necessarily discrimination on the basis of sex.

Whereas the district court held that transgender status is not currently a protected class under Title VII, the Sixth Circuit held that it is, because gender must be "irrelevant to employment decisions." *Price Waterhouse v. Hopkins*,

490 U.S. 228, 240 (1989). “It is analytically impossible to fire an employee based on that employee’s status as a transgender person without being motivated, at least in part, by the employee’s sex.” The Sixth Circuit held that in relation to the RFRA, the least restrictive means of furthering the EEOC’s interests is not simply to impose a gender-neutral dress code but to prevent the employer from unlawfully terminating an employee in violation of Title VII.

What This Decision Means to Your District

This decision is directly applicable to Ohio, as one of the states in the Sixth Circuit. Employers may not discriminate against a transgender employee based on his or her status as transgender person, as this constitutes sex discrimination.

– *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 2018 WL 1177669.

Federal Court Holds Schools Cannot Bar Transgender Students from Restroom

A federal court in Pennsylvania recently dismissed a case filed by a male high school student, “Joel Doe,” who claimed that the school violated Title IX and Doe’s right to privacy under the Fourteenth Amendment by allowing transgender male students to use the same bathrooms he uses.

When Doe filed the lawsuit with the Eastern District of Pennsylvania, he asked that the court issue a preliminary injunction to order the school district to stop allowing transgender male students to use the boys’ restroom during the pendency of the proceedings. When the court denied the request, Doe appealed to the Third Circuit Court of Appeals.

On appeal, the Third Circuit agreed with the trial court. The court concluded that Doe failed to prove that he is likely to succeed on the merits of his claim and failed to show that he would suffer irreparable harm if the school district continues its current practice.

What This Decision Means for Your District

Although this is not the same as a final decision after a full trial, it can be viewed as an indicator of the outcome if the parents of gender-conforming students file suit against a district for allowing transgender students to use the restrooms of their choice. Simply put, gender-conforming students and their families do not have a clear legal pathway to challenge decisions about transgender student restroom use.

– *Doe v. Boyertown Area Sch. Dist.*, E.D. Pa. No. 5-17-cv-01249 (May 24, 2018).

Federal Judge Rules President Cannot Block Social Media Users

In a May 23 decision that ruled President Trump cannot block Twitter users, a federal judge in New York held that portions of the @realDonaldTrump Twitter account are considered a designated public forum and that blocking users based on their political speech violates the First Amendment. The judge declined to give the plaintiffs any monetary damages, noting that her “declaratory judgment should be sufficient.”

The Department of Justice defended President Trump’s right to block users, contending that he has the right to choose with whom to associate on social media. The Justice Department is considering its next steps, which may include an appeal.

In a pretrial hearing, the judge had suggested that perhaps President Trump could mute critics rather than block them. However, it appears that the plaintiffs who brought the lawsuit were unwilling to settle on being muted and declined to agree to that suggestion.

The public forum doctrine is used by courts to analyze the government's ability to limit speech. Traditional public forums, such as parks and sidewalks, are areas where free speech is strongly protected. Limited public forums, also called designated public forums, are locations or platforms for speech that a government need not keep open, but that while open are protected from viewpoint-based restrictions on speech. In this case, the judge found that President Trump's Twitter account is a designated public forum. As long as President Trump allows for any member of the public to speak in this forum, he may not restrict others from speaking based on the viewpoints they express.

More on this topic is sure to come in the future, as this decision leaves it where the president may not block users but Twitter still has the authority to ban users, because this space that has been declared as a public forum is not controlled by the government but by Twitter.

What This Decision Means for Your District

Limited public forums have long existed in schools, one of the more common being public comment portions of school board meetings. Today many school districts have social media accounts, such as Twitter and Facebook, that allow other users to post comments directly on the district's tweets or posts. These school accounts may be held as a public forum and subject to the doctrines set forth by the Supreme Court such that blocking users or posts based on political speech, or any other form of protected speech, may be considered a violation of the U.S. Constitution.

Special Education Spotlight: Provider Requirements for an IEE

In a parent–district dispute over the selection of an independent educational evaluation (IEE) provider, the Ohio Department of Education (ODE) determined that a school district's criteria were reasonable and that the district did not violate the Individuals with Disabilities Education Act (IDEA). Furthermore, ODE determined that the school district did not need to take any corrective action or change its criteria to accommodate a parent's request for a specific evaluator for the student's IEE.

On May 22, 2017, Cloverleaf Local School District completed an initial Evaluation Team Report and determined that an elementary school student was not eligible for special education and related services. The student's parents disagreed with the school's evaluation and requested an IEE at the district's expense. That same day, the district provided the parents with its IEE policy, including a list of six providers. Two days later, the parents selected a private evaluator who was not on the district's list of providers. The district then contacted the selected evaluator and shared the district's policy and criteria, but the evaluator declined to complete the IEE.

On May 30, the district again provided its policy and list of providers to the parents. On June 2 and 3, the parents contacted all six evaluators and found that none were available or met the district's criteria. On June 29, the parents' advocate informed the district that its criteria made it "extremely difficult" to schedule an evaluation and that the parents would like to select an evaluator of their choice.

In response, the district explained that its requirements such as cost were guidelines that may be flexible and were not a deal breaker and that the parents could choose another evaluator as long as he or she meets the district's requirements. Additionally, the district obtained additional provider referrals from its State Support Team and sent the parents an updated list of eight providers in July.

The district then reached out to the providers to confirm those who were still providing IEEs. In doing so, the district found that the parents' requested provider, who thought she did not meet the district's licensure requirements, did in fact hold an alternative, acceptable license. When the district notified the parents that this provider could complete the IEE, the parents replied that this provider would not meet the student's needs. The parents then informed the district that they wanted a specific provider who did not meet the district's criteria. The next day, however, the district conducted a telephone interview with the selected provider and found that her qualifications were sufficient. The district then obtained the paperwork to begin the IEE process. That same day, July 21, the parents notified the district that they believed the district was delaying the evaluation.

On July 24 and 31, the district provided the parents with a Prior Written Notice and explained that the cost and distance requirements could be negotiated as long as they were reasonable. By late August, the plans were finalized for the IEE provider to begin the evaluation in mid-September. As of the date of ODE's letter of determination, September 14, 2017, the evaluation was in process.

In their complaint against the school district, the parents alleged that the district delayed the IEE and that the district's required maximum cost and background checks interfered with and delayed the scheduling of the evaluation. They alleged that certain requirements were too restrictive, in violation of IDEA regulations, and requested that they be removed.

In its decision, ODE found that the district was not in violation of regulations governing IEEs. Regarding a parent's right to an evaluation at public expense, the district must, **without unnecessary delay**, either ensure that an IEE is provided at public expense or file a due process hearing request defending the appropriateness of its evaluation. Here, because the district provided the parents with the IEE procedures without unnecessary delay, the district was in compliance.

Regarding agency criteria, districts are able to have **reasonable** criteria for IEEs. However, a district needs to provide parents with the opportunity to demonstrate that unique circumstances require exceptions to the criteria. In this case, the district's original policy required that the provider have the following:

- A copy of an Ohio psychology license
- Proof of professional liability insurance of at least \$1 million
- A BCI and FBI background check completed within one year
- A resume with references
- A standard evaluation cost not to exceed \$600 along with a list of proposed cost
- The proposed assessments to be administered
- Geographic location within 50 miles of the district

The district informed the parents that the \$600 evaluation fee was negotiable but the criminal records checks and resume with references were required by all district employees and contracted staff. Additionally, the district revised its policy on July 26, amending the cost requirement to "a list of proposed cost" and the geographic location requirement to 60 miles.

In conclusion, ODE found that the district's provider criteria were reasonable. The district was not in violation of IEE regulations under IDEA. Furthermore, ODE determined that the school district did not need to take any corrective action or to change its criteria to accommodate the parents' request for a specific evaluator.

What This Decision Means for Your District

Every district should have specific criteria for IEEs. Relying on ODE's Special Education Model Policy and Procedures is not adequate because it does not include criteria. Criteria may include restrictions on location, cost, and qualifications as well as other factors. To meet the "reasonable" standard required by law, these criteria must not set higher expectations than those imposed on district evaluators (e.g., school psychologists, speech-language pathologists, intervention specialists). Also, the criteria must be broad enough to allow a parent to actually identify

evaluators in private practice who are willing to provide an IEE that meets the criteria. This limitation can lead to higher allowable costs for IEEs relative to the costs of internally conducted evaluations, and it might require broader geographic restrictions for rural districts. Please contact a member of Ennis Britton's Special Education Team with any questions about IEEs.

– *Cloverleaf Local Schools*, 71 IDELR 204 (SEA OH 2017).

Legislation in the Works

The Ohio House elected a new speaker, Rep. Ryan Smith, on June 6. Since then, the House has been catching up on many bills that had passed in committee only to stall in wait of a House floor vote. Below is an update on education-related legislation, including new bills and those that have progressed since May.

HB 8: Public Records

Gov. Kasich signed this bill on June 29. This will exempt from public records law the personal information of a minor in a school vehicle traffic accident.

HB 21: Community Schools

Also signed on June 29, this bill was amended significantly in the General Assembly. It started out to establish a procedure to verify community school enrollments, and numerous amendments were added in the Senate. Ennis Britton will have more information on this bill, and others that recently passed, during the summer.

HB 58: Cursive Handwriting

Passed in the House on June 20, this bill requires the State Board of Education to develop and adopt a model curriculum in cursive handwriting instruction, which may be used by public schools.

HB 318: School Resource Officers, Safety Training Grants, K–3 Suspensions

On June 27, the House and Senate agreed on the same version of HB 318. As it has now passed in both chambers, it awaits the governor's signature.

House Bill 318 enacts a new section of the Revised Code, R.C. 3313.951, to cover SRO responsibilities. School resource officers would be required to complete a basic training program approved by the Ohio Peace Officer Training Commission and to complete at least 40 hours of SRO training within one year after appointment to provide SRO services. Those serving as SROs before the effective date would be exempt from this requirement. The House Finance Committee appropriated \$10 million from the general revenue fund to be used for school safety training grants. Use of the grants, if approved, includes the support of SRO certification training, any type of active shooter and school safety training, "all grade level type educational resources," training to identify and assist students with mental health issues, and "any other training related to school safety." Schools will be required to work or contract with the county sheriff's office or local police department to develop programs and training.

The SAFE Act (Supporting Alternatives for Education Act) was originally proposed in SB 246 but has been amended into HB 318. This act revises procedures for emergency removals, prohibits out-of-school suspensions and expulsions of K–3 students for relatively minor offenses, and includes a tiered implementation phase. Districts will be required (rather than permitted) to permit students to complete classroom assignments missed during in-school and out-of-school suspensions. Each school district and school will be required to implement a positive behavior intervention and supports framework. An appropriation of \$2 million from lottery profits in FY 2019 was provided in the Senate Finance Committee for competitive grants for this purpose, which increases the total appropriation for this bill to \$12 million.

HB 342: Tax Levies

Passed in the House on June 20, this bill prohibits local tax-related proposals (levies/bonds) from appearing on August special election ballots and to change ballot language to reflect millage in terms of \$100,000 fair market value instead of \$100 of taxable value in election notices and on ballots.

HB 361: Tax Complaints

Also passed in the House on June 20, this bill increases the time within which boards of revision must decide property tax complaints.

HB 477: School Operations

Passed in the House on June 20, this bill eliminates various provisions and programs related to the Ohio Department of Education and the operation of primary and secondary schools.

HB 491: Pupil Services Personnel Licenses

This bill passed in the House on June 7 and awaits being assigned to a Senate Committee. Senate Education Committee Chair Peggy Lehner has noted that this bill is a priority bill. The bill enacts a new section of the Revised Code which would allow the following workers to be employed as substitutes in their profession: speech-language pathologists, audiologists, registered nurses (must hold a bachelor's degree), physical therapists, physical therapist assistants, occupational therapists, occupational therapist assistants, and social workers. Candidates for these positions must hold a valid occupational license and submit to a background check. The license requires the recommendation and request of the superintendent and would be valid for 1–5 years.

HB 522: Liquor Permitting

Passed in the House on June 20, this bill allows an outdoor refreshment area to include F liquor permit holders.

HB 702: ESC Grants

Introduced in the House on June 5 and referred to the Finance Committee on June 20, this bill makes an appropriation for grants to support the employment of social workers at ESCs.

HB 705: School Treasurer Liability

This bill was introduced in the House on June 13 and referred to the Government Accountability and Oversight Committee on June 20. The bill revises the circumstances in which school district and ESC treasurers may be held liable for a loss of public funds. The language of the bill specifies that treasurers shall not be held liable for a loss of public funds, including payments made to teachers, when they have performed their duties with “reasonable care” but only from “negligence or other wrongful act.”

SB 216: Education Deregulation

The Ohio House added several amendments in May and June before the bill passed in the House, and the Senate agreed to House amendments, on June 27. The bill is currently awaiting the governor's signature. Amendments include revisions to the state report card rating system, academic distress commissions, and others. A thorough update on this bill will be provided in the July 12 Administrator's Academy.

Section 504 Seminars Coming in October

Based on the overwhelming positive feedback we received following the 2017 Special Education Seminars, Ennis Britton has developed a Section 504 Seminar for October 2018! Our Special Education Team will travel throughout Ohio to present this professional development opportunity in five different locations. Each seminar will consist of two general sessions and two breakout sessions with our Special Education Team. The general sessions will cover the basics of Section 504 and compliance officer training. Additionally, participants will choose from

breakout session topics including accommodations, trauma and mental health, service animals, and extracurriculars.

Our Special Education Team has developed materials and practical tips that are designed to help your special education team members confidently and knowledgeably tackle difficult compliance issues. This full-day seminar will be held at five locations across Ohio:

- October 15: **Cincinnati**
- October 16: **Columbus**
- October 17: **Northwest Ohio/Toledo**
- October 18: **Cleveland**
- October 19: **Mahoning Valley**

The cost of the seminar is \$150 per attendee. The cost includes materials to be added to the custom Ennis Britton binders from the October 2017 seminars. Participants who do not have the Ennis Britton binder with the Ohio Operating Standards may purchase one for \$50. Lunch and complimentary beverage service will be provided at all locations. This seminar is open to all special education directors and staff in Ohio, but space is limited. An announcement will be sent when registration for the seminars opens.

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.

- **July 1:** Beginning of 2018–2019 school year (RC 3313.62); Deadline for board to notify teaching and nonteaching employees of succeeding year salaries (RC 3319.12, 3319.082); Board may begin to adopt appropriation measure, which may be temporary (RC 5705.38(B)); Treasurer must certify available revenue in funds to county auditor (RC 5705.36(A)(1))
- **July 9:** Deadline for voter registration for August election (RC 3503.01)
- **July 10:** Deadline for termination of teaching contract by a teacher without consent of the board of education (RC 3319.15)
- **July 15:** Deadline to adopt school library district tax budget on behalf of a library district (RC 5705.28(B)(1))
- **July 25:** Deadline to submit certification for November conversion levy to tax commissioner (RC 5705.219(B))
- **July 30:** Deadline to submit certification for November income tax levy to Ohio Department of Taxation (RC 5748.02(A))
- **July 31:** Deadline (4:00 p.m.) for certain candidates, political action committees, caucus committees, and political parties to file certain semiannual finance reports detailing contributions and expenditures through June 30, 2018 (RC 3517.10(A)(4))

Upcoming Presentations

FINAL 2017–2018 ADMINISTRATOR’S ACADEMY WEBINAR!

July 12, 2018: Education Law Year in Review
Live video webinar

The July Administrator’s Academy will be offered via a live video webinar professionally produced by the Ohio State Bar Association. For this webinar, Ennis Britton attorneys Pamela Leist, Hollie Reedy, and Gary Stedronsky will provide school administrators with current updates on the following topics:

- Supreme Court decisions and other case law
- Education deregulation and other pending and newly enacted legislation
- School safety levies and other new laws
- Teacher licensure and evaluations
- Complaints through the Office for Civil Rights
- And more legal updates from this past year

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 may register on our [website](#) or contact Nancy via [email](#) or phone at 513-674-3451.

Archives Available

Low-Stress Solutions to High-Tech Troubles
Take Hold on Public Relations
Special Education Scramble

OTHER UPCOMING PRESENTATIONS

July 26: Buckeye Association of School Administrators – New Superintendents

– Pamela Leist, Bronston McCord, Hollie Reedy

August 1: Montgomery County ESC

– Ryan LaFlamme and Erin Wessendorf-Wortman

August 2: Clermont–Brown Regional Network – Principals

– Ryan LaFlamme

August 2: Northwest Ohio ESC

– Bill Deters, Bronston McCord, Gary Stedronsky

August 3: Ohio School Boards Association – Attendance, Tuition, and Custody Law Workshop

– Hollie Reedy

August 9 & 10: Trumbull County ESC Summer Conference
– John Britton, Pamela Leist, Giselle Spencer, Megan Bair Zidian

August 10: Butler County ESC – Curriculum Directors
– Gary Stedronsky

**August 23: Ohio School Boards Association Collaborative Conversations –
Finance: Managing and Monitoring Educator Certifications**
– Pamela Leist

August 31: Hamilton County ESC
– Jeremy Neff

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

Webinar Archives

Did you miss a past webinar or would you like to view a webinar again? If so, we are happy to provide that resource to you. To obtain a link to an archived presentation, contact Nancy via [email](#) or phone at 513-674-3451. Archived topics include the following:

- Three Hot Topics in Special Education
- School Employee Nonrenewal
- New Truancy and Discipline Laws
- Supreme Court Special Education Decisions
- Employee Licensure
- Transgender and Gender-Nonconforming Students
- Contract Nonrenewal
- Ohio Sunshine Laws
- School Employee Leave and Benefits
- Managing Workplace Injuries and Leaves of Absence
- Special Education: Challenging Students, Challenging Parents
- Fostering Effective Working Relationships with Boosters
- Low-Stress Solutions to High-Tech Troubles
- Requirements for Medicaid Claims
- Effective IEP Teams
- Discrimination: What Administrators Need to Know
- 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
- Crisis, 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
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

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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

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