



Ennis Britton Co., L.P.A.  
Attorneys at Law

# School Law Review

Cincinnati • Cleveland • Columbus

## June 2020

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## Ohio Supreme Court Upholds School District Takeover Law

On May 13, 2020, the Ohio Supreme Court upheld House Bill (HB) 70, which was passed in 2015 by the 131<sup>st</sup> General Assembly. HB 70 is a school takeover bill that gave sweeping powers to an appointed CEO in districts that struggled to meet overall state report card requirements.

The Youngstown City School District Board of Education argued that HB 70 was unconstitutional. HB 70 originally authorized schools to create community learning centers where academic performance was low. It was considered by the House on three separate days, after which it was ultimately passed by the House and went to the Senate for consideration.

The Senate considered the bill on three separate days also but made two amendments, one of which modified the structure of academic-distress commissions. Among other items, the amendment included a requirement that for any district that has received an overall grade of “F” on its state report card for three consecutive years, a commission must appoint a CEO who has “complete operational, managerial, and instructional control” over the

school district. The Senate passed the amended bill and the House quickly concurred in the Senate amendments. The Governor subsequently signed the bill into law.

The Youngstown Board of Education (along with its employee unions) sought a declaratory judgment and permanent injunction by challenging the constitutionality of the bill and the legislative process in enacting it. The Board of Education argued that the law violated an Ohio Constitutional provision that requires that every bill “be considered by each house on three different days,” and another provision that states that a city school district has the power “by referendum vote to determine for itself the number of members and the organization of the district board of education.”

The trial court ruled against the Board of Education, as did the Tenth District Court of Appeals. The Ohio Supreme Court agreed to hear the Board of Education’s appeal.

The Supreme Court found that the three-consideration provision in the Ohio Constitution was not violated. The Board of Education argued that the bill was substantially changed in the Senate from its original purpose of creating

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community learning centers. The Board of Education also claimed that the amended bill must satisfy the three-consideration provision of the Constitution. The Supreme Court disagreed. It found that a bill need not contain the exact same language in each of its three readings to be valid. “[A]mendments which do not vitally alter the substance of a bill do not trigger a requirement for three considerations anew of such amended bill.” Only where the subject or proposition of a bill is wholly changed must an amended bill satisfy the three-consideration provision.

In this case, the House and Senate each considered HB 70 on three different days. The Supreme Court found that the amended bill had a common purpose to the original bill of seeking to improve underperforming schools. Therefore, the amended bill that included the additional academic-distress commission provisions did not also need to satisfy the three-consideration provision of the Constitution.

As for the Board of Education’s other argument, the Supreme Court found that the Ohio Constitution governs the size and organization of school boards, not the power and authority conferred to them. Although HB 70 removed most of the Board of Education’s power, the Supreme Court found that the Constitution does not prevent that. Accordingly, the Supreme Court upheld HB 70 and affirmed the judgments of the lower courts that ruled against the Board of Education.

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

HB 70 does not apply to the vast majority of Ohio school districts. However, it has been declared constitutional and will remain valid Ohio law until such time as the legislature amends it. Recent legislation has been proposed seeking to end school takeovers such as this (SB 89) or dissolve the academic-distress commission overseeing Lorain City Schools (HB 9). Neither of those legislative attempts have become law. Members of the General Assembly have indicated that they will continue to address the status of academic-distress commissions and school takeover. We will monitor those efforts and keep you updated.

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## **Ensuring Graduation Ceremonies Are Accessible to All Viewers**

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In light of ongoing bans on mass gatherings, many school districts are moving to a graduation ceremony plan that involves video or other online elements (e.g. video, PowerPoint, etc.). While virtual commencements may be almost unheard of prior to this spring, there are long-standing legal requirements that apply to this format just as they would to traditional, in-person ceremonies.

Traditional graduation ceremonies include many features aimed at making them accessible to students, family and friends, and school employees who have disabilities. Because schools are subject to the Americans with Disabilities Act, they must ensure that facilities from the parking lots, building entrances, restrooms, and seating areas are already accessible. Specific to the graduation ceremony itself, a school might have wheelchair ramps to access the stage, a sign language interpreter, and other accommodations.

The same anti-discrimination laws that inform the accommodations described above also apply to online services offered by school districts. In recent years, disability rights activists have filed hundreds of complaints regarding school district website accessibility. In many cases, the activists had no connection at all to the district against which the complaint was filed. They were simply scouring the internet for websites with obvious accessibility concerns. It is entirely possible that a similar approach may be used in relation to this year’s virtual graduation ceremonies. In any event, it makes good sense for districts to address website accessibility, irrespective of the pandemic.

As such, and in our experience assisting school districts that were subject to website accessibility complaints, it seems that there are certain “red flags” that may have caused some websites to be targeted for complaints while others were not. In applying this lesson to virtual graduation ceremonies, there are some basic steps that can still be taken to reduce the risk of receiving an investigation letter from the Office for Civil Rights:

- Investigate practical captioning options: Many online platforms have captioning already built-in, so it may just be a matter of enabling this feature and editing the automatic captioning. Captioning can stand in the place of a sign language interpreter if that is normally offered at your district's ceremonies. Of course, many graduation ceremonies in the past did not have an interpreter and this has not caused widespread complaints. The idea now is to investigate what options are available in the online platform that you use for the ceremony and to use available tools to reduce your risks.
- Pay attention to color contrast: School colors are a source of pride and frequently used in important rituals like graduation. However, if the school colors are low contrast (e.g. red and orange, green and blue) it may cause problems for people with vision-related disabilities. Consider pairing neutral alternative colors like black or white with a school color to avoid low contrast pairings.
- Ensure announcements of the ceremony details are formatted for screen reader use: People with vision-related disabilities sometimes use screen readers to access electronic written information. Some file formats are less screen reader-friendly. PDF files and other picture type files can be problematic. Simpler can be better when it comes to conveying information in writing. A basic email or attached Word document is less likely to cause challenges.
- Make access to the virtual ceremony accessible: A common challenge with school websites is that they are not easily navigated by individuals with physical challenges that prevent them from using a mouse. Consider emailing students and their families a link that goes directly to the virtual ceremony. The more steps that must be taken to get to the virtual ceremony, the more risk there is of an accessibility issue (e.g. a drop-down menu that cannot be easily accessed using keyboard tabbing, a link button that is not tagged, etc.).

The efforts taken by school districts to offer something special for seniors graduating under the current conditions are admirable. Paying close attention to accessibility for people with disabilities will help ensure that these celebrations do not lead to legal headaches down the road.

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## Title IX Regulation Changes

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The U.S. Education Department recently released revised Title IX regulations that will take effect on August 14th, 2020. The changes include several new provisions. U.S. Education Department Secretary Betsy DeVos stated that the changes take “historic steps to strengthen Title IX protections for all students and to ensure all students can pursue an education free from sex discrimination.” Below are a few of the changes that are especially important for districts. Districts should check with their policy providers for updates this summer.

### **34 CFR Sec. 106.8(a) “Designation of coordinator”**

Districts must designate at least one employee as the “Title IX Coordinator” to serve as the point person who coordinates efforts for Title IX compliance. Districts must provide the Coordinator’s contact information to applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining agreements or professional agreements with the district.

### **34 CFR Sec. 106.8(b) “Dissemination of policy”**

The former requirement that a district must publish notice of its Title IX coordinator and grievance procedures in local newspapers and magazines has been eliminated from the new version of the regulations. Instead, districts must prominently display this information on their websites. The new regulation does not contain a requirement to publish this information by a certain date.

### **34 CFR Sec. 106.8(c) “Adoption of grievance procedures”**

Districts must adopt and publish a grievance process that complies with the new regulation at 34 CFR Sec. 106.45 (“Grievance process for formal complaints of sexual harassment”). It must describe how to report or file a complaint of sexual harassment or discrimination and how the recipient will respond.

### **34 CFR Sec. 106.30(a) “Definitions”**

The following definitions were included in the regulations:

**Actual knowledge:** “Actual knowledge” of alleged harassment will be found when a person provides notice of sexual harassment or allegations thereof to a district’s Title IX Coordinator, to any individual with authority to use corrective measures at the district, or to any employee of an elementary or secondary school. “Notice” includes, but is not limited to, a report of sexual harassment.

**Sexual harassment:** Conduct that satisfies one or more of the following:

- An employee conditioning service or participation on unwelcome sexual conduct.
- Unwelcome conduct so severe, pervasive, and objectively offensive that denies a person equal access.
- Sexual assault, dating violence, domestic violence, or stalking.

### **34 CFR Sec. 106.44(a) “General response to sexual harassment”**

This new section requires that a district respond promptly and in a way that is not intentionally indifferent when it has actual knowledge of sexual harassment.

Districts must treat complainants and respondents equally in offering supportive measures to the complainant and by following a complaint grievance process before issuing disciplinary sanctions on the respondent.

The Title IX Coordinator is required to (1) immediately contact the complainant with information regarding supportive measures, (2) consider the complainant’s wishes regarding those measures, (3) inform the complainant of those measures with or without filing a formal complaint, and (4) explain the process of filing a formal complaint to the complainant.

### **34 CFR Sec. 106.44(c) “Emergency removal”**

A district may remove a respondent from school and activities on an emergency basis as long as it undertakes a safety and risk analysis, justifies emergency removal by determining that an immediate threat to the health and safety of any individual, and provides the respondent with notice and appeal options following his or her removal. The provision states that this is not intended to modify any rights under IDEA, Section 504, or the ADA.

### **34 CFR Sec. 106.45(a) “Discrimination on the basis of sex”**

A district’s (mis)treatment of either the complainant or respondent in response to a formal complaint of sexual harassment could itself be considered as sex discrimination under Title IX.

To view all of the Title IX regulations visit:

<http://dataserver.lrp.com/DATA/servlet/DataServlet?fname=Title+IX+Final+Rule+5-6-2020.pdf>

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## Special Education Spotlight: Refresher on Compensatory Education

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With the impact of school shutdowns due to COVID-19 reverberating through the special education community across the country and as plans to move into the next school year develop, this is a good time to review the legal outlines of compensatory education. The U.S. Department of Education (USDOE) and the Ohio Department of Education (ODE) have both stated that compensatory education may be required depending on the unique circumstances of each child. There is not a legal requirement or assumption that each child will require additional services related to COVID-19 closures and disruptions.

### Where is compensatory education defined in the law?

Compensatory education is not actually defined in the IDEA. The IDEA does allow courts, in ruling on IDEA litigation, to grant the relief that the court deems appropriate to the circumstances, and that may include an award of compensatory education. An award of compensatory education is an equitable remedy; meaning that it is meant to resolve the dispute when legal or monetary remedies alone cannot adequately resolve the wrongdoing (in the IDEA context, the wrongdoing is a failure to provide FAPE or procedural violation). OSEP has recognized compensatory education as a remedy under IDEA. Therefore, compensatory education is a remedy available to courts or through administrative hearings by ODE.

### Who decides whether and under what circumstances a student gets compensatory education?

Compensatory education may be awarded by a court or by ODE for a procedural violation that has led to a denial of FAPE or for the failure of a school district to offer or provide a child FAPE. As noted, it is an equitable remedy, which means that it should be fashioned and customized to the student's needs and services in a way that will place them in the same position they would have been in had they received the services they should have in accordance with the IEP. In situations where there is a serious dispute of whether IDEA has been violated, it is common for parents and school districts to reach an agreement on compensatory services rather than go through the risk and expense of a formal investigation or hearing.

### When is an award of compensatory education warranted?

Once it has been determined by a court or SEA that there was a failure to deliver a FAPE or an IDEA procedural violation that has led to a denial of FAPE, an award of compensatory education may be made by the court or ODE. The facts and circumstances of the individual student's IEP and the nature of the failure to deliver FAPE will determine whether and what type of compensatory education may be ordered.

### What specific things may be awarded as compensatory education?

An award of compensatory education and what that means in a particular case here in the 6th Circuit will likely be outlined specifically by the court. The award is made specifically to address that individual situation.

In *Reid v. District of Columbia*, the D.C. Circuit court described the possibilities for an award of compensatory education as "...Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Others may need extended programs, perhaps even exceed hour-for-hour replacement of time spent without FAPE." (D.C. Cir, 2005), 401 F.3d 516. The 6th Circuit has followed this approach. In addition, the 6th Circuit does not allow delegation of authority to determine to reduce or terminate a compensatory education award to an IEP team. [*Bd. Of Edn. of Fayette Cty v. L.M.*, (C.A. 6, 2007),478 F.3d 307]

An award of compensatory education is not made exactly based on what services were missed (quantitative approach), but instead, qualitatively; i.e., what services are needed by the student to make up for a failure to provide FAPE. Compensatory education may mean current services, future services, an extension of services when a student has reached age 22 (for failures to provide FAPE prior to the student reaching age 22), payment for private services a parent engaged to make up for IEP deficiencies, or payment for a private placement.

## The pandemic and compensatory education considerations

The COVID-19 pandemic has been the subject of some limited guidance from USDOE. The guidance acknowledges that how FAPE is provided may need to change. (See [Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities](#)). ODE has specifically directed districts to hold off on discussing possible compensatory services until after the current school closure ends.

As schools plan to resume at least some operations, special education teams will begin individualized consideration for students to determine whether delayed IEP services, IEP services that were unavailable, or services that were unsuccessful in the format in which they were provided may result in a need for compensatory education for that individual student. It may be worthwhile to consider proactively offering compensatory services to those students for whom it is known that the pandemic and resulting remote instruction may have caused denials of FAPE. This should be a data-driven decision. Given the highly unique circumstances of COVID-19, and legally unprecedented questions about whether and how this creates a requirement for compensatory services, consideration of an agreement to provide compensatory-type services should involve legal counsel.

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## UPDATE: Sixth Circuit Finds a Constitutional Right to a Basic Minimum Education

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In last month's newsletter, we [reported](#) to you that a panel of the U.S. Court of Appeals for the Sixth Circuit issued a decision holding that there is a fundamental right to a "basic minimum education" that is potentially violated when the state fails to provide adequate public schools. As a follow up to that article, on May 19, 2020 the Sixth Circuit vacated that ruling so that the case can be considered by the entire Sixth Circuit bench. The ruling allowed students from five of the lowest-performing schools in Detroit to sue Michigan officials over their inability to read. There was some speculation about whether a rehearing before the entire Sixth Circuit bench (*en banc*) would be sought by the Attorney General, who had publicly praised the decision. However, in an unusual move, the Sixth Circuit did so itself (*sua sponte*) under rules granting it the power to vacate panel decisions for consideration by the entire bench. This is done so where there is a potential for "a precedent-setting error of exceptional public importance" or direct conflict with Sixth Circuit or Supreme Court precedent. As reported in the blog post, the U.S. Supreme Court has not expressly held that the U.S. Constitution provides a fundamental right to a basic minimum education. As the dissent noted, the Court held in *Plyler v. Doe*, that "[p]ublic education is not a 'right' granted to individuals by the Constitution." The effect of the ruling is that the opinion of the three-judge panel is vacated and of no force and effect. We will keep you posted on any developments in this important case.

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## Upcoming Deadlines

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

- **June 1** – Last day to take action to nonrenew contracts of administrators other than superintendent and treasurer (RC 3319.02(C)). Last day to take action on and give written notice of intent not to re-employ teachers (RC 3319.11(D)). Last day to take action on and give written notice of intent not to re-employ nonteaching employees (Note: this requirement does not apply to municipal school district employees as defined in RC 3311.71) (RC 4141.29(I)(1)(f)).
- **June 30** – 2019-2020 school year ends (RC 3313.62). End of third ADM reporting period (RC 3317.03(A)).
- **July 1** – 2020-21 school year begins (RC 3313.62). Last day 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(A) and (B)). Treasurer must certify available revenue in funds to county auditor (RC 5705.36(A)(1)).
- **July 6** – Last day for voter registration for August election (RC 3505.01, 3503.19) (30 days prior to the election).

- **July 10** – Last day for termination of teaching contract by a teacher without consent of the board of education (RC 3319.15).
- **July 15** – Last day to adopt school library district tax budget on behalf of a library district (RC 5705.28(B)(1)).
- **July 27** – Last day to submit certification for November income tax levy to Ohio Department of Taxation (RC 5748.02(A)) (100 days prior to election).
- **July 31** – Last day for board of education to adopt a plan to require students to access and complete online classroom lessons (“blizzard bags”) in order to make up hours for which it is necessary to close schools (RC 3313.482(A)(1)). Semiannual campaign finance reports must be filed by certain candidates (by 4 p.m.) detailing contributions and expenditures made through June 30, 2020 (RC 3517.10(A)(4)).

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## Upcoming Presentations

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### Special Education Coffee Chats

The Ennis Britton Special Education Team invites you to join a facilitated conversation with student services personnel and Ennis Britton attorneys to discuss the COVID-19 educational impacts. We know that as educational leaders, you are great collaborators, and if there was ever a time for sharing your insights on how to serve students, it is now.

Ennis Britton’s Special Education Team is offering a new way to serve our clients during this ongoing COVID-19 pandemic. We will be hosting three coffee chats over the summer. During the chats, our special education team of attorneys will provide a quick overview of hot topics – then turn things over to you and your colleagues across the state. We will help facilitate discussions and encourage you to take your conversations in the direction that best serves your students and school district.

If you are interested in joining us for this coffee chat, please contact our paralegal, Kayla Browning, at [kayla@ennisbritton.com](mailto:kayla@ennisbritton.com) to receive the Zoom conference link (it will be sent Thursday morning). If you have already signed up, you are on the list and do not need to sign up again. The general logistics are as follows:

- Our Zoom conferences are set for June 11th, June 25th, from 9:00 a.m. to 10:00 a.m. and July 9th from 1:00 p.m. to 2:00 p.m (following our Administrator’s Academy year in review). Attendees will be placed in a virtual waiting room until the meeting begins. After brief introductions, you will be prompted to join a breakout room.
- The Zoom chat feature will be available throughout this session. You may send messages to all participants or send “private” messages to facilitators.
- Special Education Team members will be available by email or cell phone if you have follow-up questions.

We encourage you to continue sending us your suggestions for future chats! When we get through this – and we will – we expect that the focus of compliance and accountability efforts will have far more to do with our clients demonstrating good faith efforts to serve children in an extremely difficult situation than concerns about technical compliance, precise calculation of service minutes, meeting timelines, etc.

We’re here to help you with the technical side of compliance, but we also want to make sure we are also helping you with the bigger picture. If there is any profession up to the challenge of creatively solving problems and adjusting to ever-changing government directives, it is the educational leaders. We are inspired by your efforts and honored to be a part of your team. Thank you again!

***The information presented during our coffee chats is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, please consult with an attorney.***

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

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

The Education Law Year in review will cover important legal updates for schools, including a review of mid-biennial budget changes, new Title IX regulations, COVID-19 challenges, legislative and case law updates, and more. We encourage you to forward this invitation to your administrative teams.

Ennis Britton’s Administrator’s Academy Seminar Series is offered via a live video webinar professionally produced by the Ohio State Bar Association and is free of charge to clients. Participants must be registered to attend each event. All webinars will be archived for those who wish to access the event at a later time. You may register on our [website](#) or contact Kayla via [email](#) or phone at 513-674-3451.

### **July 17: Ohio Council of School Board Attorneys Workshop “Special Education in 2020”**

Presented by Pamela Leist and 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](#).

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# Webinar Archives

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

## Labor and Employment

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

## Student Education and Discipline

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

## School Finance

- School Levy Campaign Compliance

## School Board Policy

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

## Special Education

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

## Legal Updates

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

# Ennis Britton Practice Teams

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

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

## Labor & Employment Law

## Student Education & Discipline

## Board Policy & Representation

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

### Construction & Real Estate

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

#### Team Members:

Ryan LaFlamme  
Robert J. McBride  
Bronston McCord  
Giselle Spencer  
Gary Stedronsky

### Workers' Compensation

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

#### Team Members:

Ryan LaFlamme  
Pam Leist  
Giselle Spencer  
Erin Wessendorf-Wortman

### Special Education

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

#### Team Members:

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

### School Finance

Taxes • School Levies •  
Bonds • Board of Revision

#### Team Members:

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