Legal Update

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I. Summary of Recent Legislation – Note: Not all provisions of new laws are included.

A. **House Bill 164 –Religious expression, SY 2020-2021 flexibilities** (effective June 19 and Sept. 18, 2020)

1. **Teacher and principal evaluations**

a. For teachers evaluated in the 2019-2020 school year without using student growth measures, those rated accomplished or skilled may continue to be evaluated every three or two years, respectively, so long as the district did not participate in the OTES 2.0 pilot. (Section 7.)

b. A teacher who did not have a student growth measure as part of the teacher's 2019-2020 school year evaluation will remain at the same point in the teacher's evaluation cycle, and will retain the same evaluation rating for the 2020-2021 school year as for the 2019-2020 school year. (Section 7.)

c. For 2020-2021 school year evaluations, districts are prohibited from using value-added data, any other high-quality student data, or any other student academic growth data to measure student learning attributable to a teacher or principal. Districts are not prohibited from considering how a teacher or principal collects, analyzes, and uses student data, including student academic growth data, to adapt instruction or improve the teacher's or principal's practice. (Section 10.)

d. School districts authorized to complete a principal's 2019-2020 evaluation without using student growth. (Section 11.)

2. **Educator licenses**

a. **Grade band flexibility** – For the 2020-2021 school year, permits the superintendent of a school district to employ or reassign a person licensed under R.C. 3319.22 (who has three or more years of teaching experience) to teach a subject area for which the person is not licensed, or a grade level for which the person is not licensed that is within two grade levels of the person's licensure grade band. (Section 17.)

b. **Public school preschool integrated class teacher** – A teacher licensed to teach special education and employed as a "public school preschool integrated class" teacher prior to the effective date of licensure requirement changes may continue to teach such class until the teacher retires, resigns, or is reassigned. (New R.C. 3323.10.)

c. For ODE Guidance on educator licensure during the COVID-19 emergency, see http://education.ohio.gov/Topics/Student-Supports/Coronavirus/Educator-Licensure.

3. **HB 197 telehealth provisions** (see separate summary) extended through the entirety of the 2020-2021 school year, even if the school closure order is rescinded before July 1, 2020. Also states this authority applies to school psychologists as well. (Section 5.)

4. **Bus driver training** – ODE must develop an online training program to satisfy the classroom portion of the pre-service and annual in-serve training for driver certification the 2020-2021 school year. (Section 15.)

5. **Remote learning plans** – Permits schools to adopt remote learning plans (Section 16.) Note: ODE extended the deadline to submit such plans from July 31 2020 to August 21, 2020. Blended learning declarations are due no later than Nov. 1 2020.

   See http://education.ohio.gov/Topics/Reset-and-Restart/Blended-and-Remote-Learning-Comparison for ODE remote learning plan guidance.

6. **Diploma qualifications** (Section 12) – See ODE guidance on graduation at http://education.ohio.gov/Topics/Student-Supports/Coronavirus/Graduation-Flexibility-%E2%80%93-2021-and-Beyond for a review of these changes.

7. **Third-Grade Reading Guarantee** (Section 18) – H.B. 164 makes changes to retention requirements, promotion scores, and remediation teacher qualifications. See ODE guidance on the Third Grade Reading Guarantee, Reading Achievement Plans, and District Reading Improvement Plans at http://education.ohio.gov/Topics/Reset-and-Restart/Third-Grade-Reading-Guarantee-Reading-Achievement for more information.

8. **Reading improvement plans and reading achievement improvement plans** (Section 13(C) and Section 14) – Exempts districts from requirements to establish reading improvement plans in the 2020-2021 school year based on assessment results for the 2019-2020 school year.

9. **Home instruction students** – Exempts parents from the requirement to submit an academic assessment record for the 2019-2020 school year to the superintendent of the district of residence. (Amended Section 17(L) of HB 197 in Sections 5 and 6.)

10. **Flexibilities for community school** sponsor ratings and changes to governing authority members. (Section 17(F) of HB 197 amended in Sections 5 and 6; R.C. 3314.02(E).) Changes to the Quality Community School Support Program also made. (Sections 3 and 4.)

11. **Storm shelter moratorium** extended to Nov. 30, 2022 (R.C. 3781.1010)

12. **Emergency provision** – most of the Act's provisions are effective immediately. However, provisions regarding religious expression in schools, the Quality Community Support Program, and provisions regarding the additional payment to schools goes into effect in 90 days.

13. **Additional payment** for FY 2020 to school districts that experienced a net decrease in FY 2020 state foundation funding exceeding 6% due to budget reductions ordered by the Governor. (Section 19.)

14. **Funding adjustments** for certain school districts with decreases or increases in utility tangible personal property. (Section 9.)

15. **Ohio Student Religious Liberties Act of 2019**

    a. Enacts R.C. 3320.01, 3320.02, and 3320.03 effective September 18, 2020.

    b. R.C. 3320.01 states that religious expression includes prayer; religious gatherings such as prayer groups, "see you at the pole" gatherings, or other religious gatherings; distribution of written materials or literature of a religious nature; and other activity of a religious nature (that is not obscene, vulgar, offensively lewd, or indecent), including wearing symbolic clothing or expression of a religious viewpoint.

    c. R.C. 3320.02 provides that public school students may engage in religious expression before, during, and after school hours in the same manner and to the same extent that students are permitted to engage in secular activities. Public schools must also give the same access to school facilities to students who wish to conduct a meeting to engage in religious expression as is given to secular student groups.

    d. R.C. 3320.03 states that no public school shall prohibit a student from engaging in religious expression in the completion of homework, artwork, or other written or oral assignments. Assignment of grades and scores must be calculated using ordinary academic standards of substance and relevance, including any legitimate pedagogical concerns, and must not penalize or reward a student based on the religious content of a student's work.

    e. A provision in R.C. 3313.601 permitting boards of education to limit the exercise or expression of a pupil's religious beliefs to lunch periods or other non-instructional time periods was removed.

B. **House Bill 197 – COVID-19 Emergency; EdChoice Expansion Delay** (effective March 27, 2020)

H.B. 197, which originally addressed various changes to Ohio's tax laws, was amended to include changes in law needed as a result of the COVID-19 emergency. For a summary of provisions that impacted the 2019-2020 school year, see https://www.bricker.com/insights-resources/publications/house-bill-197-ohio-legislature-responds-to-k-12-needs-during-covid-19-pandemic. See the H.B. 164 summary for flexibilities granted for the 2020-2021 school year.

Some provisions to note:

1. **Deadlines:** H.B. 197 authorized the State Superintendent of Public Instruction to waive or extend various deadlines during the duration of the March 14, 2020 school closure order or extension of same, or any local board of health order. (Section 17(I).)

2. **OTES**: For teacher evaluations, a board of education may not use the value-added progress dimension data (R.C. 3302.021) from the 2019-2020 school year to measure student learning attributable to a teacher. (Section 17(E).)

3. ODE may issue a **one-year non-renewable provisional license**, but shall not issue one that is valid on or after July 1, 2021. (Section 17(H).)

4. **Provisions effective during the period of the governor's emergency declaration (Executive Order 2020-01D issued March 9, 2020), but not beyond December 1, 2020**:

    a. **Board meetings** – Allows members of public bodies, including school board members, to hold meetings by teleconference, video conference or other similar electronic technology. (Section 12.)[1]

    b. **Telehealth** – Section 16 of the bill permits those holding licenses, certificates, permits or other authorization issued by the boards listed below to provide services by electronic delivery or telehealth communication, with no penalty, to students participating in the Autism or Jon Peterson Special Needs Scholarship Programs or to any student enrolled in a public or nonpublic school who was receiving those services prior to the ordered closure of schools. This provision only applies during the ordered school closure period but not beyond December 1, 2020. (**Note**: subsequently enacted HB 164 extends this authority through the end of the 2020-2021 school year, even if the order or extension is rescinded prior to July 1, 2021.) The licensing boards are:

        i. The Ohio Speech and Hearing Professionals Board

        ii. The Ohio Occupational Therapy, Physical Therapy, and Athletic Trainers Board

        iii. The State Board of Psychology

        iv. The Counselor, Social Worker, and Marriage and Family Therapist Board

        v. The State Board of Education with respect to intervention specialists (HB 164 added school psychologists as well)

    c. Authority for the Ohio Director of Agriculture to **exempt a school or entity from regulation as a food processing establishing** under R.C. 3715.021 if the school or entity is transporting food for purposes of the Seamless Summer Option Program or the Summer

[1] See https://www.bricker.com/people/nicole-donovsky/insights-resources/publications/public-body-meetings-and-hearings-may-be-held-virtually-during-the-state-emergency for more information.

Food Service Program, and the school has a food service operation license under R.C. Chapter 3717. (Section 10.)

d. **Child care ratios** in R.C. 5104.033 suspended. (Section 9.)

e. **Extensions of state agency deadlines** and state license deadlines (including teacher licenses[2]) to the earlier of 90 days after the emergency ends or Dec. 1, 2020. (Section 11.)

f. **Unemployment compensation** nonmonetary eligibility changes so that an individual is not disqualified if the individual is unemployed or is unable to return to work due to an order, including an isolation or quarantine order, issued by the individual's employer, the Governor, board of health of a city or general health district, a health commissioner, or the Director of Health. (For reimbursing employers, the employer pays by reimbursing the fund.) A waiting period does not apply, and ODJFS may waive the requirement that an individual be actively seeking suitable work. (Section 19(B)(3) and (4).)

Note: On June 16, Gov. DeWine signed Executive Order 2020-24D that sets forth what constitutes "good cause" for refusing suitable work during the period of the COVID-19 state of emergency. These include: a recommendation from a medical professional that an individual not return to work because he/she is in a "high risk" category for contracting COVID-19 and the employer cannot offer telework options; the employee is 65 year of age or older; tangible evidence of a health and safety violation by the employer; potential exposure to COVID-19 and subject to quarantine by medical or health professional; or staying home to care for a family member suffering from COVID-19 or subject to a prescribed quarantine period.

5. **Tolling** of certain limitation periods and deadlines that were set to expire between March 9, 2020 and July 30, 2020. (Section 22.)[3]

6. **Municipal income tax withholdings** –Employees working from home during the pandemic (or within 30 days after the emergency is lifted) are considered to be working in the location where they would typically be reporting on a regular and ordinary basis (i.e., their principal place of work). Accordingly, under H.B. 197, employers may continue withholding municipal income taxes based on their employees' principal place of work, rather than where they actually are working during the pandemic.[4] (Section 29.) (**Note**: On July 2, 2020, a lawsuit was filed in Franklin County Common Pleas Court (No. 20-cv-004301) challenging the constitutionality of this provision.)

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[2] See http://education.ohio.gov/Topics/Student-Supports/Coronavirus/Educator-Licensure for more information.

[3] See https://www.bricker.com/insights-resources/publications/ohios-emergency-covid-19-response-bill-hb-197-and-the-ohio-supreme-court-order-the-tolling-of-statutes-of-limitations-and-other-litigation-deadlines.

[4] See https://www.bricker.com/resource-center/COVID19/publications/municipal-income-tax-withholding-working-from-home-amid-pandemic.

7. **Educational Choice Scholarships (Section 31):** For performance-based EdChoice scholarships awarded for the 2020-2021 school year, the list of EdChoice designated school buildings is limited to the 517 buildings designated for EdChoice in the 2019-2020 school year. While first-time performance-based EdChoice scholarships will not be awarded for the 2020-2021 school year, they will resume for the 2021-2022 school year if there is no further legislative action. These scholarships are funded through deduction from the district of residence (as described in R.C. 331.08). (Section 31.)

C. **Pending House Bill 606 – Civil Immunity** (conference report passed in Senate Sept. 1, 2020; House adopted Sept. 2, 2020; pending Gov. DeWine's signature)

This bill, as enacted, prohibits bringing a civil action for damages for injury, death, or loss to person or property against any person if the cause of action is based on injury, death, or loss to person or property caused by exposure to, or the transmission or contraction of, MERS-CoV, SARS-CoV, or SARS-CoV-2. Immunity would not apply in cases of reckless conduct, intentional misconduct, or willful or wanton misconduct. It also prohibits class actions if immunity does not apply. (Section 2(A) and (C).)

For purposes of the bill, "person" has the same meaning as in R.C. 1.59, and includes a school, a for-profit or nonprofit entity, a governmental entity, a religious entity, or a state institution of higher education. Reckless conduct is defined in the bill. (Section 2(D).)

The bill specifies that a government order, recommendation, or guideline shall not create a duty of care upon any person that may be enforced in a cause of action or that may create a new cause of action or substantive legal right against any person with respect to matters in the government order, recommendation, or guideline. (Section 2(B).)

The general immunity provisions would apply from March 9, 2020 through September 30, 2021. (Section 2(D).) The bill also provides temporary civil immunity for health care providers for the same time period.

D. **Pending House Bill 123 – Safety and Violence Education Students Act (SAVE Students Act)** (passed Senate July 21, 2020; House concurrence needed)

This bill, as passed by the Senate, would require schools to register with the SaferOH tip line or another anonymous reporting program and to submit certain data concerning reports to ODE and the Department of Public Safety.

It would also require schools to have threat assessment teams, and team members would have to complete a threat assessment training program upon appointment and once every three years thereafter. School building administrators would also need to incorporate a school threat assessment plan and a protocol for the building's threat assessment team into the building's existing emergency management plan.

Public schools serving students in grades 6-12 would be required to provide annual instruction in suicide awareness and prevention, safety training and violence

prevention, and social inclusion. Public schools would also be permitted to designate student-led violence prevention clubs in buildings serving grades 6-12.

The bill would also establish a pilot program for dropout recovery e-schools.

E. **Pending House Bill 341 – Naloxone access and education)** (House concurred in Senate amendments Sept. 1, 2020; pending approval by Gov. DeWine)

Current law permits service entities (including schools) to procure naloxone for use in emergency situations. This bill also allows service entities to procure and maintain naloxone for the purpose of permitting an employee, volunteer, or contractor to personally furnish a supply of naloxone pursuant to a protocol established by a prescriber or board of health. The bill also adds libraries to the definition of service entities. (R.C. 4729.514, 4729.541(A)(12).) In addition, the bill authorizes certain advanced practice registered nurses and physician assistants to develop protocols to permit service entity employees, volunteers, or contractors to administer or personally furnish naloxone. (R.C. 4723.485, 4723.486, 4730.435, and 4730.436.)

F. **Pending House Bill 339 – Insurance Code Correction Act)** (pending House concurrence in Senate's amendments)

Includes, among other changes to insurance laws, a provision specifying that a regional council of governments established to provide health care benefits to the council members' officers and employees and their dependents does not engage in the business of insurance if certain criteria are met. (R.C. 167.03(E).)

G. **Pending Senate Bill 10 – Theft in Office)** (Senate refused to concur in House amendments 9/2/2020)

To expand the penalties for theft in office based on the amount stolen, to include as restitution audit costs of the entity that suffered the loss, to modify various aspects of the laws regarding criminal and delinquency record sealing and expungement, to expand the list of debts toward satisfaction of which the Tax Commissioner may apply a tax refund due to a taxpayer, to expand the basis of a court's exercise of personal jurisdiction, to specify a separate standard for the issuing of warrants upon presentation of a court order, and to declare an emergency.

Floor amendments passed by the House modify the tolling provisions in Section 22 of H.B. 197.

H. **House Bill 65 – Child care notice of serious risk noncompliance** (effective June 19, 2020)

This bill requires child care facilities licensed by ODJFS to notify all parents if ODJFS determines that a provider's act or omission constitutes a serious risk noncompliance. The notice must be given to the caretaker parent of each child receiving care no later than 15 business days after ODJFS informs the provider of its determination or within 5 business days after ODJFS completes its review, if requested. The notice—which must include a statement of the website maintained by ODJFS and the location of further information regarding the determination—

may be furnished electronically or in writing and a copy must be provided to ODJFS. (New R.C. 5104.043 enacted.)

No notice will be required until ODJFS adopts rules to enforce the requirements. (Section 4.)

I. **House Bill 81 – Workers' Compensation** (effective Sept. 14, 2020)

While H.B. 81 was originally created to provide workers' compensation coverage to corrections officers, detention facility employees and other safety officers if they are exposed to an individual's blood or other bodily fluids in the course of their employment, it has been expanded to operate as a "clean-up" bill for various workers' compensation initiatives remaining from the state's budget bill last spring.

H.B. 81 creates several other changes to workers' compensation laws. Specifically, the bill:

1. Codifies the voluntary abandonment doctrine regarding temporary total disability claims, thereby superseding preexisting judicial decisions on the issue;
2. Reduces the statute of limitations for filing an application for violation of a specific safety requirement (VSSR) to one year from the date of injury;
3. Prohibits employers from refusing or withdrawing from a proposed settlement agreement, if (i) the employee is no longer employed, and (ii) the claim is no longer within the date of impact for the employer's experience/premium calculation;
4. Changes the date that the Industrial Commission can invoke continuing jurisdiction to the date of medical services, rather than date of payment;
5. Increases the funeral expenses benefit cap from $5,500 to $7,500; and
6. Expands the appeal period under R. C. § 4123.512, in specific circumstances, from 60 to 150 days for claims pending on and arising after September 29, 2017.

J. **Senate Bill 4 – Capital appropriations for school facilities assistance** (signed July 14, 2020; effective Oct. 13, 2020)

This bill includes a provision appropriating $300 million in new capital funds to the Ohio Facilities Construction Commission for the FY 2021-2022 biennium to support school facilities construction and renovation projects. It also authorizes the issuance of bonds in that amount. (Sections 4 and 6.)

K. **Senate Bill 120 – EdChoice Voucher delay; CCP informational sessions** (effective Jan. 31, 2020)[5]

1. EdChoice scholarships - See H.B. 197 summary for subsequent changes.
2. College credit plus informational sessions

[5] Note: EdChoice supporters filed an action in the Ohio Supreme Court challenging the effective date of this legislation (No. 2020-0175).

a. Modifies the requirements for school College Credit Plus informational sessions by requiring that public and participating nonpublic secondary schools allow each participating college (rather than "partnering" college) located within 30 miles of the school to participate. A "participating college" college is defined as a partnering college; or any public, private, or eligible out-of-state college that participates in the CCP program and submits a request to the school to attend an informational session. If there are no participating colleges within 30 miles of the school, the school must coordinate with the closest participating (rather than partnering) college. (R.C. 3365.04(D).)

3. Higher education

a. Authorizes the Auditor of State to conduct performance audits of state institutions of higher education. (R.C. 117.46.)

b. Authorizes a state institution of higher education or a university housing commission to enter into a lease agreement with a nonpublic vendor to improve campus housing facilities, rather than to solely construct such facilities. Extends the permitted lease term from 30 to 75 years. Any campus housing facility included in a lease agreement entered into under this section retain an exemption from property taxes and assessments. (R.C. 3345.55.)

L. **Senate Bill 26 – Educator Tax Deduction** (effective Feb. 5, 2020)

This bill includes a state income tax deduction of up to $250 for educator's out-of-pocket expenses for professional development and classroom supplies. (ORC 5747.01.)

M. **Senate Bill 52 – Civilian cyber security reserve forces** (effective Jan. 24, 2020; appropriations effective Oct. 25, 2019)

This bill creates the Ohio Cyber Reserve to protect government, critical infrastructure, business, and citizens from cyber attacks. The Reserve is part of the Ohio organized militia. If ordered into state active duty to perform duty or training, Reserve members are afforded the same protections as those under the "Servicemembers Civil Relief Act" and the "Uniformed Services Employment and Reemployment Rights Act." (New R.C. 5922.01 to -08.)

This bill also requires boards of elections to audit election results for general elections, and for primary elections held in even-numbered years. (R.C. 3505.331.)

N. **Senate Bill 7 – Occupational Licensing** (signed Jan. 27, 2019; effective April 28, 2020)

Requires state occupational licensing agencies, under certain circumstances, to issue temporary licenses or certificates to practice a trade or profession to members

of the military and spouses who are licensed in another jurisdiction and have moved to Ohio for military duty.

Beginning May 15, 2020, the Ohio Department of Education will issue temporary licenses to educators who are currently active duty service members or spouses of active duty service members in Ohio and who hold a valid out-of-state license in the requested subject area. (R.C. 4743.041.) For more information, see http://education.ohio.gov/Topics/Teaching/Licensure/Apply-for-Certificate-License/Temporary-Military-License.

O. **House Bill 4 – Workforce Transformation** (signed by the Governor Jan. 14, 2020; effective April 14, 2020)

Directs the Governor's Office of Workforce Transformation ("OWT") to act as a liaison between the business community and the department of education ("ODE") or chancellor of higher education with regard to industry-recognized credentials and certificate programs. Based on inquiries from the business community, the OWT will work in collaboration with ODE, the chancellor, and other stakeholders (including regional education providers) as appropriate to review an existing or proposed industry-recognized credential or certificate program.

P. **House Bill 2 – Workforce Credentialing** (signed by the Governor Jan. 13, 2020; effective April 14, 2020)

Creates the TechCred program to reimburse employers for training costs for prospective and incumbent employees to earn a microcredential. (R.C. 122.178.) Also creates the individual microcredential assistance program to reimburse training providers for training costs. (R.C. 122.1710.) The bill also modifies distribution of funds appropriated under H.B. 166 or the TechCred Program, and elaborates on the use of funds appropriated in H.B. 166 for an Industry Sector Partnerships grant program. (R.C. 122.179.)

Q. **Senate Bill 216 – Ohio Public School Deregulation Act** (effective Nov. 2, 2018)

1. **Note**: In April 2019, the Ohio Department of Education (ODE) issued a SB 216 question and answer document that addresses various provisions in this bill, including reading improvement plans, licensure grade band changes, OTES changes, and properly certified or licensed teacher requirements. See http://education.ohio.gov/Topics/Teaching/Questions-and-Answers-about-Ohio-Senate-Bill-216#FAQ3465.

2. **Ohio Teacher Evaluation System (OTES) changes** - The state board of education is required to revise the standards-based state framework for teacher evaluations based on recommendations of the educator standards board. The state board must hold at least one public hearing on the revised framework and must make the full text of the revised framework available at each hearing it holds on the subject. **The state board must adopt the revised framework by May 1, 2020**.[6] (R.C. 3319.112(A).)

[6] The State Board of Education approved changes to the new OTES framework on March 10, 2020.

a. The framework must establish an evaluation system that:

i. Provides for multiple evaluation factors (with changes to student academic growth factors, as described below).

ii. Must use at least two measures of high-quality student data (as defined by the state board) to provide evidence of student learning attributable to the teacher being evaluated. **(New.)** When applicable to the grade level or subject area taught, high-quality student data must include the value-added progress dimension, but the teacher or evaluator shall use at least one other measure of high-quality student data to demonstrate student learning. **(New.)**

iii. High-quality student data may be used as evidence in any component of the evaluation related to knowledge of the students, use of differentiated instruction, assessment of student learning, use of assessment data, and professional responsibility and growth. **(New.)**

iv. Prohibits the use of shared attribution. **(New.)**

v. Prohibits the use of student learning objectives. **(New.)**

vi. Is aligned with standards for teachers. **(No change.)**

vii. Requires observation of the teacher being evaluated, including at least two formal observations of at least 30 minutes each and classroom walk-throughs. **(No change.)**

viii. Requires each teacher to be provided with a written report of the results of the evaluation. **(No change.)**

ix. Includes development of a professional growth plan or improvement plan for the teacher that is based on results of the evaluation and is aligned to any school district or building improvement plan required under the Every Student Succeeds Act. (**New**; conforming amendment to R.C. 3319.075.)

x. Provides for professional development to accelerate and continue teacher growth and provide support to poorly performing teachers. **(No change.)**

xi. Provides for the allocation of financial resources to support professional development (**No change**; R.C. 3319.112(A).)

b. ODE must provide guidance to districts on how high-quality student data may be used as evidence of student learning attributable to a particular teacher, and how information on student surveys, student portfolios, peer review evaluations, teacher self-evaluations, and other components determined appropriate by the district may be used as part of the evaluation process. (R.C. 3319.112(D).)

c. Boards of education must update their standards-based teacher evaluation policies to conform with the framework no later than July 1, 2020 (extended to September 1, 2020 by ODE as a result of the COVID-19 pandemic). As under current law, boards must consult with teachers. The policy will become operative at the expiration of any collective bargaining agreement covering teachers that is in effect on the effective date of the amendment. (ODE provided the option to delay implementation to the 2021-2022 school year as a result of the COVID-19 pandemic.) (R.C. 3319.111(A).)

i. When using measures of student performance as evidence in a teacher's evaluation, those measures must be high-quality student data. Boards may use data from assessments on the list developed by the state board as high-quality student data. (R.C. 3319.111(B).)

ii. Boards must continue to conduct an evaluation of each teacher at least once each school year, except:

a) The board may evaluate a teacher rated accomplished on the most recent evaluation once every three years so long as the teacher submits a self-directed professional growth plan to the evaluator that focuses on specific areas identified in the observations and evaluation and the evaluator determines that the teacher is making progress on that plan.

b) A teacher rated skilled may be evaluated once every two years so long as the teacher and evaluator jointly develop a professional growth plan for the teacher. (The requirement that an accomplished or skilled teacher's student academic growth measure is average or higher is removed.)

c) Districts must still complete at least one observation and hold at least one conference in any year that a teacher is not formally evaluated, but the conference must now include a discussion of progress on the teacher's professional growth plan. (R.C. 3319.111(C).)

iii. The alternative framework for teacher evaluations (R.C. 3319.114) is **repealed**.

3. **Teacher retesting repealed** - Provisions of law that require teacher retesting based on low teacher ratings or low school building academic performance rankings is repealed. (R.C. 3319.58 repealed.)

4. This bill also made changes to highly qualified teacher and paraprofessional requirements, teacher license grade bands, substitute teacher licenses,

supplemental teaching licenses, non-teaching employee tenure, and five-year forecasts.

II. Fiscal Year 2020-2021 Budget Bill (HB 166)

Note: This summary includes provisions that primarily impact public school districts.

Signed: July 18, 2019

Effective: Non-appropriation items generally effective around October 17, 2019 unless indicated otherwise below. Appropriations/sections prefixed with numbers in the 200s, 300s, 400s, and 500s (except 501s) effective July 18, 2019.

A few reminders from the budget bill:

A. Assessments, Curriculum, Graduation, and Report Cards

1. Graduation plans and policy – **By June 30, 2020 (deadline extended by ODE to September 30, 2020), school boards must adopt a policy** regarding students who are at risk of not qualifying for a high school diploma. (R.C. 3313.617 (new).)[7]

   a. The policy must require the district to develop criteria and procedures for identifying at-risk students, and a notification process for parents, guardians, and custodians.

   b. The policy must also require the district to assist at-risk students with additional instructional or support services to help them qualify for a diploma. This support can include mentoring or tutoring programs, high school credit through demonstrations of subject area competency, adjusted curriculum options, career-technical programs, mental health services, physical health care services, and family engagement and support services.

   c. **Graduation plan**: The policy must also require the district to develop a graduation plan for each student enrolled in grades nine through twelve in the district, and to update it each year until the student qualifies for a diploma. The graduation plan must be developed jointly by the student and district representative, and districts must invite a student's parent or guardian to assist in developing and updating the plan. The plan shall supplement a district's policy on career advising adopted under R.C. 3313.6020, and an IEP may be used in lieu of developing a graduation plan if the IEP contains academic goals similar to the graduation plan.

B. Operations

1. Busing reductions prohibition – School districts are prohibited from reducing transportation provided to students the district is not required to

[7] Guidance from the Ohio Department of Education is available at http://education.ohio.gov/Topics/Ohio-s-Graduation-Requirements/Graduation-Plans-and-Policies-for-Identifying-Stud.

transport, but that the district chooses to transport, during a school year after the first day of that school year. (R.C. 3327.015 (new).)

2. School breakfast program (R.C. 3313.818.)

   a. Beginning with the 2020-2021 school year, requires high-poverty public schools to offer breakfast to all students either before or during the school day. The program applies to schools with the following percentages of enrolled students who are eligible for free or reduced-price breakfast or lunches: 70% or more in year one, 60% or more in year two, and 50% or more in year three and thereafter. ODE must publish a list of schools that meet these conditions.

   b. If a school board determines a school cannot comply because of financial reasons, or if the board already has a successful breakfast program or partnership in place, a school board may choose not to comply.

   c. ODE must prepare an annual report on the implementation and effectiveness of the program.

   d. If a school board is required to offer breakfast under current R.C. 3313.813(C)(1) or (2) and 3313.818, the program must be operated in accordance with R.C. 3313.818.

3. Territory transfers - Creates a new territory transfer procedure for electors residing in a school district with territory in an "eligible township." An "eligible township" is a township that contains the territory of two or more school districts.[8] (R.C. 3311.242.)

[8] A lawsuit was filed Nov. 20, 2019, in the U.S. District Court, Southern District of Ohio, contesting the constitutionality of this provision (No. 2:19-cv-05086). A preliminary injunction hearing scheduled for July 13, 2020 was cancelled, with the parties agreeing the case will be submitted on summary judgment motions. Plaintiffs' motion for summary judgement was filed July 27.

On January 9, 2020, the Ohio Supreme Court granted a complaint for a writ of mandamus filed by electors residing in the village of Hills and Dales (No. 2019-1723) to compel the Plain Local Board of Education to forward a R.C. 3311.242 transfer petition to the county board of elections. The Ohio Supreme Court found R.C. 3311.242 imposes a ministerial duty on a school board to forward a transfer petition to the board of elections for it to determine the sufficiency of the signatures on the petition. (2020-Ohio-40.) On Feb. 3, 2020, the Court issued a second limited writ of mandamus compelling the elections board to review the petition for placement on the March 17 ballot. If the elections board determines the petition otherwise meets the requirements, then it must place the petition on the March 17, 2020 ballot notwithstanding the 90-day requirement set forth in R.C. 3311.242(B)(2) (2020 WL 525160.)

On May 8, 2020, a complaint was filed with the Ohio Supreme Court against the Bowling Green City School District concerning the board's delay in certifying a transfer proposal to the board of elections (No. 2020-0596). On June 8, 2020, the Court granted a writ of mandamus ordering the school district to certify the transfer proposal to the State Board of Education and the board of elections (2020 WL 3044137). The Court found the school board lacked authority under R.C. 3311.242 to reject a transfer proposal based on the school board's determination that the proposed transfer, if approved by voters, would violate R.C. 3311.06(B) by creating a noncontiguous school district. The school board could have completed the required certifications in the time available but for its attempt to enforce R.C. 3311.06(B). Therefore, a writ of mandamus was issued for the school board to certify the petition for placement on the August special-election ballot.

C. **Educational Service Centers**

1. Establishes a moratorium on additional school districts joining ESCs during FY 2020 and FY 2021. (Section 265.360.)

D. **Studies and Pilots**

1. Graduation: The Superintendent of Public Instruction must establish a committee to develop policy recommendations regarding methods to assist high school students who completed the twelfth grade but did not meet graduation requirements to obtain a diploma. A report must be issued by October 1, 2020. (Section 733.51.)

2. Early learning: ODE must complete a report that reviews early childhood initiatives in Ohio and includes information on how other states support early learning. ODE must submit its findings by Dec. 31, 2020. (R.C. 3317.60(A)(2) (new).)

3. Economically disadvantaged students – ODE must conduct a study that reviews criteria used in current school funding formula to define "economically disadvantaged students" and must submit its findings by December 31, 2020. (R.C. 3317.60(A)(1) (new).)

4. STEM Public-Private Partnership Pilot - shall operate for fiscal years 2020 and 2021. (Section 733.30.)

5. Career-tech post-secondary credit plan – The chancellor, in consultation with the superintendent of public instruction, must develop a statewide plan that permits a high school student enrolled in a career-technical planning district to receive post-secondary credit on a college transcript for the completion of an approved course. The plan must be completed by June 30, 2020, and shall be implemented if determined appropriate by the chancellor and superintendent. (R.C. 3333.167.)

E. **Miscellaneous**

1. School bus purchase program – Requires ODE and the Dept. of Public Safety to develop a program to provide school bus purchase assistance. ODE and DPS must submit a report to the General Assembly by Jan. 31, 2020 that describes how the program will operate. (Section 265.324.)

2. Telemedicine services – Requires health benefit plans to provide coverage for telemedicine services on the same basis and to the same extent as in-person services. (R.C. 3902.30, 4723.94, and 4731.2910.)

III. Special Education

A. **District must defend Section 504 claim brought by tennis player cut from the team** – *Clemons as next friend of T.W. v. Shelby County Board of Education*, No. 19-5846, 2020 WL 3412693 (6th Cir., June 22, 2020)

A student ("T.W.") diagnosed with Asperger's Syndrome and anxiety disorder claimed she was discriminated against on the basis of her disability when she was cut from the girls' tennis team following tryouts and required to play challenge matches against top players.

During the 2013-2014 season, T.W. had a difficult time with the new coach and often had panic attacks following practice. When T.W. lost her spot for regionals in the prior season, she threatened suicide. For the 2014-2015 season, the coach decided to hold team tryouts for the girls' team for the first time due to limited court space. The coach testified that before tryouts even started, he had already decided T.W. would not make the team in light of issues she had the prior year. He was also concerned that T.W. would threaten suicide again. When tryouts were held, the coach said T.W. performed poorly and did not make the team. An investigation was held at the request of T.W.'s mother, and it was determined that tryouts were equitable but that the girls were not playing in their normal environment due to the weather and T.W. would be given a spot on the team. During her first week back on the team, the coach had T.W. play challenge matches to determine if she would play in competitive varsity matches. After the second game, T.W.'s mother stopped her daughter from playing because she believed it was a "set up" and T.W. was having a difficult time. T.W.'s mother withdrew her from school the next day.

The lower court dismissed the Section 504 discrimination claims against the district, but the Sixth Circuit reversed. There was a genuine factual dispute as to whether T.W. was "otherwise qualified" for the tennis program with reasonable accommodation. While she may not have been as skilled as other players, and had a difficult time accepting feedback, a reasonable jury could conclude T.W. could meet the team's requirements with the benefit of reasonable accommodations.

While there was no evidence the coach singled out T.W. for criticism, or that the challenge matches were discriminatory, T.W.'s mother did make out a prima facie case of discrimination with respect to T.W. not making the team following tryouts. The coach had decided T.W. would not make the team before tryouts even took place, and none of T.W.'s peers, except for her sisters, were excluded from or cut from the team. Nor could defendants offer a legitimate, nondiscriminatory reason for its actions. The coach's reasons for deciding T.W. would not be on the team related to behavior directly attributable to T.W.'s Asperger's Syndrome Disorder and anxiety.

Dismissal of the Title IX claim was upheld as there was no evidence that holding tryouts negatively impacted girls' athletic opportunities at the school. Tryouts were not held for the boys' team, which had difficulty filling the roster, but in all other respects the programs were equal.

B. **Ohio Operating Standards for the Education of Children with Disabilities: proposed amendments to OAC 3301-51** (June 2020)

The Ohio Department of Education posted proposed changes to Ohio's Operating Standards for the Education of Children with Disabilities for public comment. Feedback was requested on OAC 3301-51-01 to 3301-51-10 and 3301-51-21. Comments were due by July 31, 2020.[9]

Note: Proposed changes to 3301-35-15 (PBIS and restraint and seclusion) are included elsewhere in this document.

C. **Rule Change – OAC 3301-13-09** (Jan. 2020)

Provisions for an excuse from taking any assessment required for graduation of an adult with disabilities, or for providing accommodations on any assessment required for graduation for an adult.

The Ohio Department of Education amended OAC 3301-13-09 effective Jan. 24, 2020. Changes include requiring evaluations for students who are 22 or older be conducted in accordance with the requirements of the IDEA, and clarifying the board of education of the student's district of residence is responsible for conducting the evaluation for individuals enrolled in the 22+ program. The rule also requires evaluations and assessment exemption determination to be completed and approved by the board of education within 120 days from the date of the request. The five-year requirement for accepting an ETR and IEP was removed.

D. **Medicaid School Program Rule Changes** – OAC 5160-35 (effective July 1, 2020)

The Ohio Department of Medicaid (ODM) revised several of the rules governing the Medicaid School Program (MSP). The most significant change is the addition of language permitting an MSP provider to provide telehealth services in accordance with an eligible child's IEP, and in accordance with the telehealth service delivery methods as identified in rule 5160-1-18 or written guidance set forth by ODM. (OAC 5160-35-01 and -05.) OAC 5160-35-01-05 also now specifies that occupational therapy, physical therapy, speech-language pathology, and audiology students who are completing an internship or externship are qualified practitioners who can deliver services.

An amendment to 5160-35-04 clarifies how frequently re-assessment/re-evaluation services may be performed, and that services must be agreed to by the Medicaid-covered individual or authorized representative.

Note: The Ohio Department of Medicaid filed proposed (permanent) revisions to OAC 5160-1-18 with JCARR on August 31, 2020. When final, the rules will continue expanded telehealth options implemented by emergency rules in response the COVID-19 pandemic.

[9] See http://education.ohio.gov/Media/Ed-Connection/June-22-2020/Public-comment-period-open-for-Operating-Standards.

E. **Equity in the IDEA – Preparing districts for new Significant Disproportionality Regulations** (Ohio Department of Education, Nov. 2019)

The Ohio Department of Education issued guidance addressing Ohio's new methodology for calculating significant disproportionality in special education. According to the guidance, the changes will likely result in more districts being required to address inequities through the redirection of funds. The expanded disciplinary categories will likely mean more districts are identified as disproportionate in discipline. More districts of predominately one racial group may be flagged based on the new alternate risk-ratio calculation. See http://education.ohio.gov/Topics/Special-Education/Special-Education-Data-and-Funding/Equity-in-IDEA-New-Disproportionality-Regulations for more information. Implementation of the new regulations will be reflected in Ohio's 2019-2020 Special Education Profiles to be released in late January 2020.

A December 4, 2019 memo to school districts addresses in-school suspensions and whether they count as "removals" toward a disciplinary change of placement. The memo also advises that in-school suspensions count as removals for purposes of state and federal discipline reporting, including those that would not count as a removal for purposes of determining the requirement for a manifestation determination review.
See http://education.ohio.gov/getattachment/Topics/Special-Education/Special-Education-Data-and-Funding/Equity-in-IDEA-New-Disproportionality-Regulations/In-school-suspension-memo.pdf.aspx?lang=en-US.

F. **Staffing ratios for programs with preschool children with disabilities** (May 2019)

S.B. 216 amendments to R.C. 3323.022 required that State Board of Education rules for staffing ratios for programs with preschool children with disabilities must require a minimum of ten hours of services per week be provided for each child served by a center-based teacher unless otherwise specified in the child's individual education program. The State Board of Education approved amendments to the standards for preschool children eligible for special education (OAC 3301-51-11) at its May 2019 meeting. However, the rule change needs to go through the JCARR process before going into effect.[10]

G. **Medical Marijuana: Cachexia added –** (Ohio Medical Marijuana Control Program, July 2020)

In July 2020, the State Medical Board approved adding cachexia (wasting disease) to the list of conditions for which medical marijuana can be used. Petitions for anxiety disorder and autism were reviewed by the board's Medical Marijuana Committee, but the board voted to reject adding them to the list of conditions.

[10] On Feb. 3, 2020, the Common Sense Initiative completed its review of this rule. CSI had no recommendations, and concluded ODE should proceed in filing the rule with JCARR.

H. **Diabetes training materials** (Ohio Department of Education, Dec. 2019)

Ohio-specific training materials that schools can use for training staff in managing student diabetes is now available. The materials were created by the Ohio Department of Education, Ohio Department of Health, and school-based health care professionals. See http://education.ohio.gov/Topics/Other-Resources/Diabetes-Management.

I. **Students with Disabilities and the Use of Restraint and Seclusion in K-12 Public Schools** U.S. Dept. of Education Office for Civil Rights (OCR) and Office of Special Education and Rehabilitative Services (OSERS) (Jan. 9, 2020)

As part of the U.S. Department of Education's initiative to address the inappropriate use of restraint and seclusion, OCR and OSERS released a webinar, "Students with Disabilities and the Use of Restraint and Seclusion in K-12 Public Schools," to provide technical assistance to schools on how federal laws apply to the use of restraint and seclusion. To view the webinar, see https://www.youtube.com/watch?v=EZ9Yx0LC8TI&feature=youtu.be.

For information regarding the status of and case resolutions under this initiative, see OCR's Annual Report to the Secretary, the President, and the Congress (for Fiscal Year (FY) 2019 at https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2019.pdf (released July 2020).

J. **Service dog settlement** U.S. Dept. of Justice (Aug. 20, 2020)

The Justice Department announced that it reached a settlement with a school district in New York to resolve a lawsuit alleging disability discrimination. The department's complaint alleged the school district denied equal access to a student with disabilities by prohibiting her from bringing her service dog to school unless her parents provided a full-time dog handler. The school district agreed to revise its policy on service animals, and to provide reasonable modifications to facilitate the use of service dogs by students with disabilities. The modifications include the district providing minimal assistance such as helping to tether or untether a service dog, assisting a student to get water for a service dog, and prompting a student to issue commands to a service dog. For more information, see https://www.justice.gov/opa/pr/justice-department-settles-gates-chili-central-school-district-ensure-equal-access-students.

K. **OSEP Letters** (2019-2020)

The Office of Special Education Programs posted informal guidance letters addressing the following topics:

1. Concerning whether a parent may be required to sign a confidentiality agreement in order to participate in mediation under Part B of the IDEA. (Letter to Anonymous, July 31, 2020)

2. Addresses the requirements to request a waiver for 2020-2021 school year from the one percent cap on the percentage of students with the most significant cognitive disabilities who may be assessed with an alternate

assessment aligned with alternate academic achievement standards. (Letter to State Directors, June 9, 2020)

3. Addresses the use of IDEA Part B funds to pay hearing officers to conduct due process hearings under IDEA. The letter explains that because the state is required to ensure that parents and LEAs have an opportunity for an impartial due process hearing, such costs are allocable to a state's IDEA Part B grant award and a portion of funds reserved for state administration may be used for this purpose. Expenditure of an LEA's Part B allocation for this purpose is also permissible. (Letter to Anonymous, June 8, 2020)

4. Addresses the role of parents in determining the educational placement of a child with a disability, including how far from home the child will be educated. (Letter to Breeskin, Nov. 22, 2019)

5. Addresses the provision of compensatory education after a family relocates to a new state. (Letter to Anonymous, Oct. 23, 2019)

6. Letter regarding development of IEPs for children placed in certain preschool programs, including whether specific related services may be restricted based solely on a child's placement in a certain program. (Letter to Rowland, Sept. 9, 2019)

7. Addresses questions regarding the participation of transition-aged children with disabilities in IEP team meetings held to discuss results of assessments, and whether copies of assessment reports should be provided prior to meetings at which they will be discussed. (Letter to Anonymous, Sept. 9, 2019)

See https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/index.html#2018 for the letters.

IV. Student Issues

A. **Student's suspension for "off campus" social media post violated First Amendment** – *B.L. by and through Levy v. Mahanoy Area School Dist.*, No. 19-1842, 2020 WL 3526130 (U.S. Ct. App. 3rd Cir., June 30, 2020)

A panel of the U.S. Court of Appeals for the Third Circuit[11] ruled that a school district violated a student's First Amendment free speech rights when it suspended her from the junior varsity cheerleading team in response to a vulgar photo the student posted on Snapchat. The student took a photo of herself and her friends while at a store on a Saturday, and posted it to Snapchat with a caption that included "F--- cheer." The snap was visible to about 250 "friends," including fellow students and cheerleaders, several of whom informed the cheerleading coaches. The coaches then removed the student from the team for violating the team's rules concerning respect, foul language, and sharing negative information on the internet; as well as

[11] The Third Circuit covers Pennsylvania, New Jersey, Delaware, and the Virgin Islands.

the school's rules requiring athletes "conduct[ ] themselves in such a way that the image of the Mahanoy School District would not be tarnished in any manner."

The Third Circuit determined the student's snap was protected speech that occurred off-campus. The snap was created over the weekend, off-campus, and without school resources, and was shared on a platform unaffiliated with the school. While the snap mentioned the school and reached school officials and students, Third Circuit cases from 2011 (*J.S.* and *Layschock* decisions) "yield the insight that a student's online speech is not rendered 'on campus' simply because it involves the school, mentions teachers or administrators, is shared with or accessible to students, or reaches the school environment."

As a matter of first impression, the Third Circuit also held that *Tinker*—a U.S. Supreme Court decision holding that school officials may regulate student speech that "would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school"—does not apply to off-campus speech.

The court also disagreed with the school district's assertion that by agreeing to certain school and team rules, the student waived her First Amendment right to post the snap at issue. The language of the cheerleading team's "Respect Rule" suggests it only applies at games, fundraisers, and other events. "It is hard to believe a reasonable student would understand that by agreeing to the Respect Rule, she was waiving all rights to malign the school once safely off campus and in the world at large." In addition, the rule on posting negative information on the internet applied to "information," not "mere expressions of opinion or emotion." The Personal Conduct Rule only applied during the sports season, and the student's snap was posted before practices for the next season started. Furthermore, the "language is too obscure, and too dependent on the whims of school officials, to give rise to a knowing and voluntary waiver" of the student's right to speak as she did in the snap.

B. **Court troubled by school officials' response to bullying allegations** – *A.J.R., et al. v. Bd. of Educ. of Toledo City School Dist.*, et al., 2019-Ohio-3402, 2019 WL 3997419 (Ct. App. 6th Dist. Lucas County, Aug. 23, 2019)

The parents of a kindergarten student filed suit against their child's teacher, the school principal, and the assistant principal for allegedly failing to stop the bullying of their child, and for failing to prevent their child being injured by another student when the classmate punctured their daughter's cheek with a sharpened pencil. The trial court granted defendants' motion for judgment on the pleadings for all claims except recklessness or reckless negligence. The teacher and principals argued they were immune from the recklessness claim as they had no knowledge of the classmate harming other students and no reason to suspect the classmate posed a risk of harm to other students.

The court refused to dismiss the claims, finding there were genuine issues of material fact with respect to whether the school officials' conduct was reckless. The child's parents presented evidence that the classmate's bullying of their daughter was ongoing and involved pushing in the bathroom line, teasing, and demanding

that the student consume odd combinations of food. The father asserted that over a six-month time frame he notified school officials on at least four occasions of specific bullying and harassment by the classmate and of his concern about his daughter's safety. The court found that with this knowledge, it might seem reasonable to keep the two children separate, but there is nothing to suggest that this was done. Instead, there was evidence they were still eating together in the lunchroom, being taught in the same classroom, and, more troubling, sitting at the same classroom table on the day the student was injured despite the ongoing bullying.[12]

C. **Bullying and suicide** – *Feucht v. Triad Local Schools Board of Educ.*, No. 3:18-cv-345; 2019 WL 6465401 (U.S. Dist. Ct. S.D. Ohio, Dec. 2, 2019)

This case involves the tragic death of an 11-year old girl ("Bethany"). The parents alleged that despite their pleas to stop the bullying their daughter faced at school, school officials failed to stop the bullying. Consequently, their daughter suffered severe anguish, distress, and depression, and ultimately committed suicide. The parents claimed that district officials placed their daughter in the same class as the ringleader group of boys that incessantly bullied their daughter. After being informed by the parent of a classmate that Bethany threated to kill herself, the principal waited until the following day to inform the guidance counselor, and neither the principal nor the counselor informed Bethany's parents. (The counselor informed the principal that Bethany said she was not considering harming herself, and never told anyone that she was.)

Addressing the "state-created danger" arguments, the court explained the parents must show affirmative acts by the state which created or increased the risk that an individual would be exposed to private violence. The majority of the allegations concern failures to act. The court did find that one act, requiring Bethany to be in close proximity to her harasser, was an affirmative act. However, the court found this did not meet the culpability requirement, which, citing *Schroder*, "ensures that only the most egregious official conduct can be said to be arbitrary in the constitutional sense." Additionally, any connection between this act and depriving Bethany of her right to life was remote.

The court assumed, without deciding, that misrepresentation by district officials that they were handling the bullying, and would report the suicide threat, were affirmative acts. However, the individual defendants (certain district officials) were entitled to qualified immunity, as neither party cited to case law that clearly established that false assurances are considered affirmative acts under the state-created danger theory. Having dismissed these and other federal claims, the court declined to exercise supplemental jurisdiction over the remaining state law and relief claims.[13]

[12] On Nov. 26, 2019, the Ohio Supreme Court accepted an appeal of this decision (Case No. 2019-1355). Oral arguments were held July 8, 2020.

[13] An appeal to the Sixth Circuit was filed Dec. 30, 2019 (No. 19-4270). The case was dismissed May 20, 2020.

Note: In a 2018 decision, a Southern District of Ohio judge did find that a misrepresentation by school employees that a student had fainted, even though they were aware he had been knocked unconscious, was an affirmative act. This decision was issued after the events in this case.

D. **School police officer's response to suicidal student** – *Machan v. Olney,* No. 18-1691, 2020 WL 2487597 (U.S. Ct. App. 6th Cir., May 14, 2020)

A middle school student told a school principal that she had been contemplating suicide for about a month, and that she saw guns and knives at her home that made her want to hurt herself. The principal told the police officer assigned to the school what the student had said. The officer then called the student's father, who was at work about 90 minutes away, and told him she planned to take the student to the hospital for an evaluation. The father objected, but the officer took the student to the hospital anyway. After speaking with the student and performing a blood draw, the medical staff released the student to her father on the condition that he take her to a nearby mental health center.

Addressing the Fourth Amendment violation, the court concluded the student's statement that she had been thinking about suicide, had suicidal thoughts for about a month, and worried about hurting herself with guns and kitchen knives in her home provided the officer with "ample grounds to think that [the student] posed a danger to herself, and thus provided probable cause" for the officer to take her into protective custody for a mental evaluation. The court also found it reasonable that a mental evaluation could include a blood draw to determine whether a person has already acted upon her suicidal thoughts. While the father argued his daughter had not expressed any present intention to act upon her suicidal thoughts, she was distressed enough to seek help from school officials. The father also argued that the officer should have detained the student at school until he could pick her up. However, the officer had reason to fear the student might hurt herself at home given the student's statement about guns and knives.

E. **Spraying student with juice may shock the conscience** – *Kouider v. Parma City School Dist. Bd. of Educ.,* No. 1:19-cv-02294, 2020 WL 4816231 (U.S. Dist. Ct. N.D. Ohio, Aug. 19, 2020)

An eight-year-old student had an emotional outburst during recess at school. The student started pushing and kicking at people on the playground, then ran off to the parking lot area. School resource officers apprehended the student and restrained him on a bench while the student was screaming and spitting. The student was then escorted to the principal's office, where the temper tantrum continued. The student was offered a juice box from his lunch bag. The student claimed a resource officer sprayed the juice on him, while the officer claimed the student started spraying the officers, and when an officer grabbed the box, the student held on and then sprayed himself under the chin. The second resource officer, while initially corroborating the other officer's account of events, later recanted. The student's parent filed suit against the school board and a school resource officer, bringing a number of federal constitutional and state law claims.

Addressing the substantive due process claim against the resource officer, the court ruled the parent demonstrated a factual dispute as to whether the juice-squirting incident shocks the conscience. There was no need for juice-squirting, there was no pedagogical justification for spraying the child with juice, there is a dispute of fact concerning the student's emotional injury, there is a dispute of fact whether the officer's conduct was inspired by malice or sadism, and there was arguably a serious injury (or at least a factual dispute regarding a serious injury). While acknowledging it was a close question in light of Sixth Circuit precedent, the court denied defendant's motion for summary judgment on this claim.

The court also denied the school district's motion for judgment on the parent's Monell liability claim for failure to train. The court found the parent raised a genuine issue of material fact as to whether the district's training and supervision of resource officers was inadequate.[14]

F. **Football coach's verbal motivation tactics did not violate Title IX** – *Chisholm v. St. Marys City School Dist. Board of Educ.*, Nos. 19-3034, 19-3100; 2020 WL 104598 (U.S. Ct. App. 6th Cir., Jan. 7, 2020)

Male high school football players brought claims against their coach, the school board, and other school officials for federal Title IX violations and state-law intentional infliction of emotional distress. The players alleged the coach harassed them by calling them derogatory terms (including "pussy,") in front of teammates, leading some teammates to join in the name-calling. The Sixth Circuit found that while the coach's conduct was distasteful and offensive, his conduct did not constitute sex-based discrimination in violation of Title IX.

The court found the coach's use of the term "pussy" was not discrimination based on sex, as "the mere use of an offensive or gendered term does not in itself rise to the level of discrimination on the basis of sex." Nor did the coach's behavior implicate Title IX's prohibition of sex stereotyping. His remarks were based on his view that the players were not tough enough—he was not "offering a commentary on whether [the players] were exemplars of their sex." The players also did not show that the coach's statements were sufficiently severe or offensive to merit Title IX relief.

Regarding the state-law claims, the court found the comments were not "utterly intolerable in a civilized community" in violation of Ohio tort law. While the comments were "offensive and inappropriate at best," they were not "unheard of on the gridiron, where the foul-mouthed coach is something of an unfortunate cultural cliché."[15]

[14] Note: This decision was appealed to the Sixth Circuit on August 28, 2020 (No. 20-3903).

[15] Note: In a dissenting opinion concerning the emotional distress claims, the judge criticized the majority for overlooking the context surrounding the coach's behavior given that the players were minor students, not professional or collegiate players.

G. **Peer-on-peer sexual harassment standard under Title IX** – *Kollaritsch v. Michigan State University Board of Trustees,* No. 17-2445/18-1715; 2019 WL 6766998 (6th Cir., Dec. 12, 2019)[16]

Several students who were sexually assaulted by a male student sued a university, claiming the administration's response was inadequate, caused them physical and emotional harm, and consequently denied them educational opportunities. Under a 1999 U.S. Supreme Court ruling (*Davis v. Monroe County Board of Education,* 526 U.S. 629), a school can be held liable for damages under Title IX for its response to peer sexual harassment "only where [it is] deliberately indifferent to sexual harassment, of which [it] has actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."

Addressing the requirement that harassment must be "pervasive" and the school's response must "cause" the injury, the Sixth Circuit held that "a student-victim plaintiff must plead, and ultimately prove, that the school had actual knowledge of actionable sexual harassment and that the school's deliberate indifference to it resulted in further actionable sexual harassment against the student-victim, which caused the Title IX injuries. A student-victim's subjective dissatisfaction with the school's response is immaterial to whether the school's response caused the claimed Title IX violation." The Court found that none of the four plaintiffs proved any actionable sexual harassment after the school's response to their sexual assault reports. Therefore, they did not suffer "pervasive" sexual harassment for which the school could be held liable.

In the case of one student, the school investigated the sexual assault and disciplined the perpetrator by placing him on probation and forbidding any contact with the victim. However, the victim said she subsequently encountered him nine times. The Court found because the victim did not provide any details or assert any facts to show, or even suggest, the encounters were sexual, severe, pervasive, or objectively unreasonable, she could not show causation necessary to state a viable deliberate-indifference claim under Title IX and *Davis*. Similarly, for another student, the alleged perpetrator withdrew from the university prior to the university's completion of the investigation, and it was not enough for the student to claim the male student could return to campus without her knowledge, and that his mere presence on campus after she reported the assault created a hostile environment for her.

For another student, the alleged perpetrator was initially expelled, but then reinstated following an appeal and new investigation which found no sexual assault. The male student had no contact with the female student after the school's response, but the female student said she could have encountered him at any time due to his presence on campus. This student did not show any post-response encounter and cannot show causation to state a viable deliberate-indifference claim under Title IX and *Davis.*

[16] A petition for a writ of certiorari was filed with the U.S. Supreme Court on July 2, 2020 (No. 20-10).

H. **District's inadequate response to "exposing" precludes summary judgment for peer-on-peer sexual harassment claims** – *T.C. v. Metropolitan Government of Nashville,* No. 3:17-cv-01098; 2019 WL 1995235 (U.S. Dist. Ct. M.D. Tenn., May 6, 2019)

Female high school students were videotaped by other students while engaging in sexual encounters with male students at school. These videos were then circulated among the students' peers without consent—a practice known as "exposing." Several female students learned of a video's existence and circulation when other students began calling them demeaning sexual names. After reporting the incidents, the students claim the principal's reaction was focused on determining whether the sexual conduct was forcible rape. In several instances, the principal did not indicate there would be an investigation or that any steps would be taken to protect the female students from retaliation. The students said they transferred to new schools as a result of school administrators' failure to protect them. The students' parents sued the school, arguing that its handling of this matter and its general approach to harassment deprived plaintiffs of their rights under Title IX.

The court found the district was aware of the risk of students engaging in sexting, and the district's response to this known risk of harassment was unreasonable. The district's Title IX coordinator was not informed about specific sexting or exposing incidents, and relied upon principals to bring cases to her attention. These structural problems "were exacerbated by a fatally flawed understanding of the Title IX issues raised among the principals" who acted as gatekeepers. As for the district's response after it learned of the claims, the court found that in three of the cases, a reasonable juror could conclude that school administrators did not take seriously the ongoing threat the videos played to the students' dignity, privacy, and ability to receive an education. Administrators focused on consent to the sexual activity, and/or the students' failure to object to the videotaping, and did not acknowledge that the unwanted circulation of the videos posed a distinct sexual harassment threat and risk of harm to the students' education.

Note: On Jan. 24, 2020, the Sixth Circuit granted Metro's petition for permission to appeal, vacated the district court's summary judgment decision, and remanded for reconsideration in light of *Kollaritsch*. "In *Kollaritsch*, we noted that the initial sexual harassment that triggers a school's notice and the later sexual harassment caused by its unreasonable response 'must be inflicted against the same victim.' That analysis could affect the district court's decision. But we think it prudent to let the district court decide, in the first instance, *Kollaritsch's* effect (if any) on these facts." (Case no. 19-508)[17]

[17] A copy of the Sixth Circuit's order is at https://www.govinfo.gov/content/pkg/USCOURTS-tnmd-3_17-cv-01098/pdf/USCOURTS-tnmd-3_17-cv-01098-2.pdf.

I. **District Court declines to dismiss lawsuit against Ohio over right to change gender on birth certificates** – *Ray v. Ohio Department of Health*, No. 2:18-cv-00272 (S.D. Ohio, Sept. 12, 2019)

Four transgender individuals who wished to change their names on their Ohio birth certificates to reflect their gender identity filed suit against the Ohio Department of Health ("Ohio") for its categorical refusal to make the change. (Ohio is one of two states that does not permit transgender persons to change the sex on birth certificates.) Ohio moved to dismiss the complaint, maintaining that plaintiffs had no constitutional right to change their birth certificates in the manner requested.

The U.S. District Court refused to dismiss the complaint. The plaintiffs alleged facts which, if accepted as true, suggest that forced disclosure of their transgender status when they must produce a birth certificate puts their "personal safety and bodily integrity in jeopardy." The court also found that Ohio's refusal to change birth certificates violates plaintiffs' informational right to privacy as it "implicates a release of personal information that is of a 'sexual, personal, and humiliating nature' and 'could lead to bodily harm'." The court also found that Ohio's policy was not narrowly tailored to further a compelling state interest. See https://www.acluohio.org/wp-content/uploads/2019/09/Order.pdf for a copy of the order.[18]

J. **School board's bathroom and school records policies violate Title IX** – *Gavin Grimm v. Gloucester County School Board*, No. 19-1952, 2020 WL 5034430 (U.S. Ct. App. 4th Cir., August 28, 2020)

This long-running lawsuit concerns a Virginia school board's refusal to allow a transgender student, Grimm, to use the bathroom that matches his gender identity, as well as the board's refusal to amend his school records to accurately reflect his gender. While in high school, Grimm underwent reconstruction surgery, was issued a state identification card identifying him as male, and was issued a birth certificate identifying him as male. The district court ruled in Grimm's favor, and the school board appealed. On appeal, the Fourth Circuit first ruled the claims pertaining to the restroom policy were not moot, and Grimm did not need to exhaust administrative remedies (a FERPA hearing), as FERPA says nothing about exhaustion and Grimm's claims concerned discrimination rather than technical FERPA violations.

The Court then turned to Grimm's equal protection claim, finding the board's restroom policy constituted sex-based discrimination and was not substantially related to its interest in protecting students' privacy. Likewise, the board's continued refusal to update Grimm's school records violated Grimm's equal protection rights. The board's refusal was not substantially related to its interest in maintaining accurate records given that Grimm's legal gender in the state is male, not female.

[18] Note: Motions for summary judgment were filed Jan. 16, 2020 (No. 2:18-cv-00272). A notice of supplemental authority was filed June 29, 2020.

Addressing whether the board's restroom policy violated Title IX, the Court found that in light of the U.S. Supreme Court's recent *Bostock* decision, "we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him 'on the basis of sex.'" The bathroom policy unlawfully discriminated against Grimm as he alone could not use the restroom that corresponded with his gender. And while Title IX regulations allow for sex-separated restrooms, Grimm is not challenging the regulations. Rather, he challenges his exclusion from the restroom matching his gender identity. The board's refusal to update Grimm's school records also violated Title IX, as he was treated worse than other students whose records reflect their correct sex. This discrepancy harms Grimm because when he applies to universities and is asked for a transcript, the sex marker will be incorrect and will not match his other documentation.

K. **Eleventh Circuit applies *Bostock* to Title IX** – *Adams by and through Kasper v. School Board of St. Johns*, No. 18-13592, 2020 WL 4561817 (U.S. Ct. App. 11th Cir., Aug. 7, 2020)

The Eleventh Circuit Court of Appeals, citing the Supreme Court's recent decision in *Bostock v. Clayton County*, ruled that a Florida school board's policy prohibiting a transgender student from using the boys' restroom violated Title IX and the Constitution's guarantee of equal protection. Addressing the Title IX claim, the court concluded that excluding the transgender student from the boys' bathroom "amounts to sex discrimination in violation of the statute." The court rejected the school board's argument that Title IX's ban on sex discrimination differed from that of Title VII. As in *Bostock*, the transgender student was singled out for different treatment. If he used a restroom matching the sex indicated on his legal documents and his gender identity, he faced discipline. Non-transgender students did not face discipline for using the restroom matching their gender identity or legal documents. "*Bostock* confirmed that workplace discrimination against transgender people is contrary to law. Neither should this discrimination be tolerated in schools. The School Board's bathroom policy, as applied to [the student], singled him out for different treatment because of his transgender status. It caused him psychological and dignitary harm. We affirm the District Court's ruling that maintaining this policy violated Title IX."

The court also rejected the school board's argument that Title IX regulations permitting separate toilet, locker room, and shower facilities on the basis of sex foreclosed the student's discrimination claims. The student was not challenging the regulation—he was simply seeking access to boys' restroom. The regulation also does not mandate how a transgender student's "sex" is to be determined. "We need not interpret the term 'sex' to recognize that [the student] suffered discrimination at school because he was transgender. See *Bostock*, 140 S. Ct. at 1746. And nothing in *Bostock* or the language of § 106.33 justifies the School Board's discrimination against [the student]."

L. **Department of Education investigation of athletic conference's transgender athlete policy** – U.S. Department of Education Office for Civil Rights (May 15, 2020; Aug. 31, 2020)

In August 2019, the U.S. Department of Education Office for Civil Rights (OCR) announced it would investigate a complaint concerning the Connecticut Interscholastic Athletic Conference's (CIAC) policy that permits transgender athletes to participate in interscholastic athletics based on their gender identification in school records and daily life. The complaint was filed by the Alliance Defending Freedom (ADF) on behalf of three girls, and includes allegations that a school district discriminated against the girls by denying them equal athletic benefits and opportunities, and by not requesting that CIAC change its transgender participation policy. On May 15, 2020, OCR issued a Letter of Impending Enforcement Action (Letter), finding the actions of the CIAC and certain schools resulted in the loss of athletic benefits and opportunities for female student-athletes. OCR issued the Letter because the CIAC and named schools failed to voluntarily enter into resolution agreements to remedy the identified violations.[19]

A revised Letter of Impending Enforcement Action was issued August 31, 2020.[20] The letter was updated in light of the U.S. Supreme Court's holding in *Bostock v. Clayton*. A letter of notification in a case involving Shelby County Schools was also issued, indicating that OCR will be opening an investigation.[21] In the Shelby County Schools matter, OCR determined it possesses jurisdiction over a student's complaint that she was discriminated against on the basis of her biological sex, by reason of her sexual orientation.

OCR indicated these August 31, 2020 letters illustrate the Department's approach to Title IX enforcement in light of the Supreme Court's decision in *Bostock v. Clayton County, Ga*. In the Impending Enforcement Action letter, OCR noted:

> "*Bostock* does not impact OCR's regulations or enforcement of Title IX regarding schools that separate students by biological sex in the context of intimate facilities—such as locker rooms and bathrooms—or sports teams, athletic opportunities, or other substantive areas for which Title IX includes specific statutory and regulatory exemptions outlining when consideration of biological sex is permitted."

In the revised letter of impending enforcement action, OCR indicated it maintains its position that its regulations authorize single-sex teams based only on biological sex at birth as opposed to a person's gender identity. OCR also indicated the letter "constitutes a formal statement of OCR's interpretation of Title IX and its implementing regulations and should be relied upon, cited, and construed as such."

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[19] Note: On Feb. 12, 2020, three families filed a lawsuit alleging that allowing transgender female athletes on girls' athletic teams deprives other females of competitive opportunities and equal opportunities to engage in post-season competition in violation of Title IX. *Soule v. CT Association of Schools, Inc*. (U.S. Dist. Ct., CT, No. 3:20-cv-00201).

[20] See https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf for the revised letter.

[21] The letter of Notification is available at https://www2.ed.gov/about/offices/list/ocr/letters/20200831-letter-of-notification.pdf.

M. **Federal judge enjoins Idaho from enforcing law that prevents transgender female athletes from participating on women's sports teams** – *Hecox v. Little*, No. 1:20-cv-00184, 2020 WL 4760138 (D. Idaho, August 17, 2020)

The state of Idaho enacted a law (the Fairness in Women's Sports Act) that prohibits transgender female athletes from participating on women's sports teams. The law also establishes a "dispute" process that allows individuals to challenge a student's sex. If any female athlete's gender is disputed, she must undergo a potentially invasive sex verification process. Because Idaho's law does not restrict individuals who wish to participate on men's teams, men and boys are not subject to the dispute process.

Plaintiffs filed a motion for preliminary injunction seeking preliminary relief based on their equal protection claim. The court granted the motion, finding plaintiffs were likely to succeed on the merits of their equal protection claim. The court found the State did not identify "a legitimate interest served by the Act that the preexisting rules in Idaho did not already address, other than an invalid interest of excluding transgender women and girls from women's sports entirely, regardless of their physiological characteristics." In addition, the law's gender dispute process placed a significant burden on all female athletes, and defendants did not offer evidence that the law "is substantially related to its purported goals of promoting sex equality, providing opportunities for female athletes, or increasing female athlete's access to scholarship." To the contrary, "it appears that the Act hinders those benefits by subjecting women and girls to unequal treatment, excluding some from participating in sports at all, incentivizing harassment and exclusionary behavior, and authorizing invasive bodily examinations." [22]

Note: On Feb. 26, 2020, H.B. 527 (the "Save Women's Sports Act") was introduced in the Ohio House to prohibit schools, state institutions of higher education, and private colleges from permitting individuals of the male sex to participate on athletic teams or competitions designated only for participants of the female sex. Under the bill, a participant's sex must be determined based on internal and external reproductive anatomy, normal endogenously produced levels of testosterone, and an analysis of the participant's genetic makeup.

V. Sunshine Law / Records

A. **Confidentiality Restriction** – Ohio Ethics Commission Advisory Opinion No. 2020-02 (April 17, 2020)

The Ohio Ethics Commission issued an opinion concerning whether R.C. 102.03(B) prohibits a public official from disclosing information discussed during executive session.

[22] In June 2020, U.S. Attorney General Barr filed a statement of interest in this case. See www.justice.gov/opa/pr/department-justice-files-statement-interest-defending-constitutionality-idaho-s-fairness. For more on this case, see www.aclu.org/cases/hecox-v-little.

The Commission found that the use of executive session does not, by itself, create confidentiality. However, if it is clearly demonstrated that a public body met all of the legal requirements to discuss a matter in executive session, and the information is confidential by statute or has been clearly designated as confidential when warranted and necessary, then the information discussed may be considered confidential under R.C. 102.03(B). The Commission also noted that R.C. 102.03(B) does not prohibit a public body from adopting a resolution, rule, or formal action in an open meeting that results from a discussion in executive session.

B. **News agencies' request for deceased student's records denied** – *State ex rel. Cable News Network, Inc. v. Bellbrook-Sugarcreek Local Schools*, 2019-Ohio-4187, 2019 WL 5092409 (Ct. App. 2nd Dist. Greene County, Oct. 2, 2019)

An Ohio appellate court denied a writ of mandamus sought by news agencies to compel a school district to release records about an adult former student who is now deceased. The news agencies argued the student's right to privacy in his school records terminated upon his death. The court found Ohio's Student Privacy Act ("OSPA"), R.C. 3319.321, prohibits the release of records about adult former students without their written consent, and contains no exception for the death of an adult former student.

Furthermore, the news agencies' reliance on common law tort concepts and guidance of an informal U.S. Department of Education letter are not relevant in the context of an extraordinary writ of mandamus, as the duty to be enforced must be clearly articulated by the General Assembly. Because the court found OSPA prohibits release of the records, it did not determine whether FERPA prohibits their release. However, the court noted that FERPA also does not contain a statutory exception for the death of a student.[23]

C. **Public records – method of transmission** – *State ex rel. Municipal Construction Equipment Operators' Labor Council v. Cleveland*, No. 2019-0760, 2020-Ohio-3197 (Ohio Supreme Ct., June 9, 2020)

A labor union sought a writ of mandamus to compel the city to comply with the union's request for public records relating to a job posting. The union argued the city failed to comply with its duty under R.C. 149.43(B) to transmit copies of the requested records and to provide the copies in accordance with the union's chosen form of duplication. Rather than sending the union "an emailed copy" of the records as requested, the city sent an email with a link and instructions for logging in to the city's public records center.

The Ohio Supreme Court found "the fact that the union had to click on a link in the city's e-mails to view and download the responsive records does not mean that Cleveland failed to 'transmit' those records." Nor did it mean that Cleveland failed to provide copies through email as requested by the union. The union also failed to establish that the city failed to promptly release the records.

[23] This decision has been appealed to the Ohio Supreme Court, No. 2019-1433. Oral arguments were held June 3, 2020.

D. **Public records, FERPA release** – *State ex rel. Frank v. Ohio State University*, No. 2019-01515, 2020-Ohio-3422 (Ohio Supreme Ct., June 25, 2020)

The Ohio Supreme Court denied a writ of mandamus to compel the Ohio State University (OSU) to provide documents requested in a public records request. OSU denied the request on the grounds that the records were exempt from disclosure under FERPA. The Supreme Court found that while the student had executed a valid FERPA waiver, the waiver was not attached to the original request (which was submitted by a third party). The third party did not identify himself as the student's agent and did not provide the written consent form when submitting the original request.

Furthermore, OSU did not deny the request in its second response. Instead, OSU advised the requestor to contact the Office of Student Life for the student disciplinary records. The Supreme Court indicated that the public records statute, R.C. 149.43, does not require institutions like OSU to provide records through a specific public-records office. "[W]hen, as here, the requested records are sensitive in nature and subject to limitations on disclosure under federal law, it makes sense for OSU to refer [the requestor] to an office that will have the proper expertise for how to lawfully disclose the requested records and how to apply the relevant state and federal regulations."

E. **Access to personnel files** – *Watkins v. Columbus City Schools*, No. 18AP-321, 2019-Ohio-4949 (Ct. App. 10th Dist. Franklin County, Dec. 3, 2019)

A court of appeals affirmed a magistrate's decision denying a complaint for a writ of mandamus to compel a school district "to permit the unrestricted public records inspection of the Employee Relations files in all locations without redaction." The magistrate found that providing unfettered access to personnel files maintained by the district would have allowed the requestor access to material specifically exempted from disclosure under Ohio law.

F. **Reasons for entering executive session** – *State ex rel. Ames v. Portage County Board of Commissioners*, No. 2019-P-0016, 2019-Ohio-3730 (Ct. App. 11th Dist. Portage County, Sept. 16, 2019)

A complaint filed against a county board of commissioners alleged the board violated the Opens Meetings Act by, prior to entering executive session, reading the entire list of permissible purposes from R.C. 121.22(G)(1). The trial court held the board necessarily stated an acceptable purpose by reading the entire list. The court of appeals disagreed, stating "[T]he statute mandates that the Board specifically state in its motions and votes the particular permitted purpose or purposes that the Board reasonably intends to discuss during executive session."

In another case, *State ex rel. Ames v. Brimfield Township Board of Trustees,* 2019-Ohio-4926 (11th Dist., Dec. 2, 2019), the Portage County Court of Appeals considered whether R.C. 121.22(C) required meeting minutes to reflect the specific reason for entering into executive session. The court found that it does. "By not including in the meeting minutes the proper statutory purpose for entering executive

session, the public cannot determine whether it was for a proper purpose or whether any action related thereto is valid."

G. **Public participation policy for school board meetings** – *Ison, et al. v. Madison Local School Board,* No. 1:19-cv-155, 2019 WL 3254094 (S.D. Ohio, July 19, 2019)

Following a school shooting incident in the school's cafeteria, the board of education began discussing arming some of its administrators, teachers, and support staff. A series of public meetings was held concerning the board's decision to allow armed staff, and several members of the public (plaintiffs) contended they were prohibited from speaking. The plaintiffs then sought a temporary restraining order and preliminary injunction barring the school board from enforcing portions of its public participation policy. The portions of the policy challenged include: restricting participation to those with a legitimate interest in the board's actions; requiring attendees to register their intent to participate and provide proof of residence in the district; and permitting the presiding officer to interrupt, warn, or terminate a participant's statement when it is too lengthy, personally directed, abusive, off-topic, antagonistic, obscene, or irrelevant.

The court denied the motion for temporary restraining order and preliminary injunction, finding plaintiffs were unlikely to succeed on the merits of their challenge. School board meetings are a limited public forum, and the government may regulate the time, place, and manner of speech so long as the regulation is content-neutral, narrowly tailored, and leaves open ample alternative channels for communication of information. The court found the policy's prohibition on "antagonistic" speech is not content-based—it is not based on the subject of the speech, but on conducting orderly, productive meetings. The policy was narrowly tailored to prohibit only that speech which interferes with conducting meetings in a productive and efficient manner. Addressing plaintiffs' prior restraint argument, the court concluded the registration requirement is not a "prior restraint," but a reasonable regulation of time, place, and manner. (The court did not consider the residency challenge as the party asserting this claim did not have standing. The record showed he was barred from speaking because someone else submitted his public participation form, not because of the residency requirement.)[24]

H. **Tip Sheet on Text Messaging Retention** – Ohio Electronic Records Committee (Feb. 2020)

The Ohio Electronic Records Committee published a new tip sheet: Tips for Text Messaging Retention. The tips highlight records management concerns that should be considered when using text messaging for government business. Questions are included to help determine whether a text is a public record, risks and liabilities involved with texting, best practices, and the pros and cons of allowing employees to text on personal devices versus government-issued devices.

[24] Note: A hearing on motions for summary judgment is scheduled for Aug. 28, 2020.

The tip sheet is available at https://ohioerc.org/wp-content/uploads/2020/02/Tips-for-Text-Messaging-Retention.pdf.

I. **Updated Joint Guidance on Privacy and Student Education and Health Records** – U.S. Departments of Education and Health and Human Services (updated Dec. 2019)

This recently updated guidance (first issued in November 2008) clarifies how the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule apply to education and health records maintained about students. It expands on prior guidance to address potential confusion on the part of school administrators and health care professionals. The guidance also addresses disclosures that are allowed without written consent or authorization, especially as related to emergency health or safety situations. Clarification concerning schools that employ health care providers and conduct covered transactions is also included. Questions concerning records of deceased children are also addressed, but note that state law may differ.[25] See https://studentprivacy.ed.gov/resources/joint-guidance-application-ferpa-and-hipaa-student-health-records for the guidance.

VI. Employment Issues

A. **Firing employees for being homosexual or transgender violates Title VII** – *Bostock v. Clayton County, Georgia*, Nos. 17-1618, 17-1623, and 18-107, 2020 WL 3146686 (U.S. Supreme Ct., June 15, 2020)

The U.S. Supreme Court, in a 6-3 decision[26], held that "[a]n employer who fires an individual merely for being gay or transgender" violates Title VII. The majority opinion, delivered by Justice Gorsuch, explains that when an employer discriminates against gay or transgender employees, it is because of "traits or actions it would not have questioned in members of a different sex." Therefore, "[s]ex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."

This opinion addresses three different cases appealed to the Court. All three cases concern the firing of a long-time employee shortly after it was revealed the employee was homosexual or transgender. In *R.G. and G. R. Harris Funeral Homes, Inc. v. EEOC* (No. 18-107), the Sixth Circuit held that discrimination based on transgender and transitioning status violates Title VII, and that the employer engaged in improper sex stereotyping when it fired the employee for wishing to appear or behave in a manner that contradicted the employer's perception of how she should appear or behave based on her sex. (884 F. 3d 560 (2018).) In *Altitude Express Inc. v. Zarda* (No. 17-1623), the Second Circuit held that Title VII prohibits discrimination based on sexual orientation. (883 F. 3d 100 (2018).) However, the Eleventh Circuit in *Bostock v. Clayton County, Georgia* (No. 17-1618) held the

[25] See *State ex rel. Cable News Network, Inc. v. Bellbrook-Sugarcreek Local Schools* (2019-Ohio-4187; appeal pending).

[26] Justices Alito, Thomas, and Kavanaugh dissented.

opposite. (723 Fed. Appx. 964 (2018).) The Supreme Court reversed and remanded *Bostock*, and affirmed *R.G. & G.R. Harris Funeral Homes* and *Altitude Express*.

The Court, after examining the key statutory terms in Title VII, determined that a straightforward rule emerges: "An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff 's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred." The Court went on to conclude that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."

The employers raised concerns that the decision would impact other laws that prohibit sex discrimination, and that "sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable." The Court noted that others laws were not before it and declined to prejudge any such questions, and "[w]hether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these."

The Court also left for another day consideration of the ruling's interaction with religious liberties. While the Sixth Circuit rejected the funeral home's Religious Freedom Restoration Act claims in *EEOC v. R.G. & G.R. Harris Funeral Homes,* the company did not raise this issue in its certiorari petition.

B. **Post-Janus Litigation – Dues revocation** – *Littler v. Ohio Association of Public School Employees*, No. 2:18-cv-1745 (S.D. Ohio, July 17, 2020)

A school bus driver sued the Ohio Association of Public School Employees (OAPSE) for previously requiring Ohio public school employees to either join the union or pay agency fees, for continuing to deduct union dues post Janus, and deducting union dues without securing "freely given consent." The court denied all the bus driver's claims. First, the claim for compensation for past agency fees is foreclosed by the Sixth Circuit's ruling in *Lee v. Ohio Educ. Ass'n*. Concerning the union dues claims, the court found the membership card the bus driver signed is a contract. Even though the membership card did not describe anything that the bus driver received in exchange for her promise to pay dues, a contract can be partially integrated (is only one portion of a larger agreement), and the benefits the bus driver knew she would receive by signing the membership card are sufficient to establish that it is a valid contract. Furthermore, the bus driver did not comply with the membership card's withdrawal terms.

The court also found unavailing the bus driver's claim that she did not consent to the withdrawal of dues because her consent was not "freely given" given that her alternative was to pay the agency fee and because she was unaware she had a constitutional right to withhold payments from the union. "The fact that she did not like the two choices with which she was presented does not mean that she did not

have the opportunity to choose freely between these two available alternatives." It also did not matter that the bus driver was not aware of the specific right she was giving up by joining the union. She was aware that she gave up the right not to pay full union dues by joining the union, and no reasonable juror could conclude she was not aware that she did not have to join the union. "In the wake of Janus, every district court to have examined the issue has held that 'employees who voluntarily chose to join a union are bound by the terms of [their signed agreements] and cannot renege on their promises to pay union dues.' [Citations omitted.] This Court agrees."[27]

Note: The district court denied the bus driver's motion for class certification in April 2020.

C. **Post-Janus Litigation – Dues revocation policy** – *Fizer v. OAPSE, Ripley Union Lewis Huntington School District Bd. of Educ.*, No. 2:19-cv-03968 (S.D. Ohio, Nov. 11, 2019)

Following the *Janus* decision, a school bus driver notified the district's treasurer that she wished to withdraw from the union and cease the deduction of dues from her paycheck. The district initially honored her request to stop the deduction of dues, but an arbitrator determined this action violated the parties' collective bargaining agreement, which only permitted an employee to withdraw from the union during a ten-day window prior to the expiration of the agreement.

The driver then filed suit against the union and school district alleging a violation of her First Amendment rights. Approximately two months after the lawsuit was filed, the parties reached a settlement and dismissed the lawsuit. The union agreed to refund the dues paid by the driver from the date she resigned her membership.

D. **Post-Janus Litigation – Dues revocation policy** – *Allen v. Ohio Civil Service Employees Association AFSCME, Local 11,* No. 2:19-CV-03709, 2020 WL 1322051 (S.D. Ohio, March 20, 2020)

This ruling addresses a motion to dismiss for lack of jurisdiction filed by state defendants, and plaintiffs' motion for preliminary injunction seeking an order preventing defendants from enforcing sections of the collective bargaining agreement (authorizing deduction of dues and maintenance of membership requirements) against plaintiffs or members of the putative classes.

Plaintiffs made requests to the state and the OCSEA to withdraw from the union and cease withdrawal of union dues beginning around July 2018. The state ceased dues deductions for plaintiffs effective January 2020, and the OCSEA refunded plaintiffs' dues payments with interest retroactively.

The court denied the state defendants' motion to dismiss on the grounds of sovereign immunity and mootness. The court also denied plaintiffs' motion for a preliminary injunction, agreeing "with the unanimous post–Janus district court decisions holding that employees who voluntarily chose to join a union are bound by the terms of the CBA and cannot renege on their promises to pay union dues."

[27] Note: Appeal filed with 6th Circuit Court of Appeals on July 27, 2020 (No. 20-3795).

This ruling was appealed to the Sixth Circuit on April 22, 2020 (No. 20-3440). However, according to a National Right to Work news release, a settlement was reached in July 2020. Under the settlement, the maintenance of membership restriction was rescinded, requests to stop dues deductions will be honored for any employee who signed the dues authorization form at issue in the lawsuit, and dues will be refunded for "more than 150 other employees who tried to cut off union dues deductions after Janus was decided."

E. **Post-Janus Litigation – Exclusive Representation** – *Thompson v. Marietta Education Association*, No. 2:18-cv-00628, 2019 WL 6336825 (S.D. Ohio, Nov. 26, 2019); aff'd, 2020 WL 5015460 (6th Cir. Aug. 25, 2020)

A teacher, who was not a member of the union, sued the Marietta Education Association and the Board of Education alleging that Ohio Revised Code sections 4117.04 and -06 violate her First and Fourteenth Amendment rights to free speech and free association. In January 2019, the court denied the teacher's motion for preliminary injunction, finding the teacher was unlikely to succeed on the merits of her claim. In this decision, the court found that "nothing in the briefing undermines the Court's prior legal conclusion that Plaintiff's compelled speech and compelled association claims were likely foreclosed by the Supreme Court's decision in *Knight.*" (Citation omitted.) Accordingly, the court concluded the teacher's claims were precluded by U.S. Supreme Court precedent.

The court also found that even if the teacher's claims were not precluded by Supreme Court precedent, Ohio has a compelling interest in preserving labor peace, and its exclusive representation scheme is narrowly tailored to achieve that interest. (The court noted that at the time of this opinion, every court to have considered this issue has found that *Knight* precludes the claim that exclusive representation in the public sector amounts to compelled speech or compelled association.)[28]

Note: On August 25, 2020, the U.S. Court of Appeals for the Sixth Circuit affirmed the district court's decision upholding Ohio's exclusive representation law, finding *Knight* controlled. "To be sure, *Knight's* reasoning conflicts with the reasoning in *Janus*. But the Supreme Court did not overrule *Knight* in *Janus*. And when an earlier Supreme Court decision 'has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.'" [Citations omitted.]

The Sixth Circuit also rejected the teacher's First Amendment claims. The U.S. Supreme Court has held the First Amendment does not impose an affirmative obligation on the government to listen, to respond, or to bargain. Likewise, in *Knight*, the Court found a "person's right to speak is not infringed when government simply ignores that person while listening to others."

[28] On Dec. 13, 2019, this decision was appealed to the Sixth Circuit Court of Appeals (No. 19-4217). Oral argument is scheduled for Aug. 5, 2020.

F. **Post-Janus Litigation – Fair Share Fees** – *Lee v. Ohio Education Association*; *Avon Lake Educ. Assoc*., No. 19-3250, 2020 WL 881265 (6th Cir., Feb. 24, 2020)

The Sixth Circuit Court of Appeals affirmed the lower court's dismissal of a teacher's suit seeking a refund of fair-share fees she was required to pay to her public-sector union. The court found the union's good faith defense bars the claim. The teacher's state-law conversion claim also failed "because fair-share fees were permissible under then-existing state and federal law, and plaintiff was contractually obligated to pay them pursuant to the collective bargaining agreement—just as the Union was obligated to collect them. In other words, it was a condition of Lee's employment that she pay fair-share fees. She therefore had no right to ownership or possession of them at the time they were taken."

Note: In another case seeking a refund of fair share fees, a panel of the Sixth Circuit likewise granted the union's motion to dismiss. Citing the above decision in *Lee v. Ohio Educ. Ass'n*, the panel held it had no license to overrule another panel of the Sixth Circuit and must recognize the union's good-faith defense. *Ogle v. Ohio Civil Service Employees Association*, No. 19-3701, 2020 WL 1057389 (March 5, 2020).

***Janus* case update**: Following the Supreme Court's June 2018 decision, the *Janus* case returned to the lower courts to consider whether Janus could collect a refund of the fair share fees he paid. The district court said no, and on November 5, 2019, the Seventh Circuit affirmed, holding that the union had a good faith defense to employee's claim for monetary damages (No. 19-1553). On March 9, 2020, Janus filed a petition with the U.S. Supreme Court asking it to review the Seventh Circuit's decision (docket No. 19-1104). (The Supreme Court has not yet decided whether it will grant the petition.)

G. **Teacher's termination was not in retaliation for speech** – *Fledderjohann v. Celina City School Board of Educ.*, No. 3:18-cv-2236, 2019 WL 7790406 (N.D. Ohio, Dec. 27, 2019); *aff'd*, 2020 WL 5049346 (6th Cir. Aug. 27, 2020)

A teacher submitted a complaint to the state department of education alleging fellow faculty members violated protocols during the administration of a state-mandated test. The school superintendent conducted an investigation and concluded no testing violations occurred. The superintendent then investigated whether the teacher who sent the complaint submitted a false report, and ultimately terminated the teacher. A referee's report and recommendation upheld the termination, finding the teacher did not act in good faith. The teacher waited over a month to report the alleged violations (despite being required to report such violations immediately), and the complaints were made in retaliation for his co-workers' involvement in prior disciplinary actions against him.

The teacher filed a complaint claiming he was terminated in retaliation for speech protected by the First Amendment. The court ruled the teacher was not protected by the First Amendment because his speech did not involve a matter of public concern. While the court agreed that the integrity of state-mandated tests is a matter of public concern, the teacher's complaint "dealt with a 'quintessential employee beef' between Plaintiff, his superiors, and a fellow third-grade teacher -- meaning it is unprotected." Even if it was a matter of public concern, the teacher was not

speaking as a private citizen, but in his position as a teacher. Lastly, the court found the teacher was terminated for intentional misrepresentation, not for exercising his First Amendment rights.

Note: On August 27, 2020, the Sixth Circuit Court of Appeals affirmed the district court's grant of summary judgment to the defendants. The court stated that to determine whether the teacher's statements to the department of education were made as an employee or a citizen requires an evaluation of "whether they were made pursuant to his job duties or whether they merely relayed information he learned while on the job in a way that did not affect his duties." The court determined the teacher spoke as an employee, as his emails to the department of education expressed concerns involving his responsibilities as a teacher. His essential job functions included proctoring testing activities and upholding mandated security procedures. He also signed a notice regarding testing security provisions which outlined a teacher's responsibility to report alleged security violations immediately. Furthermore, his email to the department suggested his primary concern was his own responsibilities as a teacher and whether he erred in the way he administered the test. "They do not suggest that he emailed ODE as a citizen wishing to bring to light potential violations of state-testing protocols." Because the teacher failed to demonstrate a genuine issue of material fact about whether he spoke as an employee, his speech was not constitutionally protected, thus precluding his First Amendment retaliation claim. (Case No. 20-3021, 2020 WL 5049346 (Aug. 27, 2020).)

H. **Reprimand letter did not violate teacher's free speech rights** – *Sheridan v. Columbia Local School Dist. Bd. of Educ.,* No. 19-3590, 2020 WL 1131425 (6th Cir., March 9, 2020)

A school district did not violate the First Amendment free speech rights of a teacher when it issued him a reprimand letter for inappropriate and unprofessional conduct. The reprimand was issued after the teacher accused a school guidance counselor of lying about the reason for a student's absence. The counselor walked away during the confrontation, but the teacher followed her to her office and continued to scream at her, as well as her assistant and a school nurse.

The teacher argued the reprimand letter violated his free-speech rights, and that the board retaliated against him for "whistleblowing" on the guidance counselor. The Sixth Circuit agreed with the lower court that the reprimand was for verbally accosting coworkers; not the content of the teacher's speech. Even if the reprimand letter was "concerned with *what* instead of the *how*," the comments were made pursuant to the teacher's official duties as a high school teacher. Nor did the teacher qualify as whistleblower under state or federal law.

I. **First Amendment: EMS captain's controversial Facebook posts addressed matter of public concern** – *Marquardt v. Carlton*, 19-4223, 2020 WL 4811388 (6th Cir., Aug. 19, 2020)

The Sixth Circuit ruled that a district court erred when it determined that an EMS captain's Facebook posts did not address a matter of public concern. The posts—which concerned the police shooting and death of twelve-year-old Tamir Rice—

contained racially insensitive language and profanity, and expressed satisfaction at Rice's death and regret that the author was not able to kill Rice himself. The EMS captain made the posts while off-duty and did not identify himself as a public employee.

The Sixth Circuit found that aspects of the captain's posts plausibly related to the police officers' conduct and resulting community reaction, a matter of public concern "[g]iven the widespread local and national scrutiny of the Rice shooting." Furthermore, the "disturbing first-person sentiments" in the posts did not transform the subject of the speech into a personal grievance. "[E]xpressions of opinion, even distasteful ones, do not become matters of personal interest simply because they are phrased in the first person or reflect a personal desire." While the posts were visibile only to the captain's Facebook friends, "speech need not be communicated to the general public to be on a matter of public concern."

The Sixth Circuit did not address whether the posts were protected speech. The case was remanded to the lower court to determine whether the interests of the Cleveland EMS in the efficient administration of its duties outweigh the employee's free speech interests. "On that issue, we note the well-settled rule that the government, when acting as an employer, may regulate employee speech to a greater extent than it can that of private citizens, including to discipline employees for speech the employer reasonably predicts will be disruptive."

J. **Employee's termination for sick leave falsification not a pretext for disability discrimination** – *Schwendeman v. Marietta City Schools*, No. 2:18-cv-588, 2020 WL 519626 (S.D. Ohio, Jan. 31, 2020)

A former bus driver, who also performed student monitoring duties, went on paid sick leave for two months following a foot surgery. The employee was terminated for falsification of sick leave when it was discovered he worked as a volunteer reserve police officer, as well as a paid patrolman on traffic duty with a local company, while on leave. The employee brought suit alleging disability discrimination in violation of the ADA and Ohio law, retaliation, and other claims.

As an initial matter, while the employer disputed whether the driver was disabled, the court found that at some point the employee had a physical impairment that substantially limited his ability to walk, given that he had to wear a hard cast following surgery that impaired his ability to walk. However, the court found the employee's termination was not a pretext for disability discrimination, as the employer "reasonably relied on particularized facts in making the decision to terminate Plaintiff" and there was "no genuine issue of material fact that Defendants terminated Plaintiff believing that Plaintiff was dishonest and had worked during his sick leave."

Nor did the driver provide evidence that would establish discrimination was the real reason for his termination. The employer did not begin its investigation until it was reported the driver was spotted in police uniform patrolling a flea market. They met with the driver to question him about this work, and contacted the outside employers to gather information. "The circumstances outlined above do not demonstrate that discrimination was the real reason for Plaintiff's termination.

Instead, the circumstances establish Defendants' honest belief that Plaintiff falsified sick leave by working two jobs." While the employee argued the fact that the employer re-opened its investigation after he filed a discrimination complaint shows that discrimination was the driving force behind his termination, the record shows the investigation was reopened to defend against the employee's discrimination allegations, not as a response to the filing of discrimination charges generally. "If Plaintiff's argument were accepted, it is difficult to discern what avenues, if any, a respondent employer would have to adequately respond to the allegations contained in an EEOC charge."[29]

Note: Theft charges were filed against the employee, but a grand jury withheld indictment based in part (per the prosecutor) on the fact that the employee was not required to certify that he was unable to work during the time he was using sick leave.

K. **Teacher's termination was not for good and just cause – *Fiedeldey v. Finneytown Local School Dist. Bd. of Edn.,*** 2020-Ohio-3960, 2020 WL 4516084 (Ct. App. 1st Dist. Hamilton County, Aug. 5, 2020)

A teacher appealed her termination for dragging a kindergarten student down a hallway after the student refused to enter his classroom. The referee hearing the teacher's appeal found that while the teacher consistently received high marks on her evaluations during her seventeen years of service, such praise could not excuse her conduct in dragging a child by his arm down a hallway where two other staff members overheard the student saying the teacher was hurting him. Therefore, good and just cause existed for termination. The school board accepted this recommendation and terminated the teacher.

The teacher appealed to the court of common pleas, and the trial court overruled the board's decision and reinstated the teacher. The school board argued the trial court abused its discretion, as exemplified by comments made by the trial court about what it observed on the video of the incident, such as: "Frankly, it doesn't look all that serious to me"; "[It looks like] he was kind of like enjoying it"; and "This seems silly to me * * * I can't believe they fired her over this. * * * That's ridiculous." The court of appeals found that while the remarks were "intemperate and ill-advised," the trial court did not abuse its discretion in determining the facts of the case did not rise to the level of good and just cause to terminate.

L. **School board must continue to defend lawsuit of teacher allegedly forced to resign for refusing to call transgender students by their preferred names** – ***Kluge v. Brownsburg Community School Corp.,*** No. 1:19-cv-2462, 2020 WL 95061 (S.D. Indiana, Jan. 8, 2020)

A federal court in Indiana only partially dismissed a teacher's lawsuit alleging he was discriminated against and forced to resign because his sincerely-held religious beliefs prevented him from addressing transgender students by their preferred names and pronouns in accordance with school policy.

[29] Note: This decision was appealed to the Sixth Circuit Court of Appeals on March 3, 2020 (case no. 20-3251).

The court denied the school's motion to dismiss the teacher's claims under Title VII that the school discriminated against him by refusing to accommodate his sincerely-held religious beliefs, and retaliated against him by forcing him to resign. The court explained that at the motion to dismiss stage, the court must accept the teacher's claim that there was a conflict between the school's policy and his sincerely-held religious beliefs, that the school refused to accommodate his beliefs where doing so would not result in undue hardship, and that this conflict was the basis for the school's demand for his resignation. Likewise, accepting the allegations as true, "it is plausible that school officials, over time, became less inclined to tolerate [the teacher's] religious beliefs and used the idea of student complaints as a pretext to withdraw the last-names-only arrangement, refuse to provide another accommodation to which [the teacher] was entitled, and force him to resign."

However, the court did dismiss the teacher's First Amendment claims. The court found the teacher's speech was pursuant to his official duties, as "it is difficult to imagine how a teacher could perform his teaching duties on any subject without a method by which to address individual students." Furthermore, how a teacher addressed a student did not involve a matter of public concern. While "issues relating to the treatment of individuals based on their gender identity are of great public importance…the act of referring to a particular student by a particular name does not contribute to the broader public debate on transgender issues." Nor did the teacher show that the school's policy targeted or was otherwise motivated by an animus toward any particular religion or religious belief in violation of the Free Exercise Clause.

Note: In an Ohio case involving a professor at a state university who was issued a warning letter for discriminating against a student because of her gender identity by addressing her differently (by last name only) from other students, the Southern District of Ohio adopted a federal magistrate's Report and Recommendation that found the professor's speech was pursuant to his official duties and did not involve a matter of public concern. "[P]laintiff did not speak on a matter of 'public concern' simply by addressing a student in his class by titles or pronouns that did not accord with the gender by which the student identified…. Plaintiff's refusal to address a student in class in accordance with the student's gender identity does not implicate broader societal concerns and the free speech clause of the First Amendment under the circumstances of this case." The magistrate also found the professor did not state a claim for relief under the Free Exercise Clause, as his "factual allegations do not support a claim that the policies were formulated or applied to target certain religious beliefs, or that defendants targeted and suppressed plaintiff's religious beliefs by applying the nondiscrimination policies to him." *Meriwether v. Trustees of Shawnee State University*, No. 1:18-cv-753, 2019 WL 4222598 (S.D. Ohio, Sept. 5, 2019); order adopting Report and Recommendation, 2020 WL 704615 (Feb. 12, 2020).[30]

[30] This decision was appealed to the Sixth Circuit on March 16, 2020 (No. 20-3289).

M. **Duty to bargain FMLA policy changes –** *State ex rel. Professionals Guild of Ohio v. [Ohio] State Employment Relations Board,* 2020-Ohio-3289 (10th Dist. Franklin Cnty., June 11, 2020)

The Franklin County Court of Appeals ruled that the State Employment Relations Board "SERB" abused its discretion in dismissing an unfair labor practice (ULP) charge concerning a county's unilateral change to FMLA leave accrual. The county unilaterally changed from using a "measured forward" method of calculating FMLA leave to a "measured backward" calculation method. The court found the change would substantively impact the timing of leave accrual for employees, and was a change to the wages, hours, or terms and other conditions of employment. "For example, unlike the measured forward method, the measured backward method precludes the possibility of an employee taking 11 weeks of leave at the end of a one-year period and then immediately taking another 12 weeks of leave to begin the next one-year period." The court also found the fact that the calculation method had not been negotiated previously was inconsequential.

The Court upheld SERB's dismissal of a second ULP regarding applying FMLA leave to run concurrently with contractual leave. SERB found the county's policy had been in place since at least 2002, and the union did not provide any documentation or identify any contractual language supporting its position.

A third ULP alleging the county unilaterally changed its FMLA recertification policy from an annual to a biannual requirement was dismissed by SERB because the union did not show how the change affected members' wages, hours or terms and conditions of employment. The court disagreed, noting that increased recertification frequency places an additional burden on employees with chronic conditions, and "the fact that the parties had not previously bargained this issue did not relieve Montgomery County of its obligation to bargain this change in its policy."

N. **Striking employees not entitled to unemployment compensation –** *Ohio Association of Public School Employees, et al v. Unemployment Compensation Review Commission, et al*, 2020-Ohio-4028, 2020 WL 4581678 (5th Dist. Tuscarawas Cnty., August 10, 2020)

A court upheld a determination by the Ohio Unemployment Compensation Review Commission (Commission) that 51 school employees who went on strike were not eligible for unemployment compensation benefits. A hearing officer determined the employees were unemployed due to a labor dispute other than a lockout pursuant to R.C. 4141.29(D)(1)(a).

The court determined that while the Board presented the employees with a new last, best, and final offer, it never stated it was going to implement the terms and conditions on March 22 (the date the work stoppage began). The agreement was subject to approval by OAPSE members and the school board, and while the school board declined to extend the strike deadline, the board was willing to continue negotiations and operate under the terms of the prior contract. OAPSE was never told employees could not continue to work pending finalization—it was OAPSE that chose to alter the status quo and begin the strike on the scheduled date. "The

record is clear OAPSE could have pulled the strike notice, obtained clarification and refiled the strike notice after ten days if it were necessary. The record contains evidence that the Appellants could have continued to work under the terms of the prior collective bargaining agreement while continuing to pursue a resolution."

O. **New FMLA Forms** – U.S. Department of Labor Wage and Hour Division (revised June 30, 2020)

The U.S. Department of Labor (DOL) has published new model FMLA notice and certification forms. The new forms, with an expiration date of June 30, 2023, are available at https://www.dol.gov/agencies/whd/fmla/forms.

According to the DOL: "The new optional forms are simpler and easier to understand for employers, leave administrators, healthcare providers, and employees seeking leave. WHD made revisions after substantial input from the public. Significant updates include fewer questions that require written responses, replaced by statements that can be completed by checking a box, and – in support of minimized contact – electronic signature features. The changes reduce the amount of time it takes a healthcare provider to provide information, and help leave administrators review and communicate information to employees more directly and with greater clarity, reducing the likelihood of violations."

P. **New COBRA Model Notices** – U.S. Department of Labor Employee Benefits Security Administration (May 1, 2020)

The U.S. Department of Labor issued new COBRA model notices—the Model general notice and the Model election notice. An FAQ document about the model notices indicates the updates are intended to ensure that qualified beneficiaries better understand the interactions between Medicare and COBRA.

These notices have an expiration date of January 31, 2023, and are available at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

Q. **Overtime and minimum wage: Final Rule** – U.S. Department of Labor, 84 FR 51230; RIN 1235-AA20 (effective January 1, 2020)

The U.S. Department of Labor's Wage and Hour Division (Department) issued final amendments to 29 CFR Part 541: "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees."[31] The Department formally rescinded the 2016 final rule that was declared invalid by the U.S. District Court for the Eastern District of Texas, replacing it with a new rule.

The final rule governs exemption from minimum wage and overtime pay requirements for executive, administrative, professional, outside sales, and computer employees. To meet this "white collar" exemption, an employee must be paid on a salary basis[32] (the "salary basis test"), the salary must meet a specified

[31] A correction to this rule was issued on June 8, 2020. (85 FR 34969.) The final rule erroneously deleted regulatory text of § 541.601(b)(3) and (4). The correction restores these two provisions. The correction also deletes § 541.607 (automatic updates to amounts of salary and compensation required), which should have been deleted in the final rule.

[32] Administrative and professional employees may also be paid on a "fee basis" for a single job.

minimum amount (the "salary level test"), and the employee's duties must primarily involve executive, administrative, or professional duties (the "duties test").

The final rule increases the weekly standard salary level from $455 per week to $684 per week ($35,568 annually). It does not make any changes to the duties test, and teachers continue to be exempt from the salary level test. See https://www.dol.gov/whd/overtime2019/ for a copy of the rules, a fact sheet, and frequently asked questions.

R. **Final Rule - Regular and Basic Rates Under the Fair Labor Standards Act** – 84 FR 68736 (Dec. 16, 2019; effective Jan. 15, 2020)

The U.S. Department of Labor amended 29 CFR parts 548 and 778 to clarify, update, and define basic and regular rate requirements under the Fair Labor Standards Act. The regular rate defines what forms of payment employers must include when determining an employee's overtime rate. The rule clarifies that the following payments may be excluded from an employee's regular rate of pay:

- the cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services;
- payments for unused paid leave, including paid sick leave;
- reimbursed expenses, even if not incurred "solely" for the employer's benefit;
- reimbursed travel expenses that do not exceed the maximum travel reimbursement under the Federal Travel Regulation System and that satisfy other regulatory requirements;
- discretionary bonuses (provides additional examples and clarifies that the label given a bonus does not determine whether it is discretionary);
- benefit plans, including accident, unemployment, and legal services; and
- tuition programs, such as reimbursement programs or repayment of educational debt.

The Final Rule also includes additional clarification about other forms of compensation, including payment for meal periods, "call back" pay, and others. See www.dol.gov/whd/overtime/regularrate2019.htm for more information.

S. **Final Rule – Fluctuating Workweek Method of Computing Overtime Fair Labor Standards Act** – 85 FR 34970 (eff. Aug. 7, 2020)

On June 8, the U.S. Department of Labor issued a final rule revising its regulation for computing overtime compensation for salaried nonexempt employees who work hours that vary each work. The final rule "clarifies that payments in addition to the fixed salary are compatible with the use of the fluctuating workweek method of compensation, and that such payments must be included in the calculation of the

regular rate as appropriate under the Act." The rule also makes other minor revisions to improve readability and adds additional examples.

New language in 29 CFR § 778.114(a) clarifies that bonuses, premium payments, and other additional pay are compatible with the use of the fluctuating workweek method of compensation. Examples are added to § 778.114(b) illustrating calculating overtime where an employee is paid a nightshift differential, a productivity bonus in addition to a fixed salary, and premium pay for weekend work.

T. **Final Rule – Joint Employer Status under the Fair Labor Standards Act** – 85 FR 2820 (Jan. 16, 2020; effective March 16, 2020)

The U.S. Department of Labor published final amendments to regulations regarding joint employer arrangements under the FLSA. An employee can have a joint employer if the employer "suffers, permits, or otherwise employs the employee to work…but another person simultaneously benefits from that work."

In this situation, the Department provides a four-factor balancing test to determine joint employment status, specifically, whether the potential joint employer:

1. Hires or fires the employee;
2. Supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
3. Determines the employee's rate and method of payment; and
4. Maintains the employee's employment records.

The appropriate weight given to each factor will vary depending on the circumstances.

The second joint employment scenario is where one employer employs a worker for one set of hours in a workweek, and another employer employs the worker for a separate set of hours in the same workweek. If the employers are sufficiently associated with respect to the employee, they must aggregate the hours worked for each. The final rule did not make substantive changes to the standard used for determining joint employment status under this scenario.

The final rule clarifies that whether an employee is economically dependent on a potential joint employer is not relevant to the determination of joint employer status. (29 C.F.R. part 791.) See https://www.bricker.com/industries-practices/employment-labor/insights-resources/publications/%E2%80%9Care-you-my-employer%E2%80%9D-department-of-labor-clarifies-joint-employer-status-with-new-final-rule for more information.[33]

[33] Note: On Sept. 8, 2020, a federal judge in New York struck down portions of this rule, finding it violates the Administrative Procedures Act. The court let stand the Final Rule's changes to horizontal joint employer liability (29 C.F.R. § 791.2(e)). The Final Rule's standard for vertical joint employer liability was vacated. *State of New York et al. v. Eugene Scalia et al.*, No. 1:20-cv-01689, 2020 WL 5370871 (S.D. New York).

U. **Final Rule – Promoting Regulatory Openness through Good Guidance (PRO Good Guidance)** – 85 FR 53163 (Aug. 28, 2020; effective Sept. 28, 2020)

This final rule "establishes the U.S. Department of Labor's policy and requirements for issuing, modifying, withdrawing, and using guidance; making guidance available to the public; a notice-and-comment process for significant guidance; and taking and responding to petitions about guidance." 29 CFR § 89.5 requires the Department to maintain a single, searchable, indexed website that contains, or links to, each agency's guidance documents that are in effect. The Department established this website in February 2020. It is available at www.dol.gov/guidance.

V. **Telework** – U.S. Department of Labor Field Assistance Bulletin 2020-5 (Aug. 24, 2020)

The U.S. Department of Labor issued a field assistance bulletin that provides guidance regarding tracking the number of hours worked by employees who are teleworking or otherwise working remotely. Under the FLSA, an employer must pay employees for all hours worked, and must "exercise its control and see that the work is not performed if it does not want it to be performed." (29 C.F.R. § 785.11-13.) The bulletin summarizes relevant regulations and court decisions concerning actual and constructive knowledge of hours worked, and exercising reasonable diligence in acquiring knowledge of hours worked. See https://www.dol.gov/agencies/whd/field-assistance-bulletins for more information.

W. **Practice of seeking liquidated damages in settlements in lieu of litigation** – U.S. Department of Labor Field Assistance Bulletin 2020-2 (June 24, 2020)

In this bulletin, the Wage and Hour Division announced that effective July 1, 2020, the Department will not assess pre-litigation liquidated damages if any one of the following circumstances exist:

- there is not clear evidence of bad faith and willfulness;
- the employer's explanation for the violation(s) show that the violation(s) were the result of a bona fide dispute of unsettled law under the FLSA;
- the employer has no previous history of violations;
- the matter involves individual coverage only;
- the matter involves complex section 13(a)(1) and 13(b)(1) exemptions; or
- the matter involves State and local government agencies or other non-profits.

See https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_2.pdf to read the bulletin.

X. **When a physically closed school is considered "in session" relative to federal child labor requirements** – U.S. Department of Labor, Field Assistance Bulletin 2020-03 (June 26, 2020)

This Field Assistance Bulletin provides guidance regarding when schools that are physically closed due to the COVID-19 pandemic are nonetheless considered to be

in session for purposes of child labor laws for children under the age of 16. Generally, school is in session if the local public school district requires students to participate in virtual or distance learning when schools are physically closed. See https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_3.pdf for a copy of the bulletin.

Y. **EEOC Technical Assistance on Opioid Addiction and Employment** – U.S. Equal Employment Opportunity Commission (Aug. 5, 2020)

The U.S. Equal Employment Opportunity Commission (EEOC) released two technical assistance documents addressing employment provisions of the Americans with Disabilities Act (ADA) and the opioid epidemic. A document targeted at employees makes clear that current illegal drug use is not a covered disability. However, individuals lawfully using opioid medication who are in treatment for addiction and receiving Medication Assisted Treatment (MAT), and individuals who have recovered from addiction, are protected from disability discrimination. The document also addresses reasonable accommodation and safety issues. See https://www.eeoc.gov/laws/guidance/use-codeine-oxycodone-and-other-opioids-information-employees.

A document for health care providers includes information about the type and form of medical information that will be useful to employers who are requesting documentation for an employee's accommodation request. See https://www.eeoc.gov/laws/guidance/how-health-care-providers-can-help-current-and-former-patients-who-have-used-opioids.

VII. Board Issues

A. **Decision finding literacy is a fundamental right vacated**– *Gary B. v. Whitmer*, No. 18-1855/1870, 958 F.3d 1216, 2020 WL 2537428 (6th Cir., May 19, 2020)

On April 23, 2020, a panel of judges for the Sixth Circuit Court of Appeals held that "a basic minimum education—meaning one that plausibly provides access to literacy—is a fundamental right." 957 F.3d 616.

However, this landmark ruling was short-lived. On May 19, 2020, a majority of judges of the Sixth Circuit Court of Appeals voted for rehearing en banc of these cases, stating "the previous decision and judgment of this court are vacated." 958 F.3d 1216.

Following the April 23 panel decision, Michigan Gov. Whitmer and plaintiffs announced a settlement was reached. In light of this settlement, the Sixth Circuit subsequently dismissed the appeal as moot (June 10, 2020 order).

Note: Details on the settlement are at www.michigan.gov/whitmer/0,9309,7-387-90499_90640-529231--,00.html.

B. **School takeover law constitutional** – *Youngstown City School Dist. Bd. of Edn. v. State*, 2020-Ohio-2903, 2020 WL 2461716 (Ohio S. Ct., May 13, 2020)

The Ohio Supreme Court ruled that 2015 Am.Sub.H.B. 70 (academic distress commissions and community learning centers), and the process by which it was enacted, does not violate the Ohio Constitution. The Court held "the bill does not usurp the power of city schools boards," and it "received sufficient consideration for purposes of Article II, Section 15(C)." (Art. II, Section 15(C) requires every bill to be considered by each house on three different days, unless two-thirds of the members of the house in which the bill is pending suspend this requirement. The Court found there was no violation as each chamber considered the bill three times and considered the final amended version once, and the bill had the common purpose of seeking to improve underperforming schools in both the as introduced version and as enacted.

C. **U.S. Supreme Court rules states cannot limit financial aid to private religious schools**– *Espinoza v. Montana Dept. of Revenue*, No. 18-1195, 2020 WL 3518364 (U.S. Supreme Ct., June 30, 2020)

This case involved a state program that granted tax credits to those who donate to organizations that award scholarships for private school tuition. The Montana Supreme Court invalidated the program because the scholarships could be used at religious schools, and Montana's state constitution barred government aid to any school "controlled in whole or in part by any church, sect, or denomination."

The U.S. Supreme Court held "[t]he application of the no-aid provision discriminated against religious schools and the families whose children attend or hope to attend them in violation of the Free Exercise Clause of the Federal Constitution." Accordingly, because application of the no-aid provision was barred by the Free Exercise Clause, the Montana Supreme Court did not have authority to invalidate the entire program on that basis and was obligated to decide the case in accordance with the Federal Constitution.

Takeaway: "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."

D. **School district not liable for sexual assault of student on school bus** – *Jane Doe and John Doe v. Jackson Local School District Board of Education,* No. 19-3019, 2020 WL 1542307 (6th Cir., April 1, 2020)

The parents of a kindergarten student (the "Does") who was sexually assaulted on the school bus by a student in the fifth grade filed suit against the school board and various district employees alleging violations of substantive due process, liability under § 1983, Title IX, and state tort law. The older student was assigned a seat at the front of the school bus across the aisle from the Does' child after the older student lit a match on the bus.

The district court granted summary judgment to the defendants, holding that no reasonable jury could find that defendants knowingly exposed the kindergarten student to the risk of sexual assault. On appeal, the Sixth Circuit affirmed.

The Sixth Circuit examined the Does' argument that school officials violated due process by failing to prevent their daughter's abuse by another student. The Sixth Circuit's "state-created danger theory" of substantive due process uses a three-part test: an official must take an affirmative act that creates or increases the risk that someone will be exposed to private acts of violence; the risk of private harm must rise to the level of a "special danger" to a specific victim that exceeds the general risk the public faces; and when exacerbating this risk of harm the official must act with a sufficiently culpable mental state.

The court determined the Does have not created a genuine dispute of material fact over the culpability element. Nothing about the fifth-grade student's school record could have put school employees on notice that he posed a risk of sexually assaulting the Does' child. School employees knew the fifth-grade student lit matches on the bus, burned cardboard at the bus stop, prevented students from reporting his conduct, and was dishonest when confronted by school officials. However, nothing from this incident suggested that he also posed a risk of intentional sexual assault. School officials had no knowledge of the fifth-grader ever attacking students. Nor did school officials respond to the match-burning incident with "callous disregard" or "conscience-shocking" behavior. Rather, school officials quickly investigated the incident and designed a safety plan to keep the student close to an adult. "[T]he Constitution simply does not require a school to treat an 11-year-old as a violent sexual predator based on a history of lying, bullying, or playing with matches."

E. **Severance pay provision in treasurer's contract violated public policy** – *Lawless v. Lawrence Cty. Bd. of Edn.*, 2020-Ohio-117, 2020 WL 242519 (Ct. App. 4th Dist. Lawrence County, Jan. 9, 2020)

The severance pay provision in a former ESC treasurer's employment contract violated public policy and was unenforceable, according to an Ohio appellate court. The former treasurer's contract was terminated pursuant to R.C. 3319.16 after the state auditor's office issued a special audit report that included findings for recovery against the treasurer for illegally expended public monies, and the former treasurer did not appeal in accordance with this statute. The court found that "[p]roviding an employee of an educational service center who is terminated pursuant to R.C. 3319.16 with compensation for the unworked portion of the terminated contract is inconsistent with the preservation of the fiscal integrity of the educational service center. It is also inconsistent with public policy as expressed in the Unemployment Compensation Act, which provides individuals with benefits as compensation for loss of remuneration due to involuntary unemployment but generally does not apply to an individual who is 'discharged for just cause.'"

However, the court found the contract's leave time clause, which provided compensation for unused sick and vacation leave at the time of separation from employment unless the treasurer was convicted of a crime in connection with her job performance, did not violate public policy. However, the court remanded the treasurer's claim for breach of the leave time clause as genuine issues of material

fact existed with respect to whether she substantially performed prior to her termination.[34]

F. **District could not recoup overpayments made under prior contract** – *Liberty Walton v. Valley View Local School Dist.*, 2019-Ohio-4189, 2019 WL 5092622 (Ct. App. 2nd Dist. Montgomery County, Oct. 11, 2019)

A district discovered that an assistant coach had been overpaid in the prior school year. The treasurer informed the coach that it would be recouping the overpayment from payments made for the current year. Although the employee did not consent, the overpayment was deducted from her paycheck. The court ruled that a 1987 court decision upholding the deduction of overpayments from the remaining paychecks of the relevant year was not applicable to the current case since the overpayments at issue were deducted from a wholly separate contract. Furthermore, the court could not find any other statutory or case law that would permit this deduction.

The court remanded the case to the trial court to determine whether the contract that included the erroneous salary (the salary differed from the amount approved by board resolution) was valid based on R.C. 3313.33(B). (R.C. 3313.33)(B) states in part that "[n]o contract shall be binding upon any board unless it is made or authorized at a regular or special meeting of such board."

G. **School personnel authorized to carry firearms on school property need to complete basic peace officer training program**– *Gabbard v. Madison Local School District Bd. of Educ.*, No. CA2019-03-0051, 2020-Ohio-1180 (Ct. App. 12th Dist. Butler County, March 30, 2020)

A coalition of parents challenged a school board's decision to arm district employees in response to a school shooting incident at the high school. The parents sought a permanent injunction barring the board from implementing its decision to arm employees unless those employees completed a basic peace officer training program. The parents argued a provision of R.C. 109.78(D)—that prohibits educational institutions from employing a person as a "special police officer, security guard, or other position in which such person goes armed while on duty" unless the person completed an approved basic peace officer training program—applied. The school board argued the General Assembly carved out an exception to this requirement when it enacted R.C. 2923.122(D)(1)(a), which prohibits deadly weapons in school safety zones unless the board of education provides written authorization to a person to convey or possess a deadly weapon in the zone.

The common pleas court ruled that R.C. 109.78(D) did not apply to teachers, administrators, custodians, and other such school employees. This ruling was overturned by the Court of Appeals, which held that school employees authorized by the school board to carry concealed firearms onto district property must complete an approved basic peace officer training program in accordance with R.C. 109.78(D). The court found there was ambiguity in the phrase "or other position in which such person goes armed while on duty."

[34] On August 4, 2020, the Ohio Supreme Court declined jurisdiction of an appeal (No. 2020-0611).

This decision has been appealed to the Ohio Supreme Court (No. 2020-0612), which agreed to hear the case. On August 26, 2020, the Ohio Supreme Court granted appellants' motion to stay execution of the Twelfth District's judgment pending appeal, and set an expedited schedule for briefing.

Legislation (S.B. 317) has also been introduced to expressly exempt certain school employees from a requirement that basic peace officer training be obtained.

H. **Criminal conviction not a prerequisite for pursuing a civil lawsuit**– *Buddenberg v. Weisdack*, No. 2018-1209, 2020-Ohio-3832 (Ohio S. Ct., July 29, 2020)

The Ohio Supreme Court ruled that an underlying conviction is not required to bring a civil action for damages based on a criminal act. R.C. 2307.60(A)(1) provides that anyone injured in person or property by a criminal act may recover damages in a civil action unless specifically excepted by law. R.C. 2921.03 provides civil liability for attempting "to influence, intimidate, or hinder a public servant , party official, or witness in the discharge of the person's duty." A federal district court asked the Ohio Supreme Court to clarify whether these statutes required a conviction to file a civil lawsuit. The Ohio Supreme Court ruled that based on the plain language of R.C. 2307.60(A)(1) and R.C. 2921.03(C), an underlying conviction is not a prerequisite for civil liability.

VIII. The Every Student Succeeds Act – Pub.L. 114-95, 129 Stat. 1802 (signed Dec. 10, 2015)

A. **Further Consolidated Appropriations Act, 2020 (H.R. 1865, P.L. 116-94)** (signed into law Dec. 20, 2019)

The federal appropriations bill for 2020 increases funding for Title I programs by $450 million, a 2.8% increase. Special education grants to states increase by $410 million, and other programs such as Title II-A (teachers and principals), Title III (English-language learners), Title IV (student support), and 21st Century Community Learning Centers (after-school), and other programs also receive increases. $25 million was appropriated for researching gun violence, and the minimum age for purchasing tobacco products was increased from 18 to 21.

The Act also **repeals the excise tax on high cost employer-sponsored health coverage** (the "Cadillac tax") (Division N, Sec. 503), as well as the annual fee on health insurance providers (Sec. 502) and the medical device excise tax (Sec. 501).

B. **Title I, Part A: Providing Equitable Services to Eligible Private School Children, Teachers, and Families – Updated Non-Regulatory Guidance** (Oct. 7, 2019)

This updated guidance, in the form of frequently asked questions, addresses consultation; equitable service allocations and notice, timeframe for obligations, and administrative and other expenditures; delivery of equitable services; program evaluation and modification; state ombudsman; and complaints, state provision of equitable services, and bypass. See https://www2.ed.gov/about/inits/ed/non-public-education/files/equitable-services-guidance-100419.pdf for a copy of the guidance

and https://www2.ed.gov/about/inits/ed/non-public-education/files/equitable-services-response-comments-100419.pdf for a summary response to comments.

IX. Federal and State Guidance and Regulations

A. **New Title IX Regulations (34 CFR Part 106)** – U.S. Department of Education (effective Aug. 14, 2020; published in the Federal Register May 19, 2020; 85 FR 30026)

On May 6, 2020, the U.S. Department of Education issued the final rule under Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. §1681 et seq. Title IX is a Federal civil rights law that prohibits discrimination on the basis of sex, including sexual harassment and sexual violence, in education programs and activities. The new Title IX Regulations, which go into effect on August 14, 2020, describe what constitutes sexual harassment for purposes of Title IX, what triggers a school's legal obligation to respond to incidents or allegations of sexual harassment, and how a school must respond.

Under the regulations, sexual harassment actionable under Title IX is defined as:

- **Quid pro quo** - An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- **Hostile environment** - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
- **Clery crimes** - Sexual assault, dating violence, domestic violence, or stalking. [Clery regulatory definition citations omitted.]

Schools must comply with certain notification, publication, recordkeeping, and training requirements. The regulations require schools to:

1. Designate a Title IX coordinator, and provide notice of the name or title, office address, electronic mail address, and telephone number of the employee(s) so designated to applicants, students, parents/guardians, employees, and unions;
2. Provide notification to the groups listed above of the district's Title IX non-discrimination policy[35];
3. Prominently display the non-discrimination policy and Title IX Coordinator contact information on the school's website[36], and in any handbook or catalog made available to the groups listed above;

[35] Posting on a website does not satisfy notice requirements.

[36] See https://www2.ed.gov/about/offices/list/ocr/blog/20200518.html for additional details. For other Title IX technical assistance materials, see https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/crt-ta.html. Title IX policy and fact sheets are also compiled at https://sites.ed.gov/titleix/policy/.

4. Adopt and publish grievance procedures, and provide notice of the grievance procedures and grievance process including how to report or file a formal complaint of sex discrimination or sexual harassment, and how the district will respond;
5. Train Title IX coordinators, investigators, decision-makers, and facilitators of an informal resolution process;
6. Training materials must be made publicly available on the school's website (must also be maintained for seven years); and
7. Maintain investigation, appeal, and informational resolution records; documentation of response to reports and formal complaints; and training materials for seven years.

For K-12 schools, the amended Title IX regulations provide that school districts have notice or "actual knowledge" of alleged sexual harassment when **any** district employee receives a complaint from almost anyone, including the victim of sexual harassment, parent, bystander, witness, or individual with information, such as the victim's friend. Thus, it is imperative that boards train **all district employees** on how to recognize a sexual harassment complaint and the next steps for reporting a complaint, among other best practices.

B. **Civil Rights Initiative to Combat Sexual Assault in K-12 Public Schools** – U.S. Department of Education Office for Civil Rights (Feb. 26, 2020)

Citing a "troubling rise" in the number of sexual assaults in K-12 schools, the U.S. Department of Education announced a new Title IX enforcement initiative to be led by the Office for Civil Rights (OCR) to "strengthen the ability of schools to respond to all incidents of sexual harassment and assault."

Title IX requires school districts to respond promptly and equitably to both student-on-student and staff-on-student allegations of sexual harassment and sexual assault. Districts must take steps to eliminate the harassment, prevent its recurrence and remedy its effects.

OCR's sexual assault initiative will include:

- **Compliance Reviews** to examine how sexual assault cases are handled under Title IX (including incidents involving teachers and staff).
- **Public Awareness and Support** to raise awareness of sexual assault in K-12 schools.
- **Data Quality Reviews** of sexual assault/offenses data submitted by school districts through the Civil Rights Data Collection to ensure incidents of sexual assault and sexual offenses are accurately recorded and reported.
- **Proposed CRDC Data Collection**: OCR has proposed to collect more detailed sexual assault data, including data on incidents perpetuated by school staff or personnel.

The announcement identified OCR's recent resolution agreement with Chicago Public Schools concerning sexual harassment and sexual assault complaints as

illustrating "the systemic and significant deficiencies that require OCR's intentional and focused examination."

The Department of Education will also be publishing a "Pass the Trash" study to examine measures states and school districts have taken to prevent educators who have engaged in sexual misconduct with students from being employed by other districts. Section 8546 of the Every Student Succeeds Act prohibits state education agencies, schools, and school employees from assisting a school employee in obtaining a new job if the employee engaged in sexual misconduct regarding a minor or student.

Now would be a good time for districts to review their Title IX policies and to ensure that district personnel, students, and parents know how to report concerns. See https://www.ed.gov/news/press-releases/secretary-devos-announces-new-civil-rights-initiative-combat-sexual-assault-k-12-public-schools?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term= for the announcement.

C. **Updated school prayer guidance** – U.S. Departments of Education and Justice, (Jan. 16, 2020; published in the Federal Register Jan. 21, 2020; 85 FR 3257)

The U.S. Departments of Education and Justice updated their 2003 guidance on constitutionally protected prayer and religious expression in public elementary and secondary schools. The updated guidance provides information on the current state of the law, and reflects requirements of the Elementary and Secondary Education Act (ESEA), as amended by the Every Student Succeeds Act.

The ESEA requires that as a condition of receiving funds, a local educational agency must certify in writing to its state educational agency that "no policy of the local educational agency prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary schools and secondary schools, as detailed in the guidance required under [the ESEA]."

According to the introduction of the updated guidance document, schools must certify that they are in compliance with the standards set forth in Part II, which clarifies the extent to which prayer in public schools is protected. Part II states that during non-instructional time, "[s]tudents may pray when not engaged in school activities or instruction, subject to the same rules designed to prevent material disruption of the educational program that are applied to other privately initiated expressive activities." Students may also "organize prayer groups, religious clubs, and 'see you at the pole' gatherings before school to the same extent that students are permitted to organize other noncurricular student activities groups. Such groups must be given the same access to school facilities for assembling as is given to other noncurricular groups, without discrimination because of the religious perspective of their expression."

Teachers, administrators, and other school employees, when acting in their official capacities, "are prohibited by the First Amendment from encouraging or discouraging prayer, and from actively participating in such activity with students. Teachers, however, may take part in religious activities where the overall context

makes clear that they are not participating in their official capacities." For example, teachers may pray during their workday at times when it is permissible to engage in other private conduct, or meet with other teachers for prayer or bible study to the same extent they may engage in other nonreligious conversation or activities.

Schools may dismiss students to off-premises religious instruction so long as schools do not encourage or discourage participation. They may also "excuse students from class to remove a significant burden on their religious exercise, including prayer, where doing so would not impose material burdens on other students." If students express their religious beliefs in homework, artwork, or other assignments, it should be judged by ordinary academic standards and legitimate pedagogical concerns.

For student assemblies and noncurricular activities, if student speakers are selected based on "genuinely content-neutral, evenhanded criteria" and students "retain primary control over the content of their expression, that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content, and may include prayer." However, if school officials determine or substantially control the content, the speech would be attributable to the school and may not include specifically religious or anti-religious content.

At graduations, "[s]chool officials may not mandate or organize prayer at graduation or select speakers for such events in a manner that favors religious speech such as prayer." However, if students or private speakers are selected based on content-neutral criteria and retain control over the content of their expression, that expression may not be restricted because of its religious content and may include prayer. Finally, if a school makes its facilities and related services available to other private groups, they must be made available on the same terms to organizers of privately sponsored religious baccalaureate ceremonies.

Part III of the guidance addresses principles of religious liberty that relate to religious expression more broadly to provide guidance to schools on how to comply with constitutional and statutory law, but it is not part of the required ESEA certification. Topics include religious literature, teaching about religion, student dress codes and policies, and religious excusals. Part IV addresses the Equal Access Act, which requires public secondary schools that receive federal funding to provide student religious activities the same access to school facilities as is provided to student secular activities.

D. **Executive Order on Combating Anti-Semitism** (Dec. 11, 2019)

The President of the United States issued an executive order aimed at combating anti-Semitic harassment, particularly in schools and on university and college campuses. The Order states that it "shall be the policy of the executive branch to enforce Title VI against prohibited forms of discrimination rooted in anti-Semitism as vigorously as against all other forms of discrimination prohibited by Title VI." Executive departments and agencies charged with enforcing Title VI must consider the working definition of anti-Semitism adopted by the International Holocaust Remembrance Alliance (IHRA) in May 2016, as well as the "Contemporary Examples of Anti-Semitism" identified by the IHRA.

The IHRA working definition states: "Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities."

See https://www.whitehouse.gov/presidential-actions/executive-order-combating-anti-semitism/ for the order. For the examples identified by the IHRA, see https://www.holocaustremembrance.com/working-definition-antisemitism.

E. **Ceremonial gifts** – Ohio Ethics Commission Opinion No. 2019-01 (Dec. 6, 2019)

This advisory opinion from the Ohio Ethics Commission addresses whether a public official or employee can accept a ceremonial gift, such as a plaque, picture, framed certificate, trophy, or similar item. The Commission found an official or employee is not prohibited from accepting "an unsolicited, purely ceremonial gift that has little intrinsic, marketable, or utilitarian value and is intended for presentation purposes, such as a personalized plaque, picture, framed certificate, trophy, or similar item."

However, if the ceremonial gift "has significant utilitarian value; is comprised of materials of significant monetary value; or could have general desirability or marketability as an artistic or collectible item," an official or employee is prohibited from accepting it if the gift is from a prohibited source and/or is given in recognition of public service.

F. **Public servant receiving a bequest** – Ohio Ethics Commission Opinion No. 2020-01 (Jan. 23, 2020)

In this advisory opinion, the Ohio Ethics Commission determined that R.C. 2921.43, a law that prohibits a public servant from soliciting or accepting supplemental compensation for the performance of the public servant's public duties, "does not prohibit a public servant from accepting a bequest from an individual's estate if the bequest arises substantially outside the scope of the public servant's duties and there is no exchange or a reasonable expectation of an exchange for the public servant's performance of his or her duties." In the example given in the Opinion, the person who wants to bequest money to two city social workers who aid elderly residents does not have any matter currently pending before the public servants or their public agency.

G. **School Safety**

1. **Safety Assessment & Intervention training; Threat Assessment training** – Ohio Department of Education (Sept. 2019) and Ohio Attorney General (Feb. 2020)

The Ohio Department of Education is partnering with Sandy Hook Promise to offer this violence-prevention training program. It is a free, day-long workshop, and covers the theory of threat assessment and practical applications for district threat assessment teams. See http://education.ohio.gov/Topics/Student-Supports/Stop-School-Violence-Threat-Assessment-Training for more information.

The Ohio Attorney General announced free training available to schools and law enforcement to provide guidance on the use of threat assessment protocols. Grants are also being made available to help schools build threat assessment teams. The Ohio School Threat Assessment Training materials are at www.ohioattorneygeneral.gov/threatassessment.

2. **Federal School Safety Clearinghouse** – U.S. Departments of Education, Homeland Security, Health and Human Services, and Justice (Feb. 2020)

   There is a new federal clearinghouse of resources to use to prepare for and address threats related to safety and security: SchoolSafety.gov. It includes a school safety readiness tool; a secure information sharing platform to share school safety ideas, practices, plans, and tactics; and other resources and best practices on school safety topics.

3. **U.S. Secret Service analysis of targeted school violence** – U.S. Department of Homeland Security (Nov. 2019)

   The U.S. Secret Service National Threat Assessment Center (NTAC) released a report that analyzes 41 incidents of targeted school violence that took place from 2008 to 2017. The analysis examined the motives, behaviors, situational factors, and other details of attacks and found that many of the attacks could have been prevented. See https://www.secretservice.gov/data/protection/ntac/usss-analysis-of-targeted-school-violence.pdf for a copy of the report.

H. **Suicide Prevention Plan for Ohio** – Ohio Suicide Prevention Foundation; Gov. Mike DeWine (Feb. 28, 2020)

Gov. DeWine announced a collaborative suicide prevention plan for Ohio that will direct Ohio's suicide prevention efforts over the next three years. One of the plan's goals is to "[i]ntegrate suicide prevention best practices and suicide-specific care across educational systems, including Educational Service Centers." Specific objectives include increasing implementation and support for the PAX Good Behavior game to improve self-regulation; providing guidance and support to develop and implement evidence-based strategies to prevent suicide; guidance and support for developing model school policies for suicide prevention and postvention services and protocols; and expanding the use of the OHYES! survey for students in grades 7-12.

See:
https://content.govdelivery.com/attachments/OHOOD/2020/02/28/file_attachments/1389086/Suicide%20Prevention%20report%20FINAL.pdf for the report.

Note: On March 9, 2020, Gov. DeWine announced a telehealth pilot program being implemented in the Switzerland of Ohio Local School District. The $1 million program will connect students with mental health counselors in eight school buildings via videoconferencing. After results are received from the pilot, the goal is to expand the project to other schools in Ohio.

I. **OAC 3301-25-01 through -08: Educational Aide Permits** – Ohio Department of Education (effective March 26, 2020)

The State Board of Education amended OAC 3301-25-01 through 3301-25-08 concerning educational aide permits. An amendment to OAC 3301-25-05 permits an applicant to apply for a four-year educational aide permit after one year of work under the one-year permit, rather than two years. A revision to OAC 3301-25-08 removes the restriction that a one-year educational aide permit is valid only in the employing district or school that requested the issuance of the permit. Instead, only the initial one-year permit is subject to this restriction. Other changes are to provide consistency around the issuance and renewal of permits.

J. **OAC 3301-24-18 Resident Educator License** – Ohio Department of Education (effective June 25, 2020)

This rule was amended to align with grade band changes made by Senate Bill 216. (New licensure options, the primary resident educator license, and early childhood intervention specialist and primary intervention specialist resident educator licenses, added.) It also adds a new licensure option, the dual-licensed intervention specialist, to be issued to individuals who have completed a dual license program approved by the Chancellor of the Ohio Department of Higher Education.

K. **OAC 3301-24-23 and -24 Resident and alternative resident educator license renewal and extension** – Ohio Department of Education (changes proposed June 2020)

The Ohio Department of Education accepted feedback on proposed changes to the above rules that are currently under five-year rule review. The rules outline requirements for renewal and extension of resident educator and alternative resident educator licenses. ODE indicated the proposed changes "provide greater clarity to the educational community, establish a clear date for educators as to when renewal coursework and applications must be completed, and align with the language used in the renewal of professional educator licenses."

Comments were due July 23, 2020. To see the proposed changes: http://education.ohio.gov/getattachment/About/Ohio-Administrative-Code-OAC-Rule-Comments/3301-24-23-Resident-educator-license-renewal-with-ESB-Edits.pdf.aspx?lang=en-US and http://education.ohio.gov/getattachment/About/Ohio-Administrative-Code-OAC-Rule-Comments/3301-24-24-Alternative-Resident-educator-license-renewal-with-ESB-edits.pdf.aspx?lang=en-US.

L. **OAC 3301-20-03 Employment of non-licensed individuals with certain criminal convictions** – Ohio Department of Education (June 2020)

On June 9, 2020, the Ohio Department of Education filed proposed changes to OAC 3301-20-03 that would generally align the rehabilitation standards for non-licensed employees to those applicable to licensed school employees.

As proposed, several offenses that are eligible for rehabilitation under the current rule if the conviction occurred beyond a certain number of years would now be absolute bar offenses regardless of when the conviction occurred. However, a

provision has been included specifying that an employer is not required to release an employee from employment if the employer learned about the conviction prior to the rule's effective date.

A new provision requires a district to maintain documentation of employment decisions in the district's files. For the proposed rule, see www.registerofohio.state.oh.us/rules/search/details/313558.

Note: At the July 2020 State Board of Education meeting, the board indicated it plans to reconsider this rule in light of testimony urging two additions to the rule: an exception for individuals with a Certificate of Qualification for Employment (CQE), and treating the sealing of a person's record and expungement of a record differently. The rules were placed on "to be refiled" status with JCARR on July 20.

M. **OAC 3301-35 Operating Standards for Ohio Schools** – Ohio Department of Education (July 2020)

At its July 2020 meeting, the State Board of Education approved changes to the Operating Standards for Ohio Schools contained in OAC 3301-35-01 to 3301-35-07. The Board decided to leave unchanged rules that apply to nonpublic schools.[37] Proposed changes include, but are not limited to:

1. Definitions: Amends definition of educational service personnel to remove language requiring all ESP to hold licensure in the areas to which they are assigned (for consistency with 3301-35-05). Adds a list of positions that are included within the definition of "credentialed staff." Defines "evidence-based." Defines "parent" to reflect different relationships of persons serving in a parental capacity. (3301-35-01.)

2. As proposed, changes to the rule would have required school districts to develop and implement strategic plans. The Board accepted an amendment to make implementing a strategic plan permissive rather than mandatory. (3301-35-02.)

3. Clarifying that the operating standards apply with respect to schools or classrooms with blended learning environments only to the extent that they do not conflict with the blended learning rule. (3301-35-03.)

4. An amendment proposed by a Board member to remove language requiring specific course offerings was accepted. Course requirements are set forth in statute. (3301-35-04.)

5. Clarifying that credentialed staff members must hold the appropriate credential prior to performing any activities or duties related to the assigned position, except as otherwise provided in R.C. 3302.151, 3319.36, and 3319.361. Removes language requiring educational service personnel assigned to elementary fine arts, music, and physical education to hold the special teaching certificate or multi-age license in the subject to which they

[37] Following Board approval, the rules must still go through the JCARR process before going into effect.

are assigned.[38] (Physical education licensure is required by R.C. 3319.076. Fine arts is a core subject area subject to R.C. 3319.074.) (3301-35-05.)

N. **Calculating student attendance rate** – Ohio Department of Education, OAC 3301-18-01 (revisions proposed July 2020)

The Ohio Department of Education posted for comment proposed revisions to OAC 3301-18-01 (calculating student attendance rate). In addition to making changes to reflect the change from days to hours, the proposed changes clarify that instructional services do not include a student's completion of classroom assignments missed because of the student's suspension.[39]

O. **Reading achievement improvement plans** – Ohio Department of Education, OAC 3301-56-02 (revisions proposed September 2020

The Ohio Department of Education posted for comment proposed revisions to OAC 3301-56-02 (reading achievement improvement plans). Proposed amendments would add the following components to improvement plans: adult implementation data, culturally responsive practice, root cause analysis, data analysis for the Ohio English Learners Proficiency Assessment and Assessment for Students with Significant Cognitive Disabilities, a description of how the plan's strategies will be funded, identification of the plan's stakeholders, and an update of the implementation progress of the plan's activities. The comment deadline is October 9, 2020.[40]

P. **PBIS and restraint and seclusion rule** – Ohio Department of Education, OAC 3301-35-15 (revisions proposed June 2020)

In June 2020, the Ohio Department of Education re-posted for comment (through July 6) proposed amendments to OAC 3301-35-15 "Standards for the implementation of positive behavior intervention supports and the use of restraint and seclusion." (ODE previously posted proposed changes in August 2019.)

ODE's summary of changes: "New paragraphs have been added to provide for additional definitions, professional development requirements for the implementation of positive behavioral interventions and supports, to account for students with multiple incidents of restraint and/or seclusion, and to provide a restraint and seclusion complaint process for parents who believe a school district has violated certain provisions of the rule."

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[38] Note: This provision received a number of comments. A comment to the draft rule states certification/licensure for instruction in these subjects is addressed in ORC 3319.074 and 3319.076. A summary concerning final stakeholder comments (March 2020) indicates the committee decided to leave the proposed changes in place, as reinstating the stricken language would result in a rule that is more restrictive than the statute. The summary states that the "general" elementary license allows teachers to provide instruction in any subject area in the grade band for which they are licensed unless otherwise prohibited by law (such as physical education).

[39] See http://education.ohio.gov/getattachment/About/Ohio-Administrative-Code-OAC-Rule-Comments/3301-18-01_5YearReviewDraft.pdf.aspx?lang=en-US for the proposed changes.

[40] See http://education.ohio.gov/getattachment/About/Ohio-Administrative-Code-OAC-Rule-Comments/RAP-DRAFT-RULE-accessible-090820.pdf.aspx?lang=en-US for the proposal.

See http://education.ohio.gov/getattachment/About/Ohio-Administrative-Code-OAC-Rule-Comments/Draft-Rule-3301-35-15-June-2020-Public-Comment-Version-3-11-20.pdf.aspx?lang=en-US for a copy of the proposed changes.[41]

Q. **Innovative Education Pilot Programs** – Ohio Department of Education, OAC 3301-46-01

At its July 2020 meeting, the State Board of Education voted on proposed changes to OAC 3301-46-01, Innovative Education Pilot Programs. [42]

According to ODE, "[t]he most substantial revision to this rule is the addition [of] a definition for 'innovation' and a requirement that applicants describe how their proposed program meets that definition. Additionally, application requirements have been amended to allow for more robust and comprehensive evaluations of applications, including consideration of impacts of the program, what will happen if the program fails, and whether the applicant is currently on any corrective action plans." To view the proposed changes, see http://www.registerofohio.state.oh.us/pdfs/3301/0/46/3301-46-01_PH_OF_N_RU_20200820_0925.pdf.

R. **School Child Program and Child Day-Care Programs rule amendments** – Ohio Department of Education, OAC 3301-32 and 3301-37 (June 2020)

In early June 2020, the Ohio Department of Education solicited feedback on proposed revisions to rules for child day-care and school child programs licensed by ODE. Before any changes take effect, the amendments will need to be approved by the State Board of Education and be submitted to JCARR.

The proposed amendments would ensure the regulations meet or exceed R.C. 5104 (as required by R.C. 3301.53) and comply with the federal Child Care Development Block Grant. Other revisions are being made to reduce confusion or inconsistency between programs licensed by ODE and the Ohio Department of Job and Family Services, and to eliminate words, definitions, or programs that are duplicative or no longer exist.[43]

S. **School Transportation Rules** – Ohio Department of Education, OAC 3301-83 (2019-2020)

The Ohio Department of Education recently revised a number of transportation rules. See http://codes.ohio.gov/oac/3301-83 for all recently amended rules. Changes effective in the spring of 2020 include:

1. OAC 3301-83-05 amendments went into effect Feb. 20, 2020. (Earlier, this rule was refiled following public feedback concerning official timing language changes. ODE staff then recommended including language from the existing manual used and relied upon by districts for official timings.)

[41] Note: ODE issued guidance for local professional development committees on PBIS Professional Development. See http://education.ohio.gov/getattachment/Topics/Student-Supports/Creating-Caring-Communities/FINAL-LPDC-PBIS-Profesional-Development-Guidance.pdf.aspx?lang=en-US.

[42] The rule was filed with JCARR on Aug. 20, 2020. The public hearing is scheduled for Sept. 22, 2020.

[43] Note: Emergency rules addressing the COVID-19 pandemic are not included in this summary.

2. OAC 3301-83-10 (personnel training) went into effect Feb. 20, 2020. Changes include additions to instruction topics, and limiting temporary certificates to first time drivers seeking certification.

3. OAC 3301-83-08 (pupil transportation management policies) amendments require (rather than suggest) adoption of policies; permit eating and drinking on the bus for non-routine trips if permitted by school district and if supervised by a chaperone or school personnel; and prohibit use of nicotine (vs. tobacco) products on the bus. (Effective March 26, 2020.)

4. OAC 3301-83-07 (driver physical qualifications) amended to clarify requirements, to include drivers of vehicles other than school buses, and to update the list of those who may perform medical exams. (Effective March 26, 2020.)

5. OAC 3301-83-13 (school bus routes and stops) – Amending to require adoption of policies and procedures for bus stop locations and bus stop procedures, and to add requirements from 3301-83-20 that pertain to bus stops and routes). (Effective March 26, 2020.)

6. Revisions to 3301-83-06 (personnel qualifications); 3301-83-11 (school bus inspections – amendment requires a post-trip check, requires defects to be reported in writing, and clarifies requirements) and 3301-83-20 (general rules – amended to remove requirements being added to another rule). (Effective March 26, 2020.)

7. The Ohio Department of Education requested public comment on OAC 3301-51-10 (transportation of children with disabilities) in early 2019, and the State Board approved the rule change at its June 2019 meeting. A supplemental document was created to outline the governing federal and state statutes.[44] **Note**: This rule has not yet been formally amended.

T. **FMCSA Drug and Alcohol Clearinghouse** – U.S. Department of Transportation (2019)

In 2016, the Federal Motor Carrier Safety Administration (FMCSA) published final rules (81 FR 87686) to establish requirements for the Commercial Driver's License Drug and Alcohol Clearinghouse (Clearinghouse). While the rules were effective January 4, 2017, compliance was not required until January 6, 2020 to give the agency time to design the system.

The Clearinghouse contains information about violations of FMCSA's drug and alcohol testing program for holders of commercial driver's licenses. Beginning January 6, 2020, employers are required to:

1. Conduct pre-employment queries for drug and alcohol program violations – both electronically within the Clearinghouse, as well as manual inquiries with previous employers. (Beginning in 2023, only Clearinghouse inquiries

[44] See ftp://ftp.ode.state.oh.us/StateBoardBooks/June-2019/Voting%20Items/Item%2008%20-%203301-51-10%20-%20Transportation%20of%20Children%20with%20Disabilities%20-Backup%20Materials.pdf for changes. This rule has not yet been filed with the register of Ohio.

will be required.) These must be full queries, for which drivers must submit electronic consent through the Clearinghouse.

2. Conduct annual queries for all drivers. This may be satisfied by conducting a limited query (rather than a full query), and drivers may give consent to conduct limited queries that is effective for more than one year. (Limited queries only tell the employer whether there is information about the driver in the Clearinghouse; full queries release the information in the Clearinghouse to the employer.)

3. Report drug and alcohol program violations in the Clearinghouse within three days.

4. Comply with record-keeping requirements.

Employers will also need to update their CDL drug and alcohol testing policies and educational materials to include the requirement that certain personal information will be reported to the Clearinghouse.

For additional information, see https://clearinghouse.fmcsa.dot.gov/. For query plan pricing, see https://clearinghouse.fmcsa.dot.gov/Query/Plan.

The foregoing is a summary of legal developments, and this document and the accompanying presentation are not intended to offer legal advice. Please be sure to consult the full text of legislation and cases. Also, please be sure to consult competent legal counsel for specific legal issues.