



IGNORANCE OF THE LAW IS NO EXCUSE!

WVASBO SPRING CONFERENCE

Embassy Suites, Charleston, WV

Attorneys Howard Seufer, Jr. and Laura Sutton

May 18, 2018



EDUCATION PRACTICE GROUP ATTORNEYS

Rick Boothby, Parkersburg
Office: (304) 420-5535; Cell: (740) 373-1693
rboothby@bowlesrice.com

Howard Seufer, Jr., Charleston
Office: (304) 347-1776; Cell: (304) 767-1804
hseufer@bowlesrice.com

Kim Croyle, Morgantown
Office: (304) 285-2504; Cell: (304) 319-4745
kcroyle@bowlesrice.com

Laura Sutton, Martinsburg
Office: (304) 264-4216; Cell (304) 676-4941
lsutton@bowlesrice.com

Canon Hill, Charleston
Office: (304) 347-1182; Cell: (478) 954-7739
chill@bowlesrice.com

Rebecca Tinder, Charleston
Office: (304) 347-2132; Cell: (304) 545-4097
rtinder@bowlesrice.com

EDUCATION PRACTICE GROUP STAFF

Sarah Simpson Plantz
Charleston, (304) 347-1183
splantz@bowlesrice.com

Linda Poff
Parkersburg, (304) 420-5508
lpoff@bowlesrice.com

OTHER BOWLES RICE ATTORNEYS PROVIDING SUPPORT TO PUBLIC EDUCATION CLIENTS IN SPECIFIC AREAS

(Contact Information may be found at www.bowlesrice.com or by calling (304) 347-1100)

Mark Adkins – Construction Litigation.

Roger Hunter – Bond Issues, Excess Levies, Lease Purchase.

Bob Bays – Condemnations.

Bob Kent – Civil Litigation on behalf of School Boards.

Berkeley Bentley – FOIA Replies.

Robert Kiss – PILOTs and Tax

Aaron Boone – Civil Litigation on behalf of School Boards.

Tom Pearcy – Bond Issues; Excess Levies; Lease Purchase.

Michael Card – Title IX.

Steve Prunty – Easements.

Kayla Cook – Title IX.

Marion Ray – Workers Compensation.

Josh Cottle – Education Services Cooperatives; Employee Grievances and Appeals.

Floyd “Kin” Sayre – Taxes; PILOTs

Mark D’Antoni – Acquisition and Disposition of Real Estate.

Cam Siegrist – Bond Issues, Excess Levies, Lease Purchase.

Roger Hanshaw - Parliamentary Procedure; Education Services Cooperatives.

Ken Webb – Construction Issues and Litigation.

Ashley Hardesty O’Dell – Civil Litigation on behalf of School Boards.



TABLE OF CONTENTS

	<u>Page</u>
Highlights of Legislation Enacted at the 2018 Regular Session Affecting Public Education in West Virginia	1
Recent Decisions of the West Virginia Supreme Court of Appeals.....	20
Recent Decisions of the West Virginia Public Employees Grievance Board.....	22
Recent Advisory Opinions from the West Virginia Ethics Commission	31
Recent Open Meetings Advisory Opinion from the West Virginia Ethics Commission	32

HIGHLIGHTS OF LEGISLATION ENACTED AT THE 2018 REGULAR SESSION AFFECTING PUBLIC EDUCATION IN WEST VIRGINIA

By the Education Law Group at Bowles Rice LLP

Senate Bill 62

Adjusting requirements for hiring school attendance directors

In effect May 15, 2018

[Read the Entire Bill](#)

In employing attendance directors, county boards of education will no longer be required to prefer an applicant holding full certification in attendance over an applicant who holds a professional administrative certificate. *West Virginia Code § 18-8-3(b)*.

Senate Bill 244

Specifying conditions for unlawful possession of firearm at school sponsored activities

In effect June 8, 2018

[Read the Entire Bill](#)

Senate Bill 244 amends the statute that, with certain exceptions, makes it a felony to possess a firearm or other deadly weapon on a school bus, in or on the grounds of any primary or secondary educational facility of any type, or at school-sponsored functions. *West Virginia Code § 61-7-11a*.

The amended statute no longer forbids the possession of a firearm or other deadly weapon at a school-sponsored function, unless the function takes place in a “specific area that is owned, rented or leased” by the State Department of Education, the Secondary Schools Activities Commission, a county board of education, or local public school for the period of time the function is occurring. *West Virginia Code § 61-7-11a(b)(1)(C)*.

Changes are made to the provision that allows a retired law enforcement officer to possess a firearm or other deadly weapon on a school bus, in or on school grounds, or at a school-sponsored function. The statute will no longer specify that the retiree must be employed by a state, county or municipal law enforcement agency; covered for liability purposes by his or her employer; and authorized by a county board of education and the school principal to serve as security for a school. Instead, the statute will now require that the retired law enforcement officer meet all of the requirements to carry a firearm as a qualified retired law-enforcement officer under the federal Law-Enforcement Officer Safety Act of 2004, as amended; carry a firearm in a concealed manner; and have on his or her person, official identification as provided by that Act. *West Virginia Code § 61-7-11a(b)(2)(C)*.

The legislation also modifies the exception that allows a person specifically authorized by the county board or school principal to conduct programs with valid educational purposes to possess a firearm or deadly weapon that would otherwise be prohibited. The modification makes a student of a primary or secondary facility ineligible for this exception. *West Virginia Code § 61-7-11a(b)(2)(D)*.

Senate Bill 283
Relating generally to procurement by state agencies
In effect June 8, 2018
[Read the Entire Bill](#)

Certain provisions of this legislation affect county boards of education.

Amendments to the West Virginia Fairness in Competitive Bidding Act affect the requirement that county boards, with certain exceptions, solicit competitive bids for every construction project exceeding \$25,000 in total cost. The amendments include a definition of the term “construction project:”

“Construction project” means a specifically identified scope of work involving the act, trade, or process of building, erecting, constructing, adding, repairing, remodeling, rehabilitating, reconstructing, altering, converting, improving, expanding, or demolishing of a building, structure, facility, road, or highway. Repair and maintenance of existing public improvements that are recurring or ongoing in nature and that are not fully identified or known at any one time shall be considered a construction project and procured according to this article on an open-ended basis, so long as the work to be performed under the contract falls into a generally accepted single class, or type, and bidders are notified of the open-ended nature of the work in the solicitation: Provided, That no open-ended repair or maintenance contract may exceed \$500,000.

West Virginia Code § 5-22-1(b)(5).

Also, if the solicitation for a construction project contains a request for any alternates, they must be listed numerically in the order of preference. Alternates will now be limited to five instead of seven. A provision is repealed that allowed a public entity to accept an alternate out of the listed order. *West Virginia Code § 5-22-1(c)(1); West Virginia Code § 5-22-1(f).*

Senate Bill 319
Allowing individuals who completed home schooling be eligible for PROMISE scholarship without equivalent diploma
In effect July 1, 2018
[Read the Entire Bill](#)

To be eligible for the PROMISE scholarship, a person who completed a secondary education program in home school will no longer be required to also acquire a General Equivalency Degree (GED). Additionally, an individual who obtains a GED or equivalent, to be eligible for the PROMISE scholarship, will no longer have to also complete a secondary education program in a public, private or home school. All other requirements of eligibility for the PROMISE scholarship remain the same as before. *West Virginia Code § 18C-7-6(c)(1)(A); West Virginia Code § 18C-7-6(c)(1)(B).*

Senate Bill 364

Allowing parent or legal guardian of homeschooled child provide signed statement for obtaining permit or license to operate motor vehicle

In effect May 31, 2018

[Read the Entire Bill](#)

Attendance directors and chief school administrators remain under a duty to provide, upon request, a driver's eligibility certificate to students ages 15-18 who are enrolled in school, making satisfactory academic progress, and applying to the Division of Motor Vehicles for an instruction permit or license to operate a motor vehicle. Under Senate Bill 364, a parent or legal guardian of a child who is being home schooled will now be empowered to provide a signed statement that takes the place of the driver's eligibility certificate. The statement must affirm that the child is being educated in accordance with law, is making satisfactory academic progress, and meets the conditions to be eligible to obtain an instruction permit or license to operate a motor vehicle. *West Virginia Code § 18-8-11(b)*.

Senate Bill 461

Extending time to file petition for motor fuel excise tax refund

In effect June 6, 2018

[Read the Entire Bill](#)

Like certain other parties, county boards of education have the right to petition the State Tax Commissioner for a refund of motor fuel excise taxes previously paid. *West Virginia Code § 11-14C-9(c)(4); West Virginia Code § 11-14C-9(d)(5)*.

Before the effective date of Senate Bill 461, the petition had to be filed no later than August 31 for purchases of motor fuel made during the preceding fiscal year ending June 30. The bill changes the filing deadline to December 31 for purchases of motor fuel made during the preceding fiscal year ending June 30. *West Virginia Code § 11-14C-31(d)(3)*.

Senate Bill 465

Relating to mandated reporting of child abuse and neglect

In effect June 5, 2018

[Read the Entire Bill](#)

In this bill, the Legislature revisited the statute mandating that certain persons report suspected child abuse and neglect.

This legislation repeals, on its effective date, certain subsections of West Virginia Code § 49-2-803 that were added to the statute in 2015 in the wake of the Penn State child abuse scandal. One of the repealed provisions imposed broad reporting requirement on any person over the age of 18 who receives a disclosure from a credible witness about, or observes, any sexual abuse or sexual assault of a child. Another of the repealed provisions imposed a particularized reporting requirement on any school employee who receives a disclosure from a witness about, or observes, any sexual contact, sexual intercourse or sexual intrusion of a child on school premises or on transportation used in furtherance of a school purpose. A third repealed provision made clear that the reporting requirements included reported, disclosed or observed conduct involving, or

between, students in any public or private school, or involving a student and a school employee. [When they were added to the statute in 2015, the repealed subsections were subsections (b), (c) and (e) of the mandatory reporter statute.]

Senate Bill 465 clarifies that sexual abuse and sexual assault constitute abuse of a child for reporting purposes. It reduces from 48 hours to 24 hours the period in which a mandated reporter is required to report suspected abuse or neglect. The bill clarifies that persons under the age of 18 are not mandatory reporters. *West Virginia Code § 49-2-208(a)*; *West Virginia Code § 49-2-208(d)*.

A mandated reporter must now directly report known or suspected abuse and neglect to the Department of Health and Human Services and, in appropriate cases, the State Police and law enforcement agency. A mandated reporter cannot discharge the reporting duty by merely “causing a report to be made.” *West Virginia Code § 49-2-208(a)*.

The amendments to the mandatory reporter law did not change the duty of county boards of education and private school administrators to provide all employees with a written statement setting forth the statute’s requirements. Nor did it change the duty to obtain and preserve a signed acknowledgment from school employees that they have received and understand the reporting requirement. *West Virginia Code § 49-2-208(b)*.

Senate Bill 506

Deregulating persons who perform work on heating, ventilating and cooling systems

In effect June 7, 2018

[Read the Entire Bill](#)

Depending upon the circumstances, a person working on certain heating, ventilating and cooling systems in West Virginia may be exempt from having to obtain, from the State Commissioner of Labor, a license to do so. *West Virginia Code § 21-16-3(b)*.

Under prior law, one exemption was for a person performing routine maintenance as a direct employee of the owner or operator of the facility where the system is located. Senate Bill 506 modifies that exemption so that if the work consists of routine maintenance of a heating, ventilating and cooling system, the worker does not have to be a direct employee of the owner or operator. *West Virginia Code § 21-16-3(c)(4)*.

Routine maintenance is still defined as “work performed on a routine schedule that includes cleaning and/or replacing filters, greasing or lubricating motor bearings, adjusting and/or replacing belts, checking system temperature, checking gas temperature, adjusting gas pressure as required, and checking voltage and amperage draw on heating, ventilating and cooling systems.” *West Virginia Code § 21-16-2(i)*.

Senate Bill 561

Increasing minimum contract price requiring execution of bond with respect to building or repairing school property

In effect June 3, 2018

[Read the Entire Bill](#)

Where the contract exceeds \$25,000, a person contracting to build, or repair, school property will be required by state law to execute a bond, with approved security, in the amount of the contract price. Previously, contractors were required to execute a bond for the contract price when the contract exceeded \$100. *West Virginia Code § 18-5-12.*

House Bill 2028

Relating to the venue for suits and other actions against the state

In effect June 6, 2018

[Read the Entire Bill](#)

Prior to the effective date of this bill, any suit in circuit court against the Governor, any other state officer, or a state agency, could be brought only in the Circuit Court of Kanawha County. The same was true of any suit to enjoin or otherwise suspend or affect any circuit court's judgment or decree on behalf of the state. *West Virginia Code § 14-2-2.*

This bill amends those rules. Such suits are no longer confined to the Circuit Court of Kanawha County. They may be brought, instead, in the circuit court of any county where the plaintiff or petitioner resides, or where the cause of action arose. They may also be brought in the Circuit Court of Kanawha County. *West Virginia Code § 14-2-2.*

House Bill 2546

Allowing replacement costs of employer provided property to be deducted from an employee's final paycheck if the property is not returned

In effect May 15, 2018

[Read the Entire Bill](#)

West Virginia's Wage Payment and Collection Act is amended to allow employers to recoup replacement costs associated with employer-provided property such as equipment, phones, computers, supplies and uniforms that an employee fails to return when the employee is discharged or resigns. *West Virginia Code § 21-5-4(f).*

Under the new legislation, an employer is permitted to withhold, deduct or divert an employee's final wages in an amount not to exceed the replacement cost of the unreturned employer-provided property under the following circumstances: (1) the property was provided to the employee in the course of, and for use in, the employer's business; (2) the value of the employer-provided property is more than \$100; and (3) the employee signed a written agreement at the time the employer-owned property was provided to the employee (or, in the case of property provided prior to the effective date of House Bill 2546, the employee signed and ratified a written agreement). *West Virginia Code § 21-5-4(f)(1).*

At a minimum, this agreement must identify the employer-owned property and replacement cost, clearly notify the employee the property must be returned immediately upon discharge or

resignation, and clearly inform the employee that failure to return the specified item may result in the replacement cost being recovered by the employer from the employee's final wages. *West Virginia Code § 21-5-4(f)(1)(C)*.

To exercise its right under the new law, the employer must notify the employee by personal service or certified mail, at the time of discharge or resignation, as to the replacement cost of the items, and make demand for return of the employer-provided property by a certain date, not to exceed 10 business days from the date of notification. *West Virginia Code § 21-5-4(f)(1)(D)*.

If, by the stated deadline, the employee returns the property in a condition suitable for the age and usage of the items, the employee is entitled to the withheld, deducted or diverted wages. Uniforms returned within three years of issuance must be deemed acceptable in their current condition at the time of separation from employment. An employee who disputes the replacement cost to be deducted by the employer must do so, in writing, within the deadline for returning the property. In the case of such a dispute, the employer must place the disputed amount in an interest-bearing escrow account. Unless within the next three months the employee files suit over the dispute, the amount in escrow reverts to the employer. *West Virginia Code § 21-5-4(f)(E)*; *West Virginia Code § 21-5-4(f)(3)*.

House Bill 2546 preserves an employee's right to voluntarily consent to withholding, deduction or diversion of final wages to account for unreturned property. The legislation also allows an employer to exercise any other remedies it may have to recover employer-provided property or the value thereof. There is an important exception to the relief offered by House Bill 2546: it is not available to an employer if the employer-employee relationship is subject to, and governed by, a collective bargaining agreement. *West Virginia Code § 21-5-4(f)(2)*; *West Virginia Code § 21-5-4(f)(4)*; *West Virginia Code § 21-5-4(f)(5)*.

House Bill 2655
Defining and establishing the crime of cyberbullying
In effect June 8, 2018
[Read the Entire Bill](#)

This legislation creates the misdemeanor criminal offense of cyberbullying of minors, punishable by a fine of not more than \$500 and/or confinement in jail for up to a year. *West Virginia Code § 61-3C-14c*; *West Virginia Code § 18-2-41(d)*.

The crime consists of knowingly and intentionally using a computer or computer network to engage in conduct with the intent to harass, intimidate or bully a minor, defined as an individual under the age of 18. The crime includes, but is not limited to, posting, disseminating or encouraging others to post or disseminate private, personal or sexual information on the Internet pertaining to a minor, or posting on the Internet obscene material in a real or doctored image of a minor. *West Virginia Code § 18-2-41(a)*; *West Virginia Code § 18-2-41(b)(2)*.

“Harass, intimidate or bully” is defined as any intentional gesture, or any intentional electronic, written, verbal or physical act, communication, transmission or threat that (1) a reasonable person under the circumstances should know will have the effect of physically harming a minor, damaging a minor's property, placing a minor in reasonable fear of harm to his or her person, or placing a

minor in reasonable fear of damage to his or her property; or (2) is sufficiently severe, persistent or pervasive that it creates an intimidating, threatening or emotionally abusive environment for a minor. *West Virginia Code § 18-2-41(b)(1)*.

Peaceful activity intended to express a political view, or provide information to others with no intent to harass, intimidate or bully, does not constitute cyberbullying of minors. *West Virginia Code § 18-2-41(b)(2)*.

House Bill 2799

Prohibiting the superintendent of schools from requiring a physical examination to be included to the application for a minor's work permit

In effect June 8, 2018

[Read the Entire Bill](#)

In considering whether to issue a work permit allowing a person, firm or corporation to employ a 14- or 15-year-old child, a county superintendent of schools, or designee, may no longer require a physical examination of the child as part of the permit application. The House Bill also provides that an issuer of work permits is not required to certify that the minor personally appeared before the issuer before a permit was issued, modified or rejected. *West Virginia Code § 21-6-3(c)*; *West Virginia Code § 21-6-3(d)*.

House Bill 3089

Relating to the adoption of instructional resources for use in the public schools

In effect June 7, 2018

[Read the Entire Bill](#)

A new section of the West Virginia Code, West Virginia Code § 18-2A-10, provides for the review and adoption, by county boards of education, of instructional resources for use in the public schools. The legislation removes from the State Board of Education and the State Department of Education many responsibilities associated with the review and adoption process. To that end, the new statute repeals any provisions of West Virginia Code § 18-2A-1 through West Virginia Code § 18-2A-8 that conflict with the new law, but only as to instructional resources adopted by a county board for use in school year 2019-2020 and successive years. *West Virginia Code § 18-2A-10(a)*.

The instructional resources subject to the new process are print materials, electronic resources and systems, and combinations of print materials and electronic resources, that convey information to a student covering at least 80% of the required content and skills approved by the State Board of Education for subjects taught in the public schools. The State Board is required to set a cycle under which instructional resources are adopted by county boards. *West Virginia Code § 18-2A-10(b)*; *West Virginia Code § 18-2A-10(c)*.

In order to offer instructional resources for use in the public schools during a school year, a vendor must first file with the State Superintendent of Schools, by the preceding January 1, a statement verifying that (1) the instructional resources meet non-negotiable evaluation criteria established by the State Board; (2) the instructional resources cover no less than 80% of the required content and skills for the subject; (3) the list wholesale price for the instructional resources will be no more than the lowest wholesale price available to school districts in any other state; and (4) the list

wholesale price for electronic files offered with the print instructional resources does not exceed the list wholesale price for the same number of the printed version of the print resources. County board members and employees are forbidden to act as a sales agent, directly or indirectly, for any vendor that files with the State Superintendent. *West Virginia Code § 18-2A-10(d); West Virginia Code § 18-2A-11(k).*

The State Board will annually provide county boards of education with a list of vendors who have filed the required information. If, after filing its statement, a vendor fails or refuses to furnish the instructional resources to any county board under the terms of its statement, the State Superintendent may disqualify the vendor and so notify each county board of education. *West Virginia Code § 18-2A-10(e); West Virginia Code § 18-2A-10(g).*

When the new law takes effect, and with two exceptions, county boards may not adopt, and may not use in the schools, instructional resources offered by vendors who do not appear on the list from the State Board or do not otherwise comply with the new law. One exception is that a county board may adopt, and may use in the schools, instructional resources approved and included on the state multiple list. The State Board will continue to prepare and approve the multiple list and make it available to the counties. The second exception is for supplementary instructional resources, including, but not limited to, reading books, library books, reference books, or any other books. Supplementary instructional resources must be ordered, received, examined and paid for in the same manner and by the same persons as other supplies and equipment. *West Virginia Code § 18-2A-11(f); West Virginia Code § 18-2A-11(h).*

Each county board must adopt a policy covering the adoption of instructional resources. The county policy must include the process for reviewing instructional resources to ensure that they meet State Board requirements and the 80% of content requirement, which may rely on an instructional material review by the State Department of Education. Additionally, the policy must specify the composition and duties of a county Instructional Resource Review Committee; establish the process for recommending instructional resources for adoption; provide for a county board meeting to determine which resources will be required in the county's public schools; and require the county board to annually inform the State Board of the instructional resources adopted by the county board. *West Virginia Code § 18-2A-11(j).*

House Bill 3089 reiterates that county boards must furnish public students, free of charge, with necessary instructional resources. If a county chooses to furnish electronic resources to students, it must provide students with reasonable access to the resources, which shall remain the property of the school board. If students are required to use electronic resources to complete homework assignments, the necessary computer equipment must be provided to students and to the teachers making the homework assignments. *West Virginia Code § 18-2A-11(i).*

House Bill 4006
Revising the processes through which professional development is delivered for those who provide public education

In effect June 8, 2018

[Read the Entire Bill](#)

House Bill 4006 is massive. In addition to eliminating the Department of Education and the Arts and eliminating or reassigning the many functions of the Department and its Secretary, the bill revises the processes through which professional development is delivered for those who provide public education in this state, including improvement of the focus on school-level continuous improvement processes led by the principal.

This summary refers to some, but by no means all, of the changes made by the legislation.

Eliminated Entities

The Department of Education and the Arts is abolished as of July 1, 2018. *West Virginia Code § 5F-1-2; West Virginia Code § 5F-1-6.*

The bill also abolishes the West Virginia Distance Learning Coordinating Council that was established in West Virginia Code § 10-5-2a, and the National Institute for Teaching Excellence established in West Virginia Code § 18B-11-6.

Transferred Functions

The Division of Rehabilitation Services is transferred to the Department of Commerce from the abolished Department of Education and the Arts. *West Virginia Code § 18-10A-2; West Virginia Code § 18-10A-3.*

The Center for Professional Development is transferred from the Department of Education and the Arts to the authority and control of the State Board of Education, where it no longer has a governing board and its general mission is to advance the quality of teaching and learning in the schools through programs, technical assistance and support. The Center is also to provide statewide coordination for the continued growth and development of advanced placement programs, serve as a liaison for The College Board, and provide for the training of advanced placement teachers. The statute establishing the West Virginia Advanced Placement Center, West Virginia Code § 18A-3A-5, is repealed. *West Virginia Code § 18-2I-4(b).*

Teacher Preparation Programs and Alternatives

In directing and controlling the education of professional educators in West Virginia, and in adopting standards for the education and certification of professional educators, the State Board is no longer required to consult with the Secretary of Education and the Arts and the Chancellor for Higher Education. Those standards must provide for the study of the history and philosophical foundations of Western Civilization and the writings of the founders of the United States. Nor need the State Board consult with the Secretary or Chancellor concerning procedures for the approval and operation of alternative teacher preparation programs. *West Virginia Code § 18A-3-1(a); West*

Virginia Code § 18A-3-1(b); West Virginia Code § 18A-3-1(b)(1); West Virginia Code § 18A-3-1d(a)(1).

Principals

The legislation also addresses the duties and responsibilities of school principals, expressly recognizing that, in addition to supervising the management and operation of the school, the principal shall be the principal instructional leader. Beginning on July 1, 2019, the prerequisites for an administrative certificate for principals will include successfully completing at least six credit hours of approved course work in public school instructional leadership and management techniques, including, but not limited to, the school accreditation process and strategic planning for continuous improvement. *West Virginia Code § 18A-2-9(a); West Virginia Code § 18A-2-9(b)(2).*

An individual will not be eligible for employment as a principal or assistant principal without first successfully completing education and training in evaluation skills approved by the State Board. Once employed as a principal, an employee will assume administrative and instructional leadership responsibility for the planning, management, operation and evaluation of the total educational program of the school. *West Virginia Code § 18A-2-9(c); West Virginia Code § 18A-2-9(c); West Virginia Code § 18A-2-12(f).*

By October 1, 2018, the State Board of Education will adopt rules regarding the minimum qualities, proficiencies and skills that will be required of principals after July 1, 2019. The rules will address staff relations, school community leadership, educational proficiencies and administrative skills, as was required under the prior version of the statute. They must also address the added skills of instructional leadership and management techniques, including, but not limited to, the accreditation process and strategic planning for continuous improvement. *West Virginia Code § 18A-3-2c(1).*

House Bill 4006 repeals West Virginia Code § 18A-3-2d, which is the statute that required beginning principal internships. It also repeals West Virginia Code § 18A-3-2c, the statute that established the Center for Professional Development's Principals Academy and required principals to attend the Academy.

No principal may be assigned more than two schools. County boards of education are authorized, but not required, to assign a full-time principal to a school with a net enrollment of less than 170 students. *West Virginia Code § 18A-2-9(f)(2); West Virginia Code § 18A-2-9(f)(8).*

Performance Evaluations for Professional Personnel

In developing and modifying the professional personnel performance evaluation system, the State Board is no longer required to consult with the Center for Professional Development. Nor must candidates for administrative certificates obtain their education and training in evaluation skills from the Center for Professional Development. The statute establishing the Center's personnel evaluation project, West Virginia Code § 18A-3A-3, is repealed. *West Virginia Code § 18A-2-12.*

The legislation repeals obsolete provisions of West Virginia Code § 18A-3C-2 related to the phased implementation of provisions for professional personnel evaluations. It requires that the

annual personnel performance evaluations of all classroom teachers, principals and assistant principals in each school and school system be conducted under rules to be adopted by the State Board of Education before July 1, 2018. Required components of those rules must be the same as under the most recent version of the statute, except that House Bill 4006 eliminates the requirement to base 5% of classroom teacher, principal, and assistant principal evaluations on the school-wide score on the state summative assessment. The bill increases by 5% the portion of those evaluations that must be based on student learning as measured by two pieces of evidence at two points in time over the instructional term. *West Virginia Code § 18A-3C-2(b); West Virginia Code § 18A-3C-2(c); West Virginia Code § 18A-3C-2(d).*

Teacher and Leader Induction and Professional Growth

The Legislature intends to allow for local-level implementation of systems of support for building professional practice. To that end, it directs that support systems must incorporate support for improved professional performance targeted on deficiencies identified through the educator personnel evaluation process and other professional needs identified in the strategic plans for continuous improvement of schools and school systems. *West Virginia Code § 18A-3C-3(a).*

The State Board of Education must, by July 1, 2018, publish guidelines for the design and implementation of a county-level comprehensive system of support for teachers and principals. Effective for the 2018-2019 school year, a county board will be ineligible for state funding for such systems unless it has adopted an implementation plan that is found by the State Board to meet those requirements. Among other things, the plan must address how the county will provide strong support and supervision to assist beginning principals in developing instructional leadership; supervisory and management strategies; procedural and policy expertise; and other professional practices they need to be successful in leading continuous school improvement and perform at the accomplished level or above. *West Virginia Code § 18A-3C-3(b); West Virginia Code § 18A-3C-3(c).*

The legislation eliminates a requirement that a county board of education adhere to the posting and other provisions of West Virginia Code § 18A-4-7a to judge the qualifications of applicants for the positions of master teacher, mentor, academic coach, and similar positions that provide support, supervision or other professional development or training to improve the professional practice of other employees. *West Virginia Code § 18A-3C-3(c)(6).*

Professional Development

The State Board of Education is no longer required to follow the process of West Virginia Code § 18-2I-3 under which it developed an annual professional development master plan with input from the State Department of Education, the Higher Education Policy Commission, the Legislative Oversight Commission on Education Accountability, the Center for Professional Development, and regional educational development agencies. West Virginia Code § 18-2I-3 is repealed, as are provisions previously found in West Virginia Code § 18A-3-8 and West Virginia Code § 18A-3A-2 for the professional staff development project of the Center for Professional Development.

As the State Board continues to institute a system for the coordination and delivery of high-quality professional development, it is directed to include in the system's goals (1) developing instructional leadership skills of principals to ensure that each school is led by a principal who is knowledgeable of continuous improvement processes, capable of leading effective improvement efforts, and understands the value of fair and accurate performance evaluations to drive professional learning at the school level; (2) basing professional development on a thorough analysis of accountability data and strategic planning for continuous improvement that addresses those areas that must be a priority for individual school support, including an analysis of personnel evaluation data; (3) focusing on assisting the improvement of each school, and differentiating supports, according to need and level of performance, including a school-based professional development system that addresses the unique needs of staff and students; and (4) delivering professional development using techniques, school schedules or time in a manner that does not diminish student learning. *West Virginia Code § 18-2I-1.*

House Bill 4006 incorporates a finding by the Legislature that professional development resources must be focused in the most cost-effective manner on the unique needs of individual schools, including their professional evaluation data, to increase each school's capacity to improve student performance and progress. The comprehensive infrastructure that supports a continuous process for improving teaching and learning will now also include high-quality principal preparation, induction and evaluation; universal support for emerging principals, beginning teachers, and beginning principals, assistant principals, and vocational administrators; and support for principals, assistant principals, and vocational administrators beginning a new assignment at a school with a significantly different grade level configuration. *West Virginia Code § 18A-3C-1(a)(3); West Virginia Code § 18A-3C-1(b)(1); West Virginia Code § 18A-3C-1(b)(2).*

House Bill 4042

Redefining school zone to facilitate placement of school zone signs

In effect June 7, 2018

[Read the Entire Bill](#)

In a school zone, the speed limit is 15 miles per hour during school recess and while children are going to, or leaving, school during opening or closing hours. A school zone already includes all school property, including school grounds; any street or highway abutting the school grounds; and a street or highway extending 125 feet from the school grounds. *West Virginia Code § 17C-6-1(a).*

This bill defines speed zones in the case of school properties that do not abut a street or highway, but are accessed through a right-of-way granted for entrance to school property. In such a case, the school zone will now consist of all the school's property, including school grounds; any property within the access right of way; and the street or highway extending 125 feet from the right of way entrance. *West Virginia Code § 17C-6-1(a).*

House Bill 4145
Increasing the annual salaries of members of the West Virginia State Police, public school teachers and school service personnel

In effect July 1, 2018

[Read the Entire Bill](#)

House Bill 4145 increases compensation for certain public employees, including the minimum salaries payable to professional and service employees of county boards of education, beginning July 1, 2018.

For the 2018-2019 school year, each annual salary figure appearing on the 2017-2018 state minimum salary schedule for teachers is increased by \$2,020 and then continues at that level, without further increase, in subsequent years. *West Virginia Code § 18A-4-2(b)*.

For the 2018-2019 school year, each monthly pay figure appearing on the 2017-2018 state minimum pay scale for service personnel is increased by \$110 and then continues at that level, without further increase, in subsequent years. *West Virginia Code § 18A-4-8a(a)(1)*.

House Bill 4183
Relating generally to standardized testing requirements for nonpublic schools

In effect June 6, 2018

[Read the Entire Bill](#)

This legislation concerns testing requirements for students in private, parochial or other nonpublic schools electing to operate under West Virginia Code § 18-28-3 in lieu of the approval requirements of West Virginia Code § 18-8-1(b). [The approval requirements of a nonpublic school under West Virginia Code § 18-8-1(b) are that the county board of education must approve the nonpublic school, instruction must be for a time equal to the instructional term that public schools must offer, and, upon the request of the county superintendent of schools, the nonpublic school must furnish to the county board such information and records as may be required with respect to attendance, instruction and progress of students enrolled.]

Under House Bill 4183, nonpublic schools operating under West Virginia Code § 18-28-3 are no longer required to annually administer one of several specified achievement or basic skills tests to students aged seven through twelve. Instead, annual assessments must now be made at the same grade levels and in the same subject areas as required in the public schools for the state-wide summative assessment. With one exception, the assessments must be nationally normed standardized achievement tests, published or normed within the last 10 years, but selected by the chief administrative officer of each school. The student participation rate must be the same as required in the public schools for a school's composite score to be considered valid. *West Virginia Code § 18-28-3(a)*.

The one exception is for nonpublic schools operating under West Virginia Code § 18-28-3 that exclusively teach special education students or students with learning disabilities. Although they, too, must now academically assess students at the same grade levels and in the same subject areas as required in the public schools for the state-wide summative assessment, these schools may continue to use one or more of the same four assessments as before: a standardized group

achievement test; a standardized individual achievement test; a written narrative of an evaluation of a portfolio of samples of a child’s work; and an alternative academic assessment of the child’s proficiency as mutually agreed by the county superintendent, parent(s) or legal guardian(s) and the school. *West Virginia Code § 18-28-3(b)*.

As before, all nonpublic schools covered by House Bill 4183 are required to initiate remedial programs if the composite tests results on required academic assessments fall below the 40th percentile for a single year. If a school’s results fall below the 40th percentile for two consecutive calendar years, the school will no longer satisfy the compulsory school attendance requirement until the 40th percentile standard is met. *West Virginia Code § 18-28-3(f)*.

Nonpublic schools retain discretion to administer standardized achievement tests in subject areas, or at grade levels, not required by the statute. *West Virginia Code § 18-23-3(c)*.

House Bill 4187
Business Liability Protection Act
In effect June 8, 2018
[Read the Entire Bill](#)

House Bill 4187 amends an existing section of the West Virginia Code. As amended, the section is now called the “Business Liability Protection Act.” *West Virginia Code § 61-7-14*.

The amendment makes it illegal for the owner, lessee or other person charged with the care, custody and control of real property to

- prohibit any customer, employee or invitee from possessing any legally owned firearm when the firearm is lawfully possessed, out of view, locked inside or locked to a motor vehicle in a parking lot, and when the customer, employee or invitee is lawfully allowed to be present in the area;
- verbally or in writing inquire about the presence or absence of a firearm locked inside or locked to a motor vehicle in a parking lot;
- ascertain the presence of a firearm within a vehicle in a parking lot, except when a search of the motor vehicle for that purpose is conducted by on-duty law enforcement personnel in accordance with statutory and constitutional protections;
- take any action against a customer, employee or invitee based upon verbal or written statements by anyone concerning possession of a firearm stored inside a motor vehicle in a parking lot, for lawful purposes, except upon statements made pertaining to unlawful purposes, or threats of unlawful action, involving a firearm, made in violation of the state law that makes it a felony to make threats of terrorist acts, convey false information concerning terrorist acts, and commit terrorist hoaxes; or
- prohibit or attempt to prevent any customer, employee or invitee from entering the parking lot of the person’s place of business because the customer’s, employee’s or invitee’s motor

vehicle contains a legal firearm being carried for lawful purposes and out of view in the customer's, employee's or invitee's motor vehicle.

West Virginia Code § 61-7-14(d)(1); West Virginia Code § 61-7-14(d)(2); West Virginia Code § 61-7-14(d)(4).

Under the Act,

- an “employer” is any business that has employees and is a sole proprietorship, partnership, corporation, limited liability company, professional association, cooperative, joint venture, trust, firm, institution, association, or public-sector entity;
- an “employee” is a person over the age of 18 who is not prohibited from possessing firearms, and who works for the employer for salary, wages, or other remuneration, or as an independent contractor, or as a volunteer or intern; and
- an “invitee” is any business invitee, including a customer or visitor, who is lawfully on the premises of a public or private employer.

West Virginia Code § 61-7-14(a)(3); West Virginia Code § 61-7-14(a)(4); West Virginia Code § 61-7-14(a)(5).

The Act makes it illegal for employers to condition employment upon whether an employee or prospective employee holds or does not hold a license to carry a deadly weapon or a provisional license to do so. *West Virginia Code § 61-7-14(d)(3).*

The state Attorney General is authorized to enforce the above provisions of the Act by seeking an injunction or other relief from the Circuit Court of Kanawha County to protect the rights of a customer, employee or invitee, and/or civil penalties of no more than \$5,000 for each violation, plus all costs and attorney's fees. A customer, employee or invitee aggrieved by a violation of the Act may also institute a civil action for similar relief in the circuit court for the county where the alleged violator resides or has a principal place of business, or where the violation occurred *West Virginia Code § 61-7-14(f).*

An employer, owner, lessee or other person charged with the care, custody and control of real property is not liable in a civil action for money damages based upon any action or inaction taken in compliance with the above provisions of the Act. *West Virginia Code § 61-7-14(e)(2).*

House Bill 4242

Clarifying the jurisdictional amount for removal of a civil action from magistrate court to circuit court

In effect May 17, 2018

[Read the Entire Bill](#)

West Virginia magistrate courts continue to have jurisdiction of all civil actions where the value or amount in controversy, or the value of property sought, exclusive of interest and costs, is not more than \$10,000. *West Virginia Code § 50-2-1.*

By agreement, the parties to a civil action in magistrate court may, before trial, remove the case to circuit court if the case involves less than \$5,000. This changes the prior rule, which allowed removal by agreement if the case involved less than \$2,500. *West Virginia Code § 50-4-8*.

Also, any party may now, before trial, remove a magistrate civil action to circuit court if the case involves \$5,000 or more. The prior rule allowed removal by any part if the case involved \$2,500 or more. *West Virginia Code § 50-4-8*.

As before, removal of either kind is conditioned on payment of the circuit court filing fee. *West Virginia Code § 50-4-8*.

House Bill 4336
Updating the schedule of controlled substances

In effect June 7, 2018

[Read the Entire Bill](#)

House Bill 4336 updates the schedules of controlled substances by reorganizing each schedule to remove numbering and lettering for subparts. Additionally, it provides that the drugs listed in each schedule include not just the drug's chemical substance but also any isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, when the existence of the such compounds are possible within the chemical designation. The bill adds specific chemical compounds to three of the schedules. *West Virginia Code § 60A-2-204; West Virginia Code § 60A-2-206; West Virginia Code § 60A-2-210; West Virginia Code § 60A-2-212*.

House Bill 4402
Relating to the prevention of sexual abuse of children

In effect June 3, 2018

[Read the Entire Bill](#)

With the aim of educating and preventing the sexual abuse of children, this legislation requires that children in grades K-12 receive body-appropriate safety information at least once per school year, with a preference for four times per school year, beginning July 1, 2019. *West Virginia Code § 18-2-41(a)*.

In order to facilitate the process and develop resources, the State Board of Education must propose by December 31, 2018, a rule that, at a minimum, provides for developmentally appropriate education and resources; social media usage and content; implementation of best practices; implementation strategies for differing school sizes and demographics; strategies for dealing with disclosures after student education; rules informed by family voice; offender dynamics; child-on-child scenarios; the development of supplementary materials to embed into the school climate; and protocols for local crisis response in conjunction with schools' crisis response plans. *West Virginia Code § 18-2-41(a)*.

The State Board must also propose another rule by December 31, 2018, and may earlier adopt an emergency rule, establishing standards for training for all public school employees. The rules must be focused on developing skills, knowledge and capabilities to prevent child sexual abuse and recognize and respond to suspected abuse and neglect. *West Virginia Code § 18-2-41(b)*.

At a minimum, the training rule must require comprehensive instruction and information to better equip schools and their employees to (1) recognize sexually offending behaviors in adults, questionable behaviors such as boundary violations, and signs in adults that indicate they pose a sexual risk to children; (2) recognize, appropriately respond to, and prevent sexually inappropriate, coercive or abusive behaviors among children served by schools; (3) recognize behaviors and verbal cues that might indicate a child or youth has been a victim of abuse or neglect; (4) support the healthy development of children and the building of protective factors to mitigate against their sexual victimization by adults or peers; (5) recognize and appropriately respond to student infatuations and flirtations with adults in schools; (6) recognize appropriate and inappropriate social media usage by adults and children; (7) provide consistent and standard protocols for responding to disclosures of sexual abuse or reports of boundary-violating behaviors by adults or children in a supportive and appropriate manner that meets mandated reporting requirements; (8) provide adequate understanding of the age-appropriate, comprehensive, evidence-informed child sexual abuse prevention education which will be offered to their students; and (9) reflect the research on adverse childhood experiences and trauma-informed care. *West Virginia Code § 18-2-41(b)(1)*.

The State Board’s training rule must require public school employees to complete the required training for at least a cumulative four hours every two years, with a skills renewal every two years thereafter. It may allow in-person and e-learning instruction, as well as a series of trainings or modules. The State Board must provide certificates of satisfactory completion for the employee and employer, documenting that the employee completed the required training. *West Virginia Code § 18-2-41(b)(2)*.

House Bill 4424

Providing that the Ethics Act applies to certain persons providing services without pay to state elected officials

In effect June 8, 2018

[Read the Entire Bill](#)

House Bill 4424 makes West Virginia’s Governmental Ethics Act applicable to “public servant volunteers” by including public servant volunteers within the definition of “public official.” *West Virginia Code § 6B-1-3(k)*.

A public servant volunteer is defined as “any person who, without compensation, performs services on behalf of a public official and who is granted or vested with powers, privileges or authorities ordinarily reserved to public officials.” *West Virginia Code § 6B-1-3(l)*.

House Bill 4473

Relating to use of state funds for advertising to promote a public official or government office

In effect June 5, 2018

[Read the Entire Bill](#)

West Virginia’s Governmental Ethics Act is amended to allow situations in which a public official’s name or likeness may appear on certain items, and in certain materials, produced using public funds.

Specifically, a public official's name or likeness may now be placed on any educational materials paid for with public funds if the primary purpose of the material is to provide information about the processes, operations, structure, functions or history of an agency, agencies, or branch of government, or to provide lists of contact information or other identifying information about a public official. These include, but are not limited to, directories, reports, reference books and legislative publications such as the West Virginia Blue Book. *West Virginia Code § 6B-2B-2(d)*.

Likewise, the name and likeness of a public official may now be included in a press release, produced with public funds, which is disseminated by any means, if the release is intended for a legitimate news or informational purpose and does not feature or present the public official in a form, manner or context intended to promote the official. A press release produced with public funds may not request, solicit or promote voting for any official or political party. *West Virginia Code § 6B-2B-2(e)*.

Finally, a public official's name or likeness may appear on a public agency's website and social media accounts or pages if it satisfies the requirements, above, for using the name or likeness on education materials. In the case of a press release containing the official's name or likeness and posted on the public agency's website or social media accounts, the press release must satisfy the requirements, above, for using the name or likeness on a press release. *West Virginia Code § 6B-2B-2B-3(a)*.

Items or materials that are paid for by a public official's campaign funds are not subject to these restrictions. *West Virginia Code § 6B-2B-4(d)*; *West Virginia Code § 6B-2B-4(e)*; *West Virginia Code § 6B-2B-4(f)*.

House Bill 4478
Authorizing public schools to distribute excess food to students

In effect June 5, 2018

[Read the Entire Bill](#)

“The Shared Table Initiative” directs the State Board of Education to provide policy guidance to county boards of education on collecting unused food appropriate for redistribution, and making it available throughout the day to students who may be hungry; providing a method for discrete distribution of that food to be taken home by kids with food insecurity; and donating any unused food to local food pantries and other entities that distribute food to those in need. In turn, each county board must establish a program to assist and encourage schools to participate in the initiative. *West Virginia Code § 18-5D-5(a)(2)*; *West Virginia Code § 18-5D-5(e)*.

At a minimum, the guidance from the State Board must list foods and methodologies that include the types of food that may be distributed; methods of distribution to make excess food available at other times during the school day and for consumption after school; and ways to otherwise donate excess food to persons or organizations providing food to persons or families suffering from food insecurity. The guidance must be consistent with state and county health department and U.S. Food and Drug Administration requirements and guidelines for the distribution of excess foods. Methods for distributing excess food to students within a school may include a sharing table where food service staff, students and faculty may return appropriate food items consistent with the State Board guidelines. *West Virginia Code § 18-5D-5(b)*; *West Virginia Code § 18-5D-5(d)*.

In participating in the initiative, county boards must comply with West Virginia's Good Samaritan Food Donation Act, West Virginia Code § 55-7D-1 et seq., which protects food donors from liability for their good faith efforts. *West Virginia Code § 18-5D-5(c)*.

House Bill 4571

Relating to the final day of filing announcements of candidates for a political office

In effect June 8, 2018

[Read the Entire Bill](#)

On the final day for filing for an office or political party position to be filled in any primary or general election, the Secretary of State's office and each county clerk's office must now be open from 9 a.m. until 11:59 p.m. *West Virginia Code § 3-5-7(c)*.



RECENT DECISIONS OF THE WEST VIRGINIA SUPREME COURT OF APPEALS

1. *West Virginia Department of Education v. McGraw*, No. 16-0679 (May 17, 2017). A government employer implicates its employee's liberty interest in his/her good name when the following elements are alleged: (1) a stigmatizing statement; (2) which was false; (3) was published, or made accessible to the public; (4) in connection with a serious adverse employment action. When these elements are met, the employee must be afforded procedural safeguards under Article III, Section 10 of the West Virginia Constitution.
2. *Smith v. Mingo County Commission*, No. 16-0417 (May 19, 2017) (memorandum decision). The rules governing whether a public official is entitled to indemnification for attorneys' fees are the same in both the civil and criminal context. In order to justify indemnification from public funds, the underlying action must arise from the discharge of an official duty in which the government has an interest; the officer must have acted in good faith; and the agency seeking to indemnify the officer must have either the express or implied power to do so.
3. *E. R. v. Jefferson County Board of Education*, No. 16-0836 (June 16, 2017) (memorandum decision). A factor in favor of the Supreme Court of Appeals considering a technically moot question is the fact that a statute like the Safe Schools Act, which calls for one-year student expulsions, by its very nature will continue to spawn controversies with limited life spans that end before the appellate process can run its course. Circumstantial evidence introduced at a student expulsion hearing is sufficient to support a county board's finding that a student possessed a handgun on school property, in violation of the Safe Schools Act.
4. *Walker v Pocahontas County Board of Education*, No. 16-0659 (September 5, 2017) (memorandum decision). The 15-day period for filing a Level One grievance complaint includes working days. It excludes weekend days, official holidays, and days on which the employee's workplace is legally closed under the authority of the employer's chief administrator due to weather or other cause as provided by statute. The only time an employee is excused from complying with the 15-day timeline is when the employee is not working because of accident, sickness, death in the immediate family or other cause for which the grievant has approved leave from employment. The fact that the grievable event occurred outside the grievant's normal contract term, e.g., during the summer months when he or she was not working, does not excuse compliance with the 15-day rule.
5. *West Virginia Board of Education v. Board of Education of the County of Nicholas*, No. 17-0767 (October 10, 2017). The West Virginia Board of Education is entitled to use its discretion in approving or rejecting an amendment to a Comprehensive Educational Facilities Plan submitted in aid of school closure or consolidation.



6. *Giles v. Kanawha County Board of Education*, No. 16-C-74 (January 5, 2018) (memorandum decision). A public official can sustain an action for libel only upon proof that: (1) the alleged libelous statements were false or misleading; (2) the statements tended to defame and reflect shame, contumely, and disgrace upon the public official; (3) the statements were published with knowledge at the time of publication that they were false or misleading or were published with a reckless and willful disregard of truth; and (4) the publisher intended to injure the public official through the knowing or reckless publication of the alleged libelous material. Statements of opinion are absolutely protected under the First Amendment and cannot form the basis for a defamation action.
7. *Ragione v. The Board of Education of Preston County*, No. 17-0037 (January 5, 2018) (memorandum decision). An employee whose grievance does not allege violations of the West Virginia Human Rights Act, and who does not appeal an adverse Level Three grievance decision to circuit court, may not then bring a civil action in circuit court alleging claims that fall within the grievance procedure and arise out of the same facts and circumstances as the grievance.
8. *Mayle v. Barbour County Board of Education*, No 17-0204 (January 8, 2018) (memorandum opinion). If an aide who applies for a posted early childhood classroom assistant teacher (ECCAT) vacancy does not have ECCAT certification or meet the definition of an ECCAT, the county board may treat her as unqualified for the position. Also, because ECCAT seniority accrues independently of aide seniority, aide seniority does not count as ECCAT seniority.



RECENT DECISIONS OF THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

1. *Carpenter v. Logan County Board of Education*, Docket No. 2016-1807-LogED (April 28, 2017). The seniority granted to regularly employed service employees and the “seniority” granted to summer service employees are controlled by separate statutes and are not meant to be commingled.
2. *Joy v. Jefferson County Board of Education*, Docket No. 2016-1687-JefED (May 16, 2017). A grievant cannot grieve for another employee. Relief entailing declarations that one party was right or wrong, but provides no substantive, practical consequences for either party, is unavailable from the Grievance Board. The Grievance Board does not issue tort-like or punitive damages, and only in extraordinary cases does it issue cease and desist orders, or injunctions. Moreover, the Grievance Board has not been granted jurisdiction over students, nor has it been granted any authority to evaluate student welfare or make changes to a student’s grades or classroom assignments. A grievant’s belief that his supervisor’s management decisions are incorrect is not grievable unless the decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee’s effective job performance or health and safety. It is not the role of the Grievance Board to change agency policies; it has no authority to make a specific change in a policy, absent some law, rule or regulation mandating such a policy be developed or changed.
3. *Wright v. Kanawha County Board of Education*, Docket No. 2017-1370-KanED (May 22, 2017). Where the underlying complaints regarding a teacher’s conduct relate to his or her performance, the effect of State Board Policy 5300 is to require an initial inquiry into whether the conduct is correctable, meaning that it involves professional incompetency and does not affect the morals, safety and health of the system in a permanent, non-correctable manner. If it is correctable, an employee is entitled to an opportunity to improve his or her job performance prior to the termination or transfer of the teacher’s services. However, a review of past improvement plans and disciplinary action can establish an employee was on notice of the inappropriate behavior, and that a continuing pattern of behavior is present which has not proven correctable.
4. *Townsend v. Kanawha County Board of Education*, Docket No. 2016-1702-KanED (May 22, 2017). Under the current grievance procedure, a county board cannot appeal a Level One decision for any reason.
5. *Werthammer v. Cabell County Board of Education*, 2016-1703-CabED (May 30, 2017). Under the statute requiring that the employment of professional personnel shall be made only upon nomination and recommendation of the superintendent, if the board refuses to employ any of the persons nominated, the superintendent shall nominate others and submit

the same to the board at such time as the board may direct. The statute contemplates that the board may reject the superintendent's initial recommendation and still hire a different person recommended by the superintendent as long as it reasonably believes that person to be the most qualified. The statute that governs the filling of vacant professional jobs sets out specific criteria a board must use in determining which candidate is the most qualified. When selecting a candidate for a professional position other than a classroom teacher, a county board must consider each applicable criterion listed, but the statute permits a board to determine the weight to be applied to each factor, so long as the weighting does not result in an abuse of discretion.

6. Hoffman v. Mingo County Board of Education, Docket No. 2016-1206-MinED (June 5, 2017). To demonstrate a prima facie case of reprisal, a grievant must establish by a preponderance of the evidence the following elements: (1) that he engaged in protected activity; (2) that he was subsequently treated in an adverse manner by the employer or an agent; (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment. If a grievant makes out a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. Should the employer succeed in rebutting the prima facie showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive."
7. Marcum v. Mingo County Board of Education, Docket No. 2017-1502-MinED (June 14, 2017). When a grievant is no longer an employee due to voluntary resignation while a grievance over her non-selection for a vacancy is pending, a decision on the merits of the grievance would be a meaningless exercise and would constitute an advisory opinion. The Grievance Board does not issue advisory opinions.
8. Pilkington v. Raleigh County Board of Education, Docket No. 2017-1498-RalED (June 15, 2017). Where a school employee's insubordinate and willfully negligent acts directly compromise the safety of school children she has been entrusted to transport, such actions are not correctable within the meaning of the State Board policy that entitles an employee to an improvement period before her contract of employment is suspended or terminated. The employee can be disciplined for insubordination and willful neglect of duty even if no students are injured.
9. Strahan v. Monongalia County Board of Education, Docket No. 2017-0148-MonED (July 14, 2017). Although a county board's decision to allow a service employee the opportunity to obtain a required license prior to his assuming the duties of a position is not precluded by statute, utilizing this alternative does not negate the requirement that the position be filled. Also, only if no qualified individual applies for a service vacancy, i.e., no applicant



holds the class title(s) in question or has successfully completed the competency test, is a county board obligated to offer competency testing so that other employees may qualify by successfully completing the examination. However, nothing in the school statutes precludes a county board from providing applicants with the opportunity to take the competency test for a posted classification title, even though it already has applicants who are fully qualified. Finally, when a multiclassified position is posted, it is a county board's choice as to which of the classifications in the posting it looks to in assessing the statutory requirement that seniority of the applicants be a determining factor in filling the position, so long as the decision is not unreasonable or an abuse of discretion.

10. Wagner v. Raleigh County Board of Education, Docket No. 2017-0809-RalED (July 20, 2017). If an applicant for a multiclassified service vacancy currently holds the very same multiclassification as the posted job, then a county board may prefer that candidate over another who currently holds a job in one, but not all, of the components of the posted multiclassified position.
11. Nowlin v. Mercer County Board of Education, Docket No. 2017-1075-MerED (July 20, 2017). A county board must make a reasonable, good faith attempt to contact service employees, in rotation list order, to present extra duty or substitute assignments. Attempts to contact an employee by telephone are generally acceptable.
12. Courts v. Kanawha County Board of Education, Docket No. 2017-1369-KanED (July 21, 2017). In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. The Grievance Board has applied the following factors to assess a witness's testimony: demeanor; opportunity or capacity to perceive and communicate; reputation for honesty; attitude toward the action; and admission of untruthfulness. Additionally, the administrative law judge should consider the presence or absence of bias, interest or motive; the consistency of prior statements; the existence or nonexistence of any fact testified to by the witness; and the plausibility of the witness's information.
13. Weaver v. Morgan County Board of Education, Docket No. 2015-1445-CONS (July 26, 2017). Under the school laws, the "cost" of a medical or physical examination required by a county board of an employee shall be paid in full by the employer. The "cost" does not include mileage reimbursement incurred by a bus operator traveling to a county board-approved physician for the annual physical examination.
14. Spatafore v. Harrison County Board of Education, Docket No. 2017-0980-HarED (July 26, 2017). There is no requirement that all qualified applicants for a classroom teaching position be interviewed. A faculty senate may, but is not required to, adopt a policy permitting the county superintendent or designee to narrow the pool of qualified applicants to no fewer than three qualified applicants who appear to be the most qualified based on



an examination of the first nine qualification criteria appearing in the statute governing the filling of teacher vacancies (unless fewer than three qualified applicants apply). In fact, there is no requirement that any interviews be conducted.

15. *Dempsey v. Kanawha County Board of Education*, Docket No. 2017-0491-KanED (August 10, 2017). A vacancy in an existing service position must be filled within 20 working days after the vacancy commences, even when the vacancy occurs near the end of the school year. A county board cannot, instead of posting the job, fill it with a substitute for a period that exceeds 20 working days.
16. *Chrisman v. Jefferson County Board of Education*, Docket No. 2017-2322-CONS (August 17, 2017). Whether a particular position which has been assigned a title that is not defined by statute is an administrative position or a classroom teaching position is an issue determined solely by the duties of the position. The focus is on the relationship between the employee and the students, and how the educator spends the majority of his or her time, or what his or her primary duties are.
17. *Walls v. Cabell County Board of Education*, Docket No. 2017-0955-CabED (August 25, 2017). It is not arbitrary or capricious for a county board to deny an employee the opportunity to perform an extracurricular run when logistical problems exist.
18. *Morris v. Jefferson County Board of Education*, Docket Not. 2017-2189-JefED (August 29, 2017). Because the non-renewal of an employee's probationary contract is not a termination and is not a disciplinary matter, a grievant whose contract was not renewed has the burden of proof by a preponderance of the evidence.
19. *Adkins v. Wayne County Board of Education*, Docket No. 2016-1817-WayED (September 13, 2017). Service employees who worked during the prior summer in a position that still exists in the coming summer are entitled to retain that position. In determining whether a summer service assignment is the same as the one held in a prior summer, the location of the assignment is not a key factor. Some flexibility exists in determining whether a position one summer is the same assignment held in the prior summer. It is enough that there is consistency in the type of work being performed, even if the location and exact nature of the work is somewhat different. For example, bus operators' positions remain the same even though the routes change from summer to summer; school lunch programs at different schools are part of one overall lunch program; and a summer transportation program employing aides remains the same program even though the routes change from summer to summer.
20. *Durstein v. Cabell County Board of Education*, Docket No. 2017-1955-CabED (September 22, 2017). Public employees are entitled to be protected from firings, demotions and other adverse employment consequences resulting from the exercise of their free speech rights, as well as other First Amendment rights. However, the state, as an employer, also has an

interest in the efficient and orderly operation of its affairs that must be balanced with the public employees' right to free speech, which is not absolute. Thus, an employee's speech, to be protected, must be spoken as a citizen on a matter of public concern. If the employee did not speak as a citizen on a matter of public concern, then the employee has no First Amendment protection. Also, statements that are made with the knowledge that they are false, or with reckless disregard of whether they are false, are not protected. Finally, statements made about persons with whom the employee has close personal contacts, and that would disrupt discipline or harmony among coworkers or destroy personal loyalty and confidence, may not be protected.

21. *Ference v. Brooke Board of Education*, Docket No. 2017-2282-BroED (September 25, 2017). Angry threats by an employee to bring a gun to work and shoot a specific employee or employees consistently result in the employee's discharge.
22. *Thomas v. Logan County Board of Education*, Docket No. 2017-1082-CONS (October 17, 2017). Elements of a grievance that are raised, but not pursued or developed, will be considered abandoned. Mere allegations alone without substantiating facts are insufficient to prove a grievance. Selection decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will generally not be overturned. Also, the approval of course work for licensure is the purview of the State Department of Education, not the county board.
23. *Gabbert v. Boone County Board of Education*, Docket No. 2017-2029-BooED (October 25, 2017). The burden of proof in cases where a public school employee is suspended by the county superintendent or county board rests with the employer. In situations where a school employee has been suspended incident to a criminal investigation, the question is whether the county board violated law, rule, or policy, or otherwise acted arbitrarily and capriciously, in suspending the employee without pay while the matter was investigated and a decision made regarding discipline. The county board does not have to prove that actual disciplinary action would be justified, but that suspension pending an investigation was proper.
24. *Finley v. Mercer County Board of Education*, Docket No. 2017-1146-MerED (October 31, 2017). A mechanical error of an automatic callout system does not deny a bus operator the opportunity to perform similar extra-duty assignments as other bus operators.
25. *Bradley v. Ohio County Board of Education*, Docket No. 2017-1538-OhiED (November 6, 2017). Under the grievance procedure, a single act that causes continuing damage does not convert an otherwise isolated act into a continuing practice. When a grievant challenges a salary determination that was made in the past as being too low, this can only be classified as a continuing damage arising from the alleged wrongful act that occurred in the past. The date a grievant finds out an event or continuing practice was illegal is not the date for



determining whether a grievance is timely filed. If an employee knows of the event or practice, he or she must file within 15 days of the event or occurrence of the practice. A grievant's failure to timely file a grievance is not excused by the fact that he did not know he could or should file one.

26. *Bird v. Kanawha County Board of Education*, Docket No. 2017-1534-KanED (November 9, 2017). With regard to the ability or qualification to perform a posted job, the status of the applicant when he or she begins the job is the critical time period.
27. *Manning v. Raleigh County Board of Education*, Docket No. 2018-0028-RaED (November 22, 2017). When filling positions in the ECCAT classification, which are required by statute to be multiclassified as aide/ECCAT, it is rational for a county board to consider applicants who are certified and currently employed aide/ECCATs over employees who are only classified as aides.
28. *Finney v. Hancock County Board of Education*, Docket No. 2017-1523-HanED (November 28, 2017). If an administrative law judge finds that a party has acted in bad faith, and the action is extreme, the cost of the hearing may be allocated to the party found to be acting in bad faith, but is to be based on the relative ability of the party to pay the costs.
29. *Estep v. Boone County Board of Education*, Docket No. 2017-1094-BooED (December 1, 2017). "Ultra vires" acts of a government agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts.
30. *Carnell v. Kanawha County Board of Education*, Docket No. 2017-0986-CONS (December 14, 2017). A qualified regularly employed bus operator who applies for a Supervisor of Transportation vacancy, and who does not at the time hold a Supervisor of Transportation job, should not be considered for the posted vacancy ahead of other applicants who are regularly employed by the county board in Supervisor of Transportation jobs.
31. *Neal v. Cabell County Board of Education*, Docket No. 2017-2157-CabED (December 29, 2017). A review of past improvement plans and disciplinary action can establish an employee was on notice of his inappropriate behavior, and that a continuing pattern of behavior is present which has not proven correctable. To rule otherwise would result in an endless cycle of employee improvement, relapse into old work habits, and the need for additional evaluations and plans of improvement.
32. *Barrett v. Berkeley County Board of Education*, Docket No. 2017-2060-BerED (January 16, 2018). Insubordination includes, and perhaps requires, a willful disobedience of, or refusal to obey, a reasonable and valid rule, regulation or order issued by an administrative



superior. Willful neglect of duty encompasses conduct constituting a knowing and intentional act, rather than a negligent act.

33. *Joy v. Jefferson County Board of Education*, Docket No. 2017-2478-JefED (January 17, 2018). The grievant prevails by default in a grievance if the employer does not make a response within the time limits established in the statute, unless the employer is prevented from doing so directly as a result of injury, illness or a justified delay not caused by negligence or intent to delay the grievance process. A response includes not only the timely issuance of a Level One decision, but also the holding of conferences and hearings within proper limits. Default grievances are generally bifurcated. In the first hearing, it is determined whether a default occurred. If a default is found to have occurred, a second hearing is conducted to determine whether any of the remedies sought by the grievant are “contrary to law or contrary to proper and available remedies.” If default occurs, the grievant prevails, and is entitled to the relief requested, unless the employer is able to state a defense to the default or demonstrate the remedy requested is either contrary to law or contrary to proper and available remedies. If the employer demonstrates that a default has not occurred because it was prevented from meeting the time lines for one of the recognized reasons, the grievant is not entitled to relief. If there is no default or the default is excused, the grievance will be remanded to the appropriate level of the grievance process.
34. *Phillips v. Boone County Board of Education*, Docket No. 2017-2333-CONS (January 19, 2018). Before an employee is disciplined for “correctable” misconduct, the employee is entitled to an opportunity to improve. It is not the label given to the conduct that controls, but whether the conduct was related to employee’s performance and is correctable. Accordingly, even when an employer labels an employee’s conduct as “willful neglect of duty” or “insubordination,” if the underlying complaints regarding an employee’s conduct relate to the person’s employment, an inquiry must be made into whether that conduct is correctable. Concerning what constitutes “correctable” conduct, the question is whether the conduct directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner. If so, the employee is not entitled to an opportunity to improve.
35. *Joy v. Jefferson County Board of Education*, Docket No. 2017-1495-JefED (January 22, 2018). Under the grievance procedure, “reprisal” is the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it. To demonstrate a prima facie case of reprisal, a grievant must establish by a preponderance of the evidence the following elements: (1) that he engaged in protected activity (i.e., filing a grievance); (2) that he was subsequently treated in an adverse manner by the employer or an agent; (3) that the employer’s official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse



treatment. The critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a ‘significant,’ ‘substantial’ or ‘motivating’ factor in the adverse personnel action.” If a grievant makes out a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action.

36. Wilfong v. Randolph County Board of Education, Docket No. 2018-0177-RanED (January 25, 2018). If, due to her seniority, a half principal/half teacher will retain employment after her position is eliminated for lack of need, and if, due to lack of certification, she cannot be placed in the only lateral administrative position in the county (another half principal/half teacher position), the employee is not entitled to direct placement into any other position in the county. Nor is the county board required to terminate the employee’s continuing contract. Instead, it may lawfully place her on transfer for subsequent assignment, with the directive to apply for all available positions for which she is certified.
37. Thomas v. Berkeley County Board of Education, Docket No. 2015-0431-BerED (February 2, 2018). A teacher’s grievance challenging the county board’s termination of his employment is moot and will be dismissed when, following the termination, he was convicted of a felony, he entered into a sentencing agreement providing that he will not pursue or accept any employment in a teaching capacity where minors are present, and the State Superintendent permanently revoked his teaching certificate.
38. Mize v. Cabell County Board of Education, Docket No. 2017-2232-CONS (February 7, 2018). Evaluations and subsequent improvement plans are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance and improve the education received by the students. Thus, in a grievance challenging an evaluation and improvement plan, the grievant has the burden of proving her case by a preponderance of the evidence. The Grievance Board will not intrude on the evaluations and improvement plans of employees unless there is evidence to demonstrate such an arbitrary abuse on the part of a school official to show the primary purpose of the underlying policies has been confounded. An evaluation is properly conducted if it is performed in an “open and honest” manner, and is fair and professional. The mere fact that a grievant disagrees with his unfavorable evaluation does not indicate that it was unfairly performed, nor is it evidence of some type of inappropriate motive or conduct on the part of the evaluator.
39. Hinkle-Brown v. Mingo County Board of Education, Docket No. 2017-2223-MinED (February 7, 2018). An assistant superintendent’s term of employment shall be not less than one year nor more than four years, and shall not extend beyond that of the incumbent county superintendent. An assistant superintendent of schools is an at-will employee who, upon recommendation by the county superintendent and approval by the board, may be



removed for good reason, no reason or bad reason, but not for a reason that violates as substantial public policy. An assistant superintendent who is being removed and replaced cannot acquire enhanced terms of employment without official action by the county board, including the right to notice and a showing of reasons under the transfer statute.

40. *Keller v. Board of Education*, Docket No. 2018-0763-BOE (February 7, 2018). Under the Grievance Board's rules, grievances may be disposed of in three ways: by decision on the merits, non-appealable dismissal order, or appealable dismissal order. Non-appealable dismissal orders may be based on grievances dismissed for the following: settlement, withdrawal, and a party's failure to pursue. Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim, or a party's failure to abide by an appropriate order of an administrative law judge. As the Grievance Board's dismissal rule is similar to a Rule 12(b)(6) motion under the West Virginia Rules of Civil Procedure, that standard should be applied when, in a grievance, the employer moves to dismiss the grievance for failure to state a claim upon which relief can be granted.



RECENT ETHICS COMMISSION ADVISORY OPINIONS

1. *Ethics Commission Advisory Opinion No. 2017-15.* (May 4, 2017). County board members are deemed to have “voice, influence, or control” over every contract to which their school system is a party, regardless of the details of such contracts. And with very few exceptions, it is a crime for any county board member to become financially interested in, directly or indirectly, the proceeds of any school system contract. Where a county board member’s spouse is the owner of a piece of real estate which is leased to a business, the county board violates the Pecuniary Interest Statute by entering into a contract with that business. This is not because the county board member is certain to benefit directly from the lease between that business and his/her spouse. That the county board member *may possibly* benefit, directly or indirectly, from that lease is enough under the Pecuniary Interest Statute to prohibit the county board from entering into any contract with that business. If not being able to contract with a business that leases property from a county board member’s spouse would result in excessive expense, undue hardship, or other substantial interference with a county board’s operations, the county board may request an exemption by filing a written application with the Ethics Commission asking permission to enter into such a contract.

It should be noted that this advisory opinion seems to indicate that individual schools may enter into contracts. They cannot. Individual schools are not legal entities capable of entering into contracts. All school-related contracts for goods or services must be between the county board and the supplier of the goods or services.

2. *Ethics Commission Advisory Opinion No. 2018-05* (March 1, 2018). County board members are deemed to have "voice, influence, or control" over every contract to which their school system is a party, regardless of the details of such contracts. And with very few exceptions, it is a crime for any county board member to become financially interested in, directly or indirectly, the proceeds of any school system contract. A county board member may be employed by another government employer which receives, indirectly, limited funding from that county board without violating the Ethics Act or the Pecuniary Interest Statute. However, this board member’s position must not be funded by the county board and the member must not have any influence, voice, or control over any decision regarding the School Board member’s employment with the other government employer or any decision to fund that other government employer.



RECENT OPEN MEETINGS ADVISORY OPINION

1. *Open Meetings Advisory Opinion No. 2018-02* (March 1, 2018). The Open Meetings Act authorizes county boards to convene an executive session to consider “matters arising from the appointment, employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation of a public officer or employee, or prospective public officer or employee unless the public officer or employee or prospective public officer or employee requests an open meeting.” When a county board is considering a personnel matter about a specific employee, and that employee requests that the board conduct an open meeting, the county board would ordinarily conduct an open meeting regarding that specific employee. However, when discussing one employee, it may sometimes be necessary to discuss highly confidential private matters about other employees who are not present at the meeting. In this situation, county boards must consider whether they can conduct an open meeting regarding the specific employee, and executive sessions regarding the other employees. But if it is not possible to have a coherent discussion of the relevant matter by conducting part of the meeting in open session and part of the meeting in executive session, it would be appropriate to discuss the entire matter in executive session.



These materials are presented with the understanding that the information provided is not legal advice. Due to the rapidly changing nature of the law, information contained in these materials may become outdated. Anyone using information contained in these materials should always research original sources of authority and update this information to ensure accuracy when dealing with a specific matter. No person should act or rely upon the information contained in these materials without seeking the advice of an attorney.