



**WHAT PUBLIC SCHOOL LEADERS OUGHT  
TO KNOW ABOUT RECENT LEGISLATION  
AND RELATED LEGAL DEVELOPMENTS**

**RESA 7 ADMINISTRATORS FORUM**

Harrison County Parks and Recreation Complex

**Attorney Howard E. Seufer, Jr.**

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## ***EDUCATION PRACTICE GROUP ATTORNEYS***

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

**Howard E. 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

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

## ***EDUCATION PRACTICE GROUP STAFF***

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

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

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

(Contact Information may be found at [www.bowlesrice.com](http://www.bowlesrice.com) or by calling (304) 347-1100)

**Mark Adkins** – Construction Litigation.

**Bob Bays** – Eminent Domain.

**Aaron Boone** – Civil Litigation on behalf of School Boards.

**Joe Caltrider** – Personal Injury Defense

**Josh Cottle** – Employee Grievances & Appeals

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

**Mark Dellinger** – EEOC/Human Rights Investigations and Proceedings.

**Kit Francis** – Securing and Enforcing the Rights of School Boards as Creditors.

**Jill Hall** – Affordable Health Care Act; Wage and Hour Laws.

**Roger Hanshaw** - Parliamentary Procedure; Roberts Rules.

**Ashley Hardesty O’Dell** – Protecting School Boards in Civil Litigation.

**Justin Harrison**- Employee Leave Issues; Americans with Disabilities Act.

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

**Bob Kent** – Protecting School Boards in Civil Litigation.

**Leonard Knee** – Environmental Law.

**Brian Peterson** – Defending Employers in Civil Litigation.

**Steve Prunty** – Easements.

**Marion Ray** – Workers Compensation Issues.

**Jessie Reckart** –Grievances and Appeals; Unemployment Compensation.

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

**Ken Webb** – Construction and Business Litigation.



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## **HIGHLIGHTS OF LEGISLATION ENACTED AT THE 2016 REGULAR SESSION AFFECTING PUBLIC EDUCATION IN WEST VIRGINIA**

*By the Education Law Group at Bowles Rice LLP*

### **Senate Bill 13**

#### **Increasing Penalties for Overtaking and Passing Stopped School Buses**

*In effect June 10, 2016*

Senate Bill 13 increases the penalties for overtaking and passing a school bus that is stopped to receive or discharge school children. A driver's first offense will now be punished by a fine of from \$250 to \$500 (instead of \$150 to \$500) and/or a maximum of six months in jail. A second offense will bring a fine of from \$500 to \$1,000 (instead of a flat \$500) and/or a maximum of six months in jail. Third offenses will be punished with a fine of \$1,000 (instead of \$500), plus a jail term of from 48 hours to six months. *W. Va. Code § 17C-12-7(b)*.

Additionally, when a driver's identity is unknown but the license plate number is known, a court is now permitted to infer, for purposes of the probable cause determination, that the operator was the person who is listed first on the motor vehicle's registration as the owner or lessee. Where that is the only evidence against the owner or lessee, he or she will be subject to only a fine, as described above. *W. Va. Code § 17C-12-7(c)*.

### **Senate Bill 32**

#### **Relating to Withdrawal of Candidates for Office and Filling Vacancies**

*In effect February 11, 2016*

In order to withdraw as a candidate for office and have one's name removed from the ballot, an individual will now have to file, by these deadlines, a notarized form provided by the Secretary of State: for primary elections or nonpartisan elections held in conjunction with a primary election, no later than the third Tuesday following the close of the candidate filing period; for general elections or nonpartisan elections held in conjunction with a general election, no later than 84 days before the general election. *W. Va. Code § 3-5-11(a); W. Va. Code § 3-5-11(b)*.

### **Senate Bill 146**

#### **Establishing Instruction Standards for Early Childhood Education**

*In effect July 1, 2016*

Under prior law, beginning with the 2016-2017 school year all school districts were to offer full-day early childhood education programs five days per week. Under certain circumstances, they were also permitted to offer, as an additional option, early childhood education programs that were less than full-day and less than five days per week. Those standards have now changed. Beginning with the 2016-2017 school year, all early childhood education programs must be full-day,



providing instruction for at least 1,500 minutes per week and 48,000 minutes per year. *W. Va. Code § 18-5-44(d)*.

A parent who chooses to enroll a child in early childhood education will now be allowed to withdraw the child without having to show “good cause.” *W. Va. Code § 18-5-44(d)(4)*.

The State Board of Education is relieved of the duty previously imposed by *W. Va. Code § 18-5-44(n)* to annually make a report to the Legislative Oversight Commission on Education Accountability about implementation of the early childhood education law.

### **Senate Bill 261**

#### **Bringing State Code Relating to Daylight Saving Time in Conformity With Federal Code**

*In effect May 15, 2016*

As a result of this legislation, West Virginia law now conforms to federal law in regard to the starting and ending dates of Daylight Saving Time (DST). For all public entities, including public schools, DST now begins at 2 a.m. on the second Sunday of March (instead of the last Sunday of April) and terminates at 2 a.m. on the first Sunday of November (instead of the last Sunday of October). *W. Va. Code § 5-1-25*.

### **Senate Bill 267**

#### **Modifying Removal Procedure for Certain County, School District and Municipal Officers**

*In effect June 10, 2016*

This bill significantly modifies the procedure for removing certain public officials from office, including members of county boards of education. As grounds for removal, Senate Bill 267 jettisons malfeasance in office and gross immorality, and it redefines the remaining three grounds: official misconduct, neglect of duty and incompetence. For example, the new definition of incompetence no longer includes adultery. Nor does it include (as the former definition did) a public official’s appointment or retention of an employee who misappropriates public funds or is habitually drunk or addicted to the use of narcotics. Unlike the previous definitions, the new law allows removal of a public official upon conviction of any felony during his or her term of office, or conviction of a misdemeanor involving dishonesty or gross immorality. *W. Va. Code § 6-6-1*.

Removal proceedings against a county board of education member may now be instituted in only four ways: by (1) resolution of the county commission, (2) petition of the prosecuting attorney, (3) petition of the chief inspector and supervisor of public offices (when the removal is for the intentional or unlawful misuse of public monies), or (4) petition signed by persons who were registered to vote in the most recent election at which the board member was chosen. Other county officials can no longer, by themselves, initiate proceedings to remove a school board member from office. *W. Va. Code § 6-6-7(b)*; *W. Va. Code § 6-6-7(d)*.

A petition by registered voters must set forth the name and office of the challenger, the alleged wrongful acts and the grounds for removal. The same information must appear on each page of



the petition on which signatures appear. In counties with a population greater than 50,000, the number of qualified persons who must sign a petition is the lesser of 2,000 or 10 percent of the registered voters who voted in the most recent election at which the board member was chosen. In counties with a population of 10,000 or less, the number of qualified persons who must sign a petition is the lesser of 100 or 10 percent of the registered voters who voted in the most recent election at which the board member was chosen. In all other counties, the number of qualified persons who must sign a petition is the lesser of 500 or 10 percent of the registered voters who voted in the most recent election at which the board member was chosen. The circuit clerk is required to determine whether the signatures on a petition are those of eligible residents. *W. Va. Code § 6-6-7(b); W. Va. Code § 6-6-7(e).*

It is still the case that removal proceedings must be initiated in the circuit court of the county in which the board member serves. However, now the circuit court will hold a preliminary hearing to determine the validity of the resolution or petition. The court is also authorized to evaluate any resolution or petition for procedural defect and determine whether, if the grounds asserted in a resolution or petition are true, they would be sufficient to remove the board member from office. The court is empowered to dismiss the resolution or petition on any of those grounds. Otherwise, as in the past, the matter will be forwarded to the Supreme Court of Appeals for the appointment of a three-judge court to hear and decide the case without a jury. *W. Va. Code § 6-6-7(f); W. Va. Code § 6-6-7(g).*

If the proceedings against a school board member are dismissed or otherwise resolved in the board member's favor, Senate Bill 267 makes the county board of education responsible for the board member's court costs and attorney fees, but only if the member is found to have been acting in good faith. *W. Va. Code § 6-6-7(j).*

**Senate Bill 274**  
**Relating to Increasing Civil Jurisdictional Amount in Magistrate Courts**  
*In effect June 5, 2016*

As a result of Senate Bill 274, magistrate courts now have jurisdiction of civil actions where the value or amount in controversy, exclusive of interest and cost, is not more than \$10,000. This is an increase of \$5,000 over the previous jurisdictional amount. *W. Va. Code § 50-2-1.*

**Senate Bill 369**  
**Reducing Legislative Education Reporting Requirements**  
*In effect May 22, 2016*

A number of reporting requirements are abolished, including the State Board of Education's duty under *W. Va. Code § 18-2-5g* to annually make a report to the Legislative Oversight Commission on Education Accountability (LOCEA) identifying unnecessary reports and recommending how to reduce or consolidate principal and teacher reports. Senate Bill 369 also eliminates the State Board's duty under *W. Va. Code § 18-2E-5(k)(6)* to annually report to LOCEA about appeals by county boards of education or schools challenging findings by the Office of Education



Performance Audits, to annually report to LOCEA under W. Va. Code § 18-21-5(b) on the effectiveness of staff development paid for by the strategic staff development fund, and to report to LOCEA under W. Va. Code § 18A-2-3(e) about the hiring of prospective employable professional personnel by county boards of education.

Other repealed reporting requirements include the duty of the State Superintendent of Schools, county superintendent and lead community-based organizations under W. Va. Code § 18-3-12 to annually make a status report to LOCEA and the State Board of Education about the Special Community Development School Pilot Program; the State Superintendent's duty under W. Va. Code § 18-5-44(n) to report to LOCEA on progress in implementing early childhood education programs; and the duties of the Secretary of the Department of Health and Human Resources and State Superintendent under W. Va. Code § 18-5-44(s) to report to LOCEA and the Joint Committee on Government and Finance about the projected impacts of approved county plans for implementing early childhood education programs.

Additionally, Senate Bill 369 ends the State Superintendent's obligation under W. Va. Code § 18-20-5(a)(3)(B) to annually report the findings of a review of the state and federal rules, policies and standards for serving the needs of exceptional children, as well as the obligation of the Advisory Council on the interagency plan for exceptional children under W. Va. Code § 18-20-8(b)(4) to annually report to the Joint Committee on Education, LOCEA, the Legislative Commission on Juvenile Law and other agencies on policies, procedures and legislation for effectively providing early intervention services.

The bill repeals the requirement under W. Va. Code § 18A-4-7a(l) that county boards of education send to the State Board of Education copies of their laterality policies and any amendments thereto, as well as the duty of the State Superintendent to make a corresponding report to LOCEA. County boards of education are no longer obliged by W. Va. Code § 18A-5-1a(h) to report to the State Board the number of students determined to be dangerous students. Nor is the State Board required to compile and report that information to LOCEA.

Because Senate Bill 369 repeals W. Va. Code § 18-2E-3g, which provided in 2004 for a special five-year demonstration professional development school project to improve the achievement of all children, the State Superintendent is no longer required to make annual reports to the Legislature about the project.

#### **Senate Bill 400**

#### **Reducing Amount of Sales Tax Proceeds Dedicated to School Major Improvement Fund**

*In effect June 6, 2016*

For fiscal year 2017, this bill reduces by \$999,996 the annual amount of sales tax proceeds dedicated to the School Major Improvement Fund, and by \$3 million the amount of sales tax proceeds dedicated to the School Construction Fund. *W. Va. Code § 11-15-30.*



**Senate Bill 459**  
**Requiring County Board of Education to Pay Tuition to Mountaineer Challenge Academy**  
*In effect June 8, 2016*

Under Senate Bill 459, the State Board of Education must adopt a policy requiring county boards of education to pay tuition to the Mountaineer Challenge Academy for students that reside in their school district but graduate from the Academy with a high school diploma. The tuition is to equal 75 percent of the amount allotted per pupil under the school aid formula. *W. Va. Code § 18-2-6(g)(6)*.

**Senate Bill 476**  
**Relating to Driving Restrictions in School Zones**  
*In effect June 9, 2016*

The Division of Highways is now responsible for erecting signage indicating the place of entry and exit of every school zone. Senate Bill 476 directs that if a county board of education votes to expand a school zone to a road that is adjacent to school property, and if it notifies the Division in writing, the Division must, within 90 days, expand the school zone and erect new signage indicating the expanded zone's location and speed limit. Such expansions are limited to 125 feet along an adjacent road unless the Division determines that an extension is necessary for the safety of school children. *W. Va. Code § 17C-6-1*.

Senate Bill 476 reduces the fine for violating a school zone speed limit when required signage is not present at the time of the violation. In such cases, the offense is a misdemeanor punishable by a fine of not more than \$25. *W. Va. Code § 17C-6-1(f)*.

**Senate Bill 483**  
**Marshall County and Wyoming County LSIC Waiver**  
*In effect July 1, 2016*

This legislation grants waivers sought by local school improvement councils in Marshall and Wyoming Counties as part of dropout prevention initiatives. Both counties are authorized to increase the compulsory school attendance age from 17 to 18. *W. Va. Code § 18-5A-3a(b)(2)*; *W. Va. Code § 18-5A-3a(b)(3)*.

**Senate Bill 484**  
**Relating to Reemployment Rights of Military Personnel**  
*In effect June 7, 2016*

National Guard members in the service of the state will now enjoy the same reemployment rights as members of the Armed Forces reserves, including rights protected by the federal Uniformed Services Employment and Reemployment Rights Act of 1994. *W. Va. Code § 15-1F-8*.





**Senate Bill 504**  
**Relating to Confidentiality of Juvenile Records**  
*In effect June 10, 2016*

A new provision of the West Virginia Code provides that the recorded interview of a child in any judicial or administrative proceeding shall not be published or duplicated except by court order. All written documentation in any form related to the recorded interview is also confidential. *W. Va. Code § 62-6B-6(a)*.

The recorded interviews covered by the rule are electronic recordings and transcripts of interviews conducted by any of the following: an employee or representative of a child advocacy center; a psychologist, psychiatrist, physician, nurse, social worker or other person appointed by a court to interview the child in certain cases; a child protective services worker, law enforcement officer, prosecuting attorney or any representative of his or her office; or any other person investigating allegations of criminal behavior or behavior alleged to constitute abuse or neglect of a child. *W. Va. Code § 62-6B-2(6)*.

Prior to the commencement of formal judicial or administrative proceedings, any of the persons or agencies listed above are entitled to have access to or copies of the recorded interview of a child. Those persons or agencies may, in turn, give reasonable access to the recorded interview to psychologists, psychiatrists, physicians, nurses and social workers who are providing services to the interviewed child. Access may also be given to a legal parent, guardian or custodian of the child, but only when the person is not alleged to have been involved or engaged in conduct that may give rise to a judicial or administrative proceeding, and only when access would not undermine or frustrate an ongoing investigation. *W. Va. Code § 62-6B-6(b)*.

A person who knowingly and willfully duplicates the recorded interview of a child in violation of a court order or in violation of the rules summarized above may be convicted of a misdemeanor. The misdemeanor is punishable by between 10 days and one year in jail and/or a fine of between \$2,000 and \$10,000. *W. Va. Code § 62-6B-6(d)*.

**Senate Bill 520**  
**Allowing PEIA Ability to Recover Benefits of Claims Obtained Through Fraud**  
*In effect June 8, 2016*

Senate Bill 520 addresses willful misrepresentations to gain benefits or payment under the Public Employees Insurance Act.

Existing law authorizes lawsuits to recover PEIA benefits that people knowingly secure or attempt to secure, but to which they were not entitled. A civil suit is also authorized against persons who illegally receive benefits by knowingly misrepresenting the presence or extent of benefits to which they are entitled under a collateral insurance source, willfully misrepresenting any material fact relating to information requested by PEIA, willfully overcharging for service provided, or willfully misrepresenting a diagnosis or the nature of service provided. *W. Va. Code § 5-16-12(a)*.



The bill empowers the PEIA, through administrative proceedings, to recover benefits or claims paid to employees or their dependents who obtained them through fraud, and to recover funds due from employers that knowingly allowed or provided benefits or claims to be fraudulently paid. To that end, the PEIA director or designee is authorized to administer oaths, issue administrative subpoenas, take evidence and require the production of any documents or records that may be relevant or material to the inquiry. Compliance with the subpoenas may be enforced by the circuit court of the county in which the administrative hearing is being held. If, through this process, a person is found liable for any overpayment received, the director is to withhold and set off any payment of any benefits or payment owed to that person until the overpayment is recovered. *W. Va. Code § 5-16-12(b)*; *W. Va. Code § 5-16-12a(c)*; *W. Va. Code § 5-16-12a(d)*.

The legislation reduces the punishment for the felony offense of knowingly securing or attempting to secure PEIA benefits, or knowingly attempting to secure greater benefits than the law permits, by willfully misrepresenting or aiding in misrepresenting any material fact relating to employment, diagnosis or services rendered. The crime will now be punishable by a fine of not more than \$1,000 (instead of not more than \$5,000) and/or imprisonment for between one and two years (instead of for at least two years). *W. Va. Code § 5-16-12(c)*.

A new misdemeanor offense is created for cases where the violation results in a loss of less than \$1,000 or overpayment of less than \$1,000 by the PEIA or the State of West Virginia. The punishment in such cases will be a fine of \$100 to \$500 and/or a jail term of 24 hours to 15 days. Where the loss or overpayment by the PEIA or State is \$1,000 or more, the crime is a felony punishable by a fine of \$1,000 to \$5,000 and/or imprisonment for one to five years. *W. Va. Code § 5-16-12(d)*.

**House Bill 2366**  
**Relating Generally to the Solicitation of Minors by Use of a Computer**  
*In effect June 10, 2016*

House Bill 2366 creates a new felony offense. It is committed when an adult who is at least four years older than a minor solicits the minor, through use of a computer, for specified illegal sexual acts and commits any overt act designed to get into the physical presence of the minor, or someone believed to be a minor, to engage in illegal sexual activity with that person. The crime is punishable by a fine of up to \$25,000 and/or imprisonment for five to 30 years. *W. Va. Code § 61-3C-14b(b)*.

The existing felony offense of using obscene matter to seduce a known minor is clarified to require that the minor must be at least four years younger than the adult perpetrator. The offense is also broadened to include using obscene matter to seduce a person whom the adult perpetrator believes to be a minor who is at least four years younger than the perpetrator. *W. Va. Code § 61-8A-4*.



**House Bill 3019**  
**Requiring Official Business and Records of the State and its Political Subdivisions be  
Conducted in English**  
*In effect May 25, 2016*

A new section of the West Virginia Code requires the State and its subdivisions, including school districts, to conduct all official business in the English language. All official records, documents, rules, orders and publications must be printed in English. All official programs, meetings, transactions and actions conducted by or on behalf of the State and its subdivisions must be in English. *W. Va. Code § 2-2-13(a)*.

There are exceptions. Other languages may be used by public officials and in official documents for a number of reasons, some of which are to protect public health and safety; teach or study other languages; comply with the federal Individuals with Disabilities Act; and use proper names, terms of art, legal terms or phrases from languages other than English. It is also permissible to use other languages to comply with the Constitution and laws of the United States or the Constitution of West Virginia. Except in exigent circumstances, whenever an official government document is translated into another language, an English translation must be provided in the same document to give the reader the opportunity to see the English translation of all phrases used. *W. Va. Code § 2-2-13(b)*.

According to House Bill 3019, the new law is not to be construed to diminish or discourage the use, study or development of any Native American language; prohibit an elected official from speaking another language while campaigning or providing constituent services; disparage any language; discourage anyone from learning or writing any language; or prohibit informal communications among representatives of various governments if the activity does not impair the conduct of official actions and it is made clear that the communications are unofficial and not binding on the state or political subdivision. *W. Va. Code § 2-2-13(c)*.

Employment examinations administered by the state or a political subdivision may be given in a different language if available. *W. Va. Code § 2-2-13(d)*.

**House Bill 4005**  
**Repealing Prevailing Hourly Rate of Wages Requirements**  
*In effect May 4, 2016*

House Bill 4005 repeals the requirement of former W. Va. Code § 21-5A-1, et seq. that workers employed by or on behalf of public authorities in the construction of public improvements must be paid the hourly rate prevailing in that region for construction work of similar character.



**House Bill 4145**  
**Relating to Carry or Use of a Handgun or Deadly Weapon**  
*In effect May 24, 2016*

As it pertains to public schools, this legislation retains the ban on possessing a firearm or other deadly weapon, with or without permit, on a school bus, at a school-sponsored function, in a public school building or structure, or on public school grounds. Violations are still felony offenses punishable by imprisonment for two to ten years and/or a fine of no more than \$5,000. However, it is no longer unlawful to possess a firearm or deadly weapon on or in the premises of a *private* primary or secondary school building or facility if the private institution has adopted written policies permitting such possession. *W. Va. Code § 61-7-11a(b)*.

As before, certain exceptions to the public school rule are recognized. Firearms and deadly weapons may be possessed at public schools and functions by law enforcement officers employed by public law enforcement agencies, retired law enforcement officers who meet certain requirements, and persons authorized by the county board or principal to conduct programs with valid educational purposes. The bill likewise preserves exceptions for persons who are otherwise permitted to possess an unloaded firearm and who either have it with them in a motor vehicle or leave it unloaded in a locked motor vehicle. The bill also retains the exceptions for school-approved programs or raffles that include the display of unloaded firearms and for the official mascots of West Virginia University and Parkersburg South High School acting in their official capacities. *W. Va. Code § 61-7-11a(b)*.

One new exception is added. It allows officially-appointed probation officers to possess firearms or deadly weapons on school premises or at school-sponsored activities in the performance of their duties. *W. Va. Code § 61-7-11a(b)*.

**House Bill 4175**  
**Relating Generally to Home Schooling**  
*In effect May 23, 2016*

House Bill 4175 modifies, in many respects, the home instruction exemption from the requirement of compulsory school attendance under *W. Va. Code § 18-8-1(c)(2)*.

A county superintendent of schools must now make a showing of probable cause before seeking a circuit court order denying home instruction based upon the allegation that the child will suffer neglect in his or her education or that there are other compelling reasons to deny home instruction. *W. Va. Code § 18-8-1(c)(2)*.

Upon commencing home instruction (instead of annually) or when withdrawing a child from public school for home instruction, the parent of a child receiving home instruction must now present to the county superintendent or board a notice of intent to provide home instruction. The notice must include the child's name, address and age (but no longer the child's grade level), together with the assurance that the child will receive instruction in reading, language,



mathematics, science and social studies, and that the child will be annually assessed. The person providing home instruction must also notify the county superintendent when home instruction terminates for a child of compulsory school age. If the provider establishes residence in another county, he or she must notify the superintendent of the county from which the provider moved and must submit a notice of intent to the superintendent of the new county of residence. *W. Va. Code § 18-8-1(c)(2)(A)*.

As an alternative to submitting satisfactory evidence that he or she possesses a high school diploma or equivalent, a person providing home instruction may submit satisfactory evidence of a post-secondary degree or certificate from a regionally accredited higher education institution authorized by the Council for Community and Technical College Education or the Higher Education Policy Commission to confer a post-secondary degree or certificate. *W. Va. Code § 18-8-1(c)(2)(B)*.

A person providing home instruction is no longer required to outline a plan of instruction for any ensuing school year. House Bill 4175 repeals that requirement, which previously appeared in *W. Va. Code § 18-8-1(c)(2)(C)*.

To obtain the required annual academic assessment of a child, a provider has the same four alternatives as before. However, if the chosen alternative is to have the child take a nationally normed standardized achievement test, it must be a test that was published or normed within the past 10 years, and it must be administered by a person qualified under the test's published guidelines. A parent who meets those guidelines may lawfully administer the test. "Acceptable progress" now means that a child's test results in the required subject areas for any single year are within or above the fourth stanine (instead of the fiftieth percentile) or, if below the fourth stanine (instead of the fiftieth percentile), that they show improvement from the previous year's results. *W. Va. Code § 18-8-1(c)(2)(C)(i)*.

If, instead, a portfolio of the child's work is reviewed, the review must now be made by a certified teacher who determines whether the child's academic progress for the year is in accordance with the child's abilities, and who provides the required written narrative about the child's progress. A child is now considered to have made acceptable progress if the narrative indicates that the child's academic progress is in accordance with the child's abilities. *W. Va. Code § 18-8-1(c)(2)(C)(iii)*.

Under the revised law, a parent or guardian must maintain copies of each student's academic assessment for three years. A parent or guardian must also provide the county superintendent with the results of the assessment of the child at grade levels three, five, eight and eleven by June 30 of the year in which the assessment was administered. *W. Va. Code § 18-8-1(c)(2)(D)*; *W. Va. Code § 18-8-1(c)(2)(E)*.

Only upon request of a homeschooled child's parents or legal guardians must a county board notify them about services available to assist in assessing the child's eligibility for special education services. *W. Va. Code § 18-8-1(c)(E)*.



**House Bill 4225**  
**Relating to Patriotic Displays at Public Buildings**  
*In effect June 6, 2016*

House Bill 4225 authorizes a governing body to prominently display the American National Motto, “In God We Trust,” and the POW-MIA flag on any public property, public building or building designed, constructed and maintained with state, county or municipal funds. The cost of the display may be paid with any private donations, gifts, grants and bequests received by the governing body. The Department of Administration will develop guidelines for such displays. *W. Va. Code § 5-6-17.*

**House Bill 4237**  
**Supporting and Strengthening Families Act**  
*In effect June 10, 2016*

The stated intent of this legislation is to allow a parent, guardian or legal custodian in difficult times to delegate the care and custody of a child to a qualified nonprofit organization for a period not to exceed one year, thus avoiding the more intrusive alternative of guardianship or giving custody of the child to the Department of Health and Human Resources. The qualified nonprofit organization must be a charitable or religious Section 501(a) organization that assists a child’s parent or legal guardian with the process of providing for the temporary care of the child through the execution of a special form of power of attorney. *W. Va. Code § 49-8-1; W. Va. Code § 49-8-2(2); W. Va. Code § 49-8-4.*

The delegation of care and custody does not deprive the parent, guardian or custodian of any parental or legal rights, obligations or authority for the custody, visitation and support of the child. The delegation may be revoked or withdrawn at any time. Until the delegation is revoked, the designee may exercise parental or legal authority over the child on a continuous basis for the duration of the power of attorney. *W. Va. Code § 49-8-3(d); W. Va. Code § 49-8-3(e); W. Va. Code § 49-8-3(f).*

**House Bill 4261**  
**Prohibiting the Sale or Transfer of Student Data to Vendors and Other Profit-Making Entities**  
*In effect June 10, 2016*

This amendment to West Virginia’s Student Data Accessibility, Transparency and Accountability Act creates yet another exception to the rule that prohibits the State Department of Education from transferring confidential student information or confidential redacted data to any government agency or other person or entity. *W. Va. Code § 18-2-5b(c)(3).*

The new exception applies if the ACT or SAT test is adopted for use as the state summative assessment. In that case, the ACT or the College Board will be allowed to use a student’s assessment results and necessary directory or other permissible information under the Act. If





information classified as confidential is required, the ACT or College Board must obtain written consent from the adult student or from the parent or guardian of the minor student. The consent must detail the kind of confidential information required and the reason why the information is required. *W. Va. Code § 18-2-5b(c)(3)(H)*.

**House Bill 4295**  
**Relating to the School Innovation Zones Act**  
*In effect June 10, 2016*

House Bill 4295 terminates funding for School Innovation Zones and Local Solution Dropout Prevention and Recovery Innovation Zones as of June 30, 2016. It then establishes the “Innovation in Education Act” in order “to encourage and incentivize public schools to improve overall student outcomes through the implementation of key innovational priorities for improving education” in the areas of (1) science, technology, engineering and math (STEM); (2) community school partnership; (3) entrepreneurship; (4) career pathways; and (5) the arts. Schools designated as Innovation in Education schools in any of those five areas will then have the opportunity to redesign their curriculum, instructional delivery and instructional strategies; enhance student engagement; develop meaningful community partnerships; and operate under greater flexibility to increase student achievement. The schools must operate according to a plan developed by the school’s principal and faculty, with input from the local school improvement council, the county board, the county superintendent and, in the case of a high school, the school’s students. *W. Va. Code § 18-5B-14; W. Va. Code § 18-5E-1; W. Va. Code § 18-5E-2*.

Under the Act, the State Board will adopt rules establishing the process and timeline by which schools apply to be designated Innovation in Education Schools in any of the five areas. The rules will establish the contents of applications, including items specified in the Act; how applications will be evaluated; and a process for periodic review of a school’s performance and student success. The periodic review will help determine whether a school’s designation as an Innovation in Education school should be reaffirmed or reconsidered, and whether the school should be designated as an exemplary demonstration site. *W. Va. Code § 18-5E-3*.

The Act specifies the elements of an Innovation in Education School’s required plan. They include a description of how the school will address the overall climate and culture of the school as a high-performing learning environment, a curriculum plan and measureable annual performance goals. Each plan must also establish a budget, a school schedule, a staffing and professional development plan, a policies and procedures plan, opportunities and expectations for parent involvement, and any exemptions the school seeks from rule, policy or statute. The State Board may require that plans include additional information. *W. Va. Code § 18-5E-4*.

An Innovation in Education School cannot begin or continue operations without a signed operational agreement between the county board and the school principal. The agreement must specify any conditions to be met before the Innovation in Education School may begin full operation, any material term of the school’s plan to be adhered to by both the county board and the school, and a process for amending or refining the school’s plan. Operational agreements must



likewise include annual performance targets to assess the school’s progress in achieving the annual measureable goals in its plan, a process and the criteria the county board will use to annually monitor and evaluate the school’s overall performance and student success, and any information the county board needs from the school for accountability. Each agreement will contain a process to notify the school of any deficiencies, an improvement plan process, and reasons (such as poor fiscal management or a lack of academic progress) that may justify the county board in intervening or in recommending that the State Board place the school’s designation on probationary status, require a remedial action plan or revoke the designation. *W. Va. Code § 18-5E-5.*

During an Innovation in Education School’s third year of operation, the county superintendent must issue a performance report on the school, to include a summary of the school’s performance and notice of any weaknesses or concerns that may jeopardize the school’s status if not rectified. After the fourth year of operation, and periodically thereafter, the school must be evaluated by the county superintendent, with the county board and State Board receiving copies of the evaluation. The county superintendent may recommend amending or suspending one or more components of the school’s plan and operational agreement, continued operation of the school in accordance with its plan and operational agreement, and designation of the school as an Innovation in Education demonstration school. The State Board may approve any of those recommendations or, if the school has substantially failed to meet the goals of its plan and operational agreement, terminate the school’s Innovation in Education designation. Amendment, suspension or termination of a plan may not take place before the completion of a school year. *W. Va. Code § 18-5E-6.*

A special “Innovation in Education Fund” is created in the State Treasury, to consist of all moneys received from any source to further the Act’s purposes. The State Board will administer the fund solely for the purposes of the Act. *W. Va. Code § 18-5E-7.*

**House Bill 4301**  
**Relating to a Framework for Initiating Comprehensive Transformation of School Leadership**  
*In effect June 9, 2016*

House Bill 4301 provides a framework for initiating comprehensive transformation of school leadership to promote instructional improvement. It requires the State Board of Education to develop and recommend needed statutory and policy changes, with broad stakeholder input. *W. Va. Code § 18-2-36(a); W. Va. Code § 18-2-36(b).*

The framework devised by the Legislature is based on findings that incorporate prior studies and emerging research, some recommendations made by Imagine West Virginia, and general conclusions of the Education Efficiency Audit of West Virginia’s Primary and Secondary Education System. The findings stress the crucial role of the principal in achieving a high-performing school. They also emphasize the value of providing teachers with authentic opportunities and resources to lead and share responsibility for professional development and school and classroom improvement. *W. Va. Code § 18-2-36(a).*





Under the framework, the State Board is to begin the process by convening stakeholders, to include principals, teachers, superintendents, county board members, education preparation program personnel, legislators or their designees, and a designee of the Governor. The State Board is required to consider certain specified issues related to principal leadership, teacher leadership, a teacher leadership development pipeline and local and state systems of support. *W. Va. Code § 18-2-36(b)*.

Not later than the Legislature's 2018 regular session, the State Board is to make a report to the Governor and the Joint Standing Committee on Education on transforming school leadership. The report must address (1) recommendations on a general leadership structure and definitions of the roles and responsibilities of principals and teacher leaders; (2) affected statutes and policies, including pending and completed policy revisions, and recommendation for statutory amendments, if any, needed to effectuate its recommendations; (3) an outline for sequential implementation of the changes needed to transform school leadership, with recommendations for any phased implementation; and (4) the estimated costs of implementation, along with potential funding sources from improved efficiencies or cost savings from the elimination of unnecessary operations or programs. *W. Va. Code § 18-2-36(c)*.

**House Bill 4316**  
**Relating to Reimbursement of Certification Fee for National Board for Professional Teaching Standards Certification**  
*In effect June 9, 2016*

Teachers who seek payment from the State for fees related to National Board for Professional Teaching Standards (NBPTS) certification must now provide the State Department of Education with not only satisfactory evidence of the teachers' enrollment in the program, completion of certification or successful renewal, as the case may be, but also with verification by the NBPTS. *W. Va. Code § 18A-4-2a(d)*, *W. Va. Code § 18A-4-2a(e)*.

**House Bill 4340**  
**Amending Licensing Requirements for an Act Which May be Called Lynette's Law**  
*In effect March 9, 2016*

House Bill 4340 requires that when disciplinary action is taken by a state board of examination or registration against members of certain professions or occupations, information about the completed disciplinary action must be posted on a website to which the public has access. Of interest to public schools, the professions and occupations include, but are not limited to, these for which persons are required to hold a West Virginia license in order to work: registered professional nurses, practical nurses, accountants, architects, engineers, athletic trainers, psychologists, social workers, licensed professional counselors and speech-language pathologists. *W. Va. Code § 30-1-5(d)*; *W. Va. Code § 30-1D-1*.

A portion of the bill that is known as "Lynette's Law" requires certain professional and occupational licensing boards to require national criminal background checks for applicants being



licensed for the first time in West Virginia. The professions and occupations include physicians, surgeons, podiatrists, physician assistants, dentists, pharmacists, registered professional nurses, practical nurses, optometrists, veterinarians, osteopathic physicians, osteopathic surgeons, and psychologists. *W. Va. Code § 30-1D-1.*

#### **House Bill 4351**

### **Transferring the Cedar Lakes Camp and Conference Center From the West Virginia Board of Education to the Department of Agriculture**

*In effect July 1, 2016*

The Legislature in House Bill 4351 transfers the Cedar Lakes Camp and Conference Center from the State Board of Education to the Department of Agriculture. Employees, too, are transferred, at their existing hourly rate of pay and with all accrued benefits. They become will-and-pleasure employees of the Department and members of the Public Employees Retirement System. The Department's Commissioner is given all the powers, duties and responsibilities relating to the Camp and Conference Center that were previously vested in the State Board of Education and its Division of Vocational Education. *W. Va. Code § 18-2-16b.*

#### **House Bill 4364**

### **Internet Privacy Protection Act**

*In effect June 10, 2016*

This new section of the West Virginia Code concerns the privacy of the "personal account" of an employee or potential employee. Under the Act, a personal account is an account, service or profile on a social networking website that is used by the employee or potential employee exclusively for personal communications unrelated to any business purposes of the employer. *W. Va. Code § 21-5G-1(e).*

The legislation prohibits employers from (1) requesting, requiring or coercing an employee or potential employee to disclose a user name, password or other information that allows access to his or her personal account; (2) requesting, requiring or coercing an employee or potential employee to access his or her personal account in the presence of the employer; and (3) compelling an employee or potential employee to add the employer or an employment agency to his or her list of contacts that enables the employer or employment agency to access a personal account. *W. Va. Code § 21-5G-1(a).*

Exceptions to those rules allow an employer to, among other things, access publicly available information about an employee or potential employee and to comply with applicable laws and regulations. An employer can also require an employee to disclose a user name, password or similar authentication information for the purpose of accessing an employer-issued electronic device or employer-provided account or service used for the employer's business or obtained by virtue of the employee's employment relationship with the employer. *W. Va. Code § 21-5G-1(b).*



The rules do not prevent an employer from conducting an investigation or requiring an employee to cooperate in an investigation. If the employer has specific information about an unauthorized transfer of the employer's proprietary information, confidential information or financial data to an employee's personal account, the employer may require the employee to share the content that has been reported in order to make a factual determination. *W. Va. Code § 21-5G-1(b)(4)*.

Nor do the rules prevent an employer from prohibiting an employee or potential employee from using a personal account during employment hours, while on employer time or for business purposes. The rules do not keep an employer from requesting an employee to share specific content regarding a personal account for purposes of ensuring compliance with applicable laws, regulatory requirements or prohibitions against work-related employee misconduct. *W. Va. Code § 21-5G-1(b)(5)*; *W. Va. Code § 21-5G-1(b)(6)*.

If, through lawful technology that monitors the employer's network or employer-provided electronic devices for network security or data confidentiality purposes, an employer inadvertently receives a user name, password or other authentication information that enables access to an employee's or potential employee's personal account, the employer is not liable for having the information unless the employer uses or enables a third party to use it to access the employee's or potential employee's personal account. An employer can also be liable in such instances if it does not delete the information as soon as reasonably practicable (unless the information is being retained in connection with an ongoing investigation of a breach of the computer, network or data security). *W. Va. Code § 21-5G-1(c)*.

The Act specifically provides that the rules do not diminish an employer's authority and obligation to investigate complaints, allegations or the occurrence of sexual, racial or other harassment as provided in West Virginia statutory law. *W. Va. Code § 21-5G-1(d)*.

**House Bill 4417**  
**Increasing Wages Protected From Garnishment**  
*In effect June 7, 2016*

House Bill 4417 potentially increases the portion of an employee's wages that are protected from garnishment. The maximum part of an individual's aggregate disposable workweek earnings subject to garnishment is now the lesser of 20 percent of the employee's disposable earnings for the week, or the amount by which the employee's disposable earnings for the week exceeds 50 times (instead of 30 times) the federal minimum hourly wage. *W. Va. Code § 46A-2-130*.

**House Bill 4461**  
**Relating to School Building Authority School Major Improvement Fund Eligibility**  
*In effect June 9, 2016*

House Bill 4461 removes the requirement that, in order to be eligible for School Building Authority major improvement funds, a county board must spend and budget certain annual amounts for facility maintenance. Previously, a county board had to show that it spent in the previous fiscal



year, and has budgeted in the current year, at least the lowest average maintenance budget over any three of the previous five years. In place of that prerequisite, the bill requires a county board that seeks an allocation of major improvement funds to provide facility maintenance expenditure data for review by the School Building Authority and the State Department of Education Office of School Facilities and Transportation. The data is intended to assist the School Building Authority in making project determinations. *W. Va. Code § 18-9D-15.*

**House Bill 4487**  
**Relating to State Retirement Systems**  
*In effect June 8, 2016*

Among other things, the bill provides that an employee's failure to pay the Teachers Retirement System according to a contract to purchase military service credit must be treated as an overpayment or excess contribution. In such a case, no military service will be credited. *W. Va. Code § 18-7A-17a(b)(8).*

**House Bill 4507**  
**Providing an Employer May Grant Preference in Hiring to a Veteran or Disabled Veteran**  
*In effect June 10, 2016*

This bill provides that an employer does not violate the equal employment opportunity provisions of West Virginia's Human Rights Act by granting a hiring preference to a veteran or a disabled veteran who has been honorably discharged from the United States Armed Services, provided that the veteran meets all the knowledge, skills and eligibility requirements of the job. However, the bill does not excuse a county board of education from filling vacancies in accordance with applicable school statutes such as *W. Va. Code § 18A-4-7a* (for professional positions) and *W. Va. Code § 18A-4-8b* (for service employee positions). *W. Va. Code § 5-11-9(1); W. Va. Code § 5-11-9a.*

**House Bill 4566**  
**Relating to School Personnel**  
*In effect July 1, 2016*

At 32 pages, House Bill 4566 is the longest of the public education bills. It addresses a number of county-level human resource issues, including assistant and associate superintendent certification, teacher disqualification, early notice of retirement in order to receive a bonus, the right of a continuing contract teacher to unilaterally resign as of year-end, actions to realign the workforce, placement of professionals subject to release, reassigning personnel after school starts, professional personnel laterality policies, service personnel competency tests, the rights of recall list employees, filling posted service vacancies, and professional and service employee "stay put" rules.



### *Assistant and Associate Superintendent Certification*

After employment by a county board of education, a candidate for assistant or associate superintendent who possesses an earned doctorate from an accredited institution of higher education will now be granted a permanent administrative certificate and a superintendent's license if he or she either has completed three successful years of public education teaching or three years of management or supervision experience recognized by State Board of Education policy. *W. Va. Code § 18-4-2(2)*.

### *Teacher Disqualification*

It has long been the case that teachers are disqualified to teach in any West Virginia public school for the next school year if they fail to fulfill their contracts, unless prevented from doing so by personal illness or other just cause, or unless released from their contracts by the county board of education. The same has been true if teachers violate any lawful provision of their contracts. In such cases the State Department of Education has been empowered to hold all papers and credentials of the teacher on file for a period of one year. *W. Va. Code § 18A-2-2(e)*.

House Bill 4566 now requires the State Department to report the disqualification in the National Association of State Directors of Teacher Education Certification database system. *W. Va. Code § 18A-2-2(e)*.

### *Early Notice of Retirement in Order to Receive a Bonus*

The deadline is extended for classroom teachers to give early notice of year-end retirement in order to receive the state bonus for early notification. The deadline is also extended for other professionals and service employees to give early notice of year-end retirement in order to receive any county bonus for early notification. It used to be that the notices had to be given on or before January 15. The notices must now be given on or before March 1. *W. Va. Code § 18A-2-2(g)(1)*; *W. Va. Code § 18A-2-5a*.

### *A Continuing Contract Teacher's Unilateral Year-End Resignation*

The deadline for a continuing contract teacher to exercise, in writing, the absolute right to resign as of the end of the school year has been changed. It used to be on or before March 1. The new deadline is on or before May 1. *W. Va. Code § 18A-2-2(c)(1)(B)*.

### *Actions to Realign the Work Force*

*Terminating Continuing Contracts.* House Bill 4566 requires the county board of education to vote to terminate, for lack of need, the continuing contracts of service employees on or before May 1 (instead of before March 1) and the continuing contracts of professional employees on or before May 1 (instead of on or before March 1). *W. Va. Code § 18A-2-2(c)(1)(A)*; *W. Va. Code § 18A-2-6*.



*Employee Transfers.* Under the new legislation, the county superintendent of schools must notify employees on or before April 1 (instead of March 1) that they are being considered for transfer or to be transferred. Hearings requested by those employees must be held on or before May 1 (instead of April 15), and the superintendent must furnish the board with the transfer list on or before May 1 (instead of April 5). Within 10 days following the board meeting, all employees whose names appear on the list are entitled to written notice, with written receipt notification documented by the superintendent (instead of only by certified mail). *W. Va. Code § 18A-2-7(a); W. Va. Code § 18A-2-7(b).*

*Nonrenewal of Probationary Contracts.* The county superintendent must now furnish the county board on or before May 1 (instead of April 1) with the list of probationary employees to be rehired. *W. Va. Code § 18A-2-8a.*

#### *Placement of Professionals Subject to Release*

Until now, all qualified professional employees subject to release in a reduction-in-force were treated as automatic applicants (and the only applicants) for vacancies that, on or before February 15, were known to exist for the ensuing school year. This occurred before any such positions were posted for application by other persons.

House Bill 4566 now requires county boards of education to treat qualified professional employees subject to release in a reduction-in-force as automatic applicants for vacancies that, on or before March 1 (instead of February 15), are known to exist for the following year. The wording of this new provision could mean that these vacancies now have to be posted, and that qualified professionals subject to release must vie for the vacancies with other current board employees who apply (but not with non-employees). *W. Va. Code § 18A-4-7a(k)(2).*

#### *Reassigning Personnel After School Starts*

Under prior law, if student enrollment, unforeseen before March 1 of the preceding school year, permitted the assignment of fewer employees to a grade level or program within a school under certain class size and caseload standards, the county superintendent, with board approval, could reassign the surplus personnel during the first two months of the following school year, if needed to comply with class size and caseload rules at another school or in a different grade level or program. House Bill 4566 modifies that option by requiring that student enrollment in a grade level or program must have been unforeseen on or before May 1 (instead of March 1) of the preceding year in order to allow the reassignment of surplus personnel during the first two months of the next school year. *W. Va. Code § 18A-2-7(e).*

#### *Professional Personnel Lateral Policies*

During a reduction-in-force of professionals, employees may sometimes avoid release by moving laterally, or “bumping,” into lateral positions held by less senior professionals. County boards of education are required to have policies defining which professional positions are lateral. House





Bill 4566 repeals a requirement that county boards provide the State Board of Education with copies of their lateral policies and any amendments to those policies. *W. Va. Code § 18A-4-7a(l)*.

#### *Service Personnel Competency Tests*

Service employees are no longer entitled to in-service training to assist them in preparing to take the State Board of Education's competency tests. Additionally, the State Board is required to review and, as necessary, update the competency tests at least every five years. *W. Va. Code § 18A-4-8e(a)*.

#### *Recall List Employee Rights*

County boards of education still have a duty to notify professional employees on the preferred recall list, by certified mail, of all openings for which they qualify. However, under House Bill 4566, service employees on the preferred recall list are now entitled to only annual notice. The notice must contain instructions to access job postings on any website maintained by the county board or available for its use. The annual notice need not be sent by certified mail as long as the recall list employee's receipt of the notice is documented by the superintendent of schools. *W. Va. Code § 18A-4-8b(p)*.

#### *Filling Posted Service Vacancies*

House Bill 4566 clarifies that the 20 working-day deadline for filling vacancies in existing or newly created service personnel positions is measured from the closing date of the job posting for the position. *W. Va. Code § 18A-4-8b(g)(3)*.

#### *Professional and Service Employee "Stay Put" Rules*

House Bill 4566 does not change the "stay put" rules for those professional employees who, after the 20th day prior to the beginning of the instructional term, successfully apply for posted, vacant positions. However, the legislation removes those rules from *W. Va. Code § 18A-4-7a* and places them in a new section of the West Virginia Code. *W. Va. Code § 18A-2-7b(a)*.

In contrast, stay put rules for some service employees will change in significant ways, and stay put restrictions will now affect all service personnel.

Autism mentors and aides working with students with autism, and paraprofessionals, interpreters and aides working with a student with exceptionalities whose individual education plan (IEP) requires one-on-one service are now forbidden to transfer to another position after the 20th day (instead of the fifth day) prior to the beginning of the instructional term. This stay put rule now also applies to early childhood classroom assistant teachers (ECCATs) who work with a student with an exceptionality whose IEP requires one-on-one service. Additionally, the bill expressly allows employees affected by this rule to apply for any posted, vacant position and, if successful,



to assume the position at the beginning of the next instructional term. *W. Va. Code § 18A-2-7b(1); W. Va. Code § 18A-2-7b(2).*

A new stay put rule now applies to all other service personnel. During the first year of employment, they are not allowed to transfer to another position during the first half of the instructional term. Thereafter, beginning after the 20th day before the instructional term begins, these other service personnel may transfer to another position one time only during any one-half of the instructional term. After one such transfer, they may be awarded a posted job during the same one-half of the instructional year, but cannot assume it until the beginning of the next half. *W. Va. Code § 18A-2-7b(c).*

The stay put rules for service employees make exceptions that are specified in the statute, including immediate placement of the successful applicant for a posted position by mutual agreement of the employee and superintendent and approval by the county board. In some instances, other exceptions apply. *W. Va. Code § 18A-2-7b.*

**House Bill 4604**  
**Relating to the Violations of the Ethics Act**  
*In effect June 10, 2016*

House Bill 4604 establishes a deadline of 18 months for the West Virginia Ethics Commission to investigate and make a probable cause determination on a complaint. It allows an extension beyond the 18-month period if both the respondent and complainant consent, or if the Commission, in writing, finds good cause. The bill changes the burden of proof needed to show a violation of the Ethics Act from “evidence beyond a reasonable doubt” to “clear and convincing evidence.” It also extends from two years to five years the statute of limitations for filing complaints alleging violations of the Ethics Act. *W. Va. Code § 6B-2-4(e); W. Va. Code § 6B-2-4(s); W. Va. Code § 6B-2-4(x).*

**House Bill 4618**  
**Relating to Limitations on Use of Public Official’s Name or Likeness**  
*In effect June 10, 2016*

This legislation focuses on the permitted and prohibited uses of a public official’s name or likeness. (A likeness is a photograph, drawing or other depiction of the official.)

House Bill 4618 prohibits elected and appointed public officials, as well as full-time and part-time public employees, from placing a public official’s name or likeness on trinkets paid for with public funds. Trinkets are items of tangible personal property that are not vital or necessary to the duties of the official’s or employee’s office, including, but not limited to, magnets, mugs, cups, key chains, pill holders, bandage dispensers, fans, nail files, matches and bags. However, the name or likeness may be placed on trinkets that are paid for with the public official’s personal money. *W. Va. Code § 6B-2B-1; W. Va. Code § 6B-2B-2(a); W. Va. Code § 6B-2B-4(e).*





Public officials, their agents and anyone on public payroll may not use public funds, public employees or public resources to distribute, disseminate, publish or display a public official's name or likeness in advertising to the public (meaning disseminating information to the general public via audio, visual or other media tools.) Nor may they use or place a public official's name or likeness on any publicly owned vehicles. However, the name or likeness may be used in advertising and on vehicles paid for with the public official's own personal money. *W. Va. Code § 6B-2B-2(b)*; *W. Va. Code § 6B-2B-2(c)*; *W. Va. Code § 6B-2B-4(e)*.

A public official's name or likeness may not be placed on any educational material that is paid for with public funds, with the exception of a report required to be issued by law. For purposes of this rule, educational materials consist of publications, guides, calendars, handouts, pamphlets, reports or booklets intended to provide information about the public official or government office. Educational materials include information or details about the office and the services provided to the public, updates on laws and services, and other informational items to educate the public. However, the name or likeness may be placed on educational material paid for with the public official's personal money. *W. Va. Code § 6B-2B-2(d)*.

A public official's name and likeness may appear on a public agency's website and social media such as Facebook, MySpace, Twitter and YouTube, subject to certain conditions. The official's name may appear throughout the website if it is reasonable, incidental, appropriate and has the primary purpose to promote the agency's mission and services, rather than to promote the official. The official's likeness may only appear on the website's home page and on any pages or section devoted to biographical information about the official. On the agency's social media, an official's name and likeness may appear if reasonable, incidental and appropriate, and if they have a primary purpose of promoting the agency's mission and services, rather than promoting the official. The public agency's website or social media may not provide links to a public official's or public employee's personal or campaign website or social media. *W. Va. Code § 6B-2B-3*.

Exceptions allow a public official to use his or her name or likeness on any official record or report, letterhead, document, certificate or instructional material explaining or detailing steps for completion of the agency's document or form issued in the course of his or her duties as a public official. The official's name, but not likeness, may appear on other official documents used in the normal course of the agency, such as facsimile cover sheets, press release headers, office signage and envelopes, unless reproduced for distribution to the public as educational material (defined above), in which case the rule about educational materials applies. *W. Va. Code § 6B-2B-4(a)*.

Among the other exceptions is one for a public official's campaign-related expenditures or materials. There is also an exemption for items or materials required by law to contain the public official's name or likeness. *W. Va. Code § 6B-2B-4(d)*; *W. Va. Code § 6B-2B-4(f)*.

A public official, employee or agency may not continue to publicly distribute, disseminate, communicate or display items or materials that violate these rules but were purchased prior to the new law's effective date, unless the public official's name and likeness are permanently removed or covered with, for example, a sticker, or by marking out or obliterating the name or likeness. If



the name or likeness are not removed or covered, the agency may use the items or materials internally as long as they are not publicly distributed, disseminated, communicated or displayed. A public agency may also donate such items to surplus, charity or an organization serving the poor and needy. *W. Va. Code § 6B-2B-5.*

Finally, if any of the legislation’s prohibitions create an undue hardship, or if a public agency will incur “significant financial impact” to bring existing material, vehicles or items into compliance, the agency may seek a written exemption from the West Virginia Ethics Commission. When an exemption is sought, the Ethics Commission must make public the name of the public agency seeking the exemption, along with the name of the affected public official, if any. *W. Va. Code § 6B-2B-6*

**House Bill 4674**  
**Relating to Motor Vehicle Back-Up Lamps**  
*In effect June 5, 2016*

This bill clarifies that school buses are not limited to having just two back-up lamps. The existing statute is amended to provide that school buses must have “at least” two back-up lamps. *W. Va. Code § 17C-15-19.*

**House Bill 4728**  
**Relating to Schedule III Controlled Substances**  
*In effect June 9, 2016*

House Bill 4728 designates human chorionic gonadotropin as a Schedule III controlled substance. The bill limits the substance to injection or implantation in cattle and other nonhuman species. *W. Va. Code § 60A-2-208(i).*

**House Bill 4730**  
**Relating to Computer Science Courses of Instruction**  
*In effect June 10, 2016*

This bill contains legislative findings about the pervasiveness of computer technology, the number of new jobs in computing occupations expected by 2024, the value of computer science study in many career areas, higher education’s emphasis upon computer science, and recommendations from organizations and technology industry leaders. On those grounds, it requires the State Board of Education, prior to the 2017 regular legislative session, to submit to the Legislative Oversight Commission on Education Accountability a plan for the implementation of computer science instruction and learning in the public schools. *W. Va. Code § 18-2-12(a); W. Va. Code § 18-2-12(b).*

The plan must include learning standards designed to provide the foundation for a complete computer science curriculum and its implementation at grades K-12. It must also recommend teaching standards and secondary certificate endorsements, if necessary, for teachers to deliver



curriculum appropriate to meet the standards. The State Board must suggest units of instruction in academic and technical settings that complement any existing K-12 computer science and IT curricula, especially the Advanced Placement computer science curricula and professional IT certifications. The plan will include proposals for implementing the recommendations over a period not to exceed four years, as well as estimates of any associated additional costs. *W. Va. Code § 18-2-12(b)*.



## RECENT DECISIONS OF THE WEST VIRGINIA SUPREME COURT OF APPEALS

### West Virginia Supreme Court of Appeals

<http://www.state.wv.us/wvsca>

1. Ellison v. Fayette County Board of Education, No. 14-0344 (August 31, 2015) (memorandum decision). In order to dismiss a school board employee for acts performed at a time and place separate from employment, the county board must demonstrate a “rational nexus” between the conduct performed outside of the job and the duties the employee is to perform. A rational nexus exists if the employee’s conduct directly affects the performance of his or her occupational responsibilities, or if, without contribution on the part of the school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular employee to discharge the responsibilities of his or her position.
2. Williams v. Raleigh County Board of Education, No. 14-0958 (October 20, 2015) (memorandum decision). A secretary/accountant in a county board’s purchasing department is not entitled to the classification of accounts payable supervisor unless her accounts payable functions constitute her primary responsibility. It is not enough to show that she performs some accounts payable duties or that she spends approximately half of her day processing invoices in a system that deliberately separates the duties of receiving and processing invoices from the paying of accounts.
3. Staats v. Jackson County Board of Education, No. 15-0227 (October 20, 2015) (memorandum decision). Under federal law, an employee is on duty, and time spent on standby duty is hours of work if, for work-related reasons, the employee is restricted by official order to a designated post of duty and is assigned to be in a state of readiness to perform work with limitations on the employee's activities so substantial that the employee cannot use the time effectively for his or her own purposes. But an employee is not considered restricted for "work-related reasons" if, for example, the employee remains at the post of duty voluntarily, or if the restriction is a natural result of geographic isolation. These rules are not changed by the West Virginia statute which provides that “[t]he workday of the bus operator or transportation aide commences at the bus at the designated beginning work station and ends when the employee is, able to leave the bus at the designated beginning work station, unless he or she agrees otherwise in writing”.
4. West Virginia Board of Education v. Marple, No. 14-1264 (November 10, 2015). To the extent that governmental acts or omissions which give rise to a cause of action fall within the category of discretionary functions, a reviewing court must determine whether the plaintiff has demonstrated that such acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known



or are otherwise fraudulent, malicious, or oppressive. In the absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability.

5. Smith v. Berkeley County Board of Education, No. 15-0062 (November 20, 2015) (memorandum decision). In rare circumstances, where an administrative law judge's credibility determinations and factual findings are not supported by common sense, a reviewing court need not give deference to those determinations and findings.
6. Sayre v. Mason County Board of Education, No. 15-0336 (January 11, 2016) (memorandum decision). A county board employee's basis for understanding terms of her employment cannot override state law that defines the terms of employment.
7. Grace v. Mingo County Board of Education, No. 15-0525 (March 7, 2016) (memorandum decision). After withdrawing a grievance by written notice to a Grievance Board administrative law judge, a grievant who seeks to reinstate the grievance is not entitled to have the same administrative law judge rule on the request to reinstate.
8. Redd v. McDowell County Board of Education, No. 15-0566 (May 20, 2016) (memorandum decision). The general rule is that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the court will act. If the matter is within the jurisdiction of the administrative agency, this rule applies even though the administrative agency cannot award damages.
9. Lemasters v. Jackson County Board of Education, Docket No. 15-0339 (May 23, 2016) (memorandum decision). Regularly scheduled bus duty for teachers that falls outside the regular school day is not an extracurricular assignment for which the teachers are entitled to additional compensation.
10. Lancaster v. Ritchie County Board of Education; Docket No. 15-0544 (May 23, 2016) (memorandum decision). In reviewing a circuit court's reversal of a Grievance Board decision, the proper standard is not that there was no evidence to support the Grievance Board's decision, but that the circuit court found the Grievance Board's decision to be clearly wrong. Also, when, having been provided numerous trainings and warnings about appropriate conduct, an employee willfully engages in prohibited behaviors, the employee's conduct may not be deemed correctable and the employee may not be entitled to an improvement plan addressing the prohibited conduct.
11. Cabell County Board of Education v. Adkins, No. 14-1213 (June 15, 2016) (memorandum decision). Collateral estoppel, or issue preclusion, applies to the decisions of the Grievance Board. Collateral estoppel will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine



is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

12. Nottingham v. Kanawha County Board of Education, Docket No. 15-0602 (June 21, 2016) (memorandum decision). Under appropriate circumstances, county boards have the right to expand the required qualifications for a given service personnel position beyond the statutory definition of the job's classification title. Where none of the applicants hold the same classification title as the posted job, the statutory definition for "qualifications" may permit the county board to consider whether an applicant meets the job's necessary requirements. While three factors – qualifications, seniority and evaluation of past service – must be considered in the hiring process, these factors need not be given equal weight under all circumstances.



## RECENT DECISIONS OF THE GRIEVANCE BOARD

<http://www.pegb.wv.gov/Pages/default.aspx>

1. Carr v. McDowell County Board of Education, Docket No. 2015-0593-McDED (June 18, 2015). Insubordination “encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer.”
2. Walker v. Pocahontas County Board of Education, Docket No. 2014-0211-PocED (July 23, 2015). The time period for filing a grievance is tolled when a 200-day employee learns of the grievable event during the summer when he is not working and is on vacation. Also, when a county board posts a service vacancy as a 240-day position, places someone in the vacancy and then, three weeks later, changes the contract to a 261-day contract, the change is so close in time to the posting and filling of the job that the county board has clearly misled potential applicants and violated the notice requirements of the statute governing the posting of vacancies.
3. Mason v. Raleigh County Board of Education, Docket No. 2015-0727-RalED (August 5, 2015). Neither the grievance statute nor the Grievance Board’s rules require that a Level One decision be sent to the grievant by certified mail.
4. Freda v. Lewis County Board of Education, Docket No. 2014-0866-LewED (August 7, 2015). In spite of the statute prohibiting county boards from making changes to the daily work schedule of service personnel during the school year without the employee’s written consent, a county board is free to make reasonable changes to a service employee’s daily work schedule within the parameters of his contract. Whether the schedule change is reasonable involves a case-by-case, fact-specific inquiry. Minor alterations to a bus operator’s route which cannot be anticipated prior to the beginning of the school year may be made after the school year begins, such as when a child moves into an area, or when overloading must be alleviated.
5. Wilt v. Marshall County Board of Education, Docket No. 2014-1757-CONS (August 20, 2015). Under the school statutes, all service personnel assignments are considered extracurricular assignments except for those that are regular positions or extra-duty assignments.
6. King v. Lewis County Board of Education, Docket No. 2014-0456-CONS (August 26, 2015). Because the application of a county board’s employee dress code is a continuing practice that recurs each time the dress code is applied to an employee, a grievance challenging the code is timely filed within 15 days of the most recent application of the code that adversely affected the grievant. Also, the existence of a dress code in and of itself does not infringe on the academic freedom of a county board’s teachers. Because the right





to dress as one sees fit is not a fundamental right, any restriction placed upon an employee's choice of dress is to be judged under a "rational basis" test to determine if the regulation is arbitrary. A county board may defeat a challenge to its employee dress code by showing that it has a reasonable and rational basis for restricting the employee's manner of dress in order to meet a legitimate end.

7. Hoke v. Lincoln County Board of Education, Docket No. 2015-1088-LinED (August 27, 2015). While a service employee's alleged misclassification can be grieved at any time while the employee remains in the classification, it may only be grieved once. An employee who previously filed a misclassification grievance that progressed to Level Two of the grievance process cannot initiate another grievance contesting the same misclassification.
8. Kinder v. Kanawha County Board of Education, Docket No. 2015-0421-KanED (August 31, 2015). Generally, an employee must obey a supervisor's order with which the employee disagrees, and then take appropriate action to challenge the validity of the supervisor's order. Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions. 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 plan before her contract of employment is suspended or terminated.
9. Swann v. Putnam County Board of Education, Docket No. 2015-0755-PutED (September 2, 2015). In a situation where two service employees have an identical seniority date, the tie must be broken through a random selection system established and approved by the county board. A second random drawing is required when any other service person subsequently acquires seniority identical to the employees involved in the original random selection. However, as long as the original two affected employees hold the same seniority date within the same classification category, the seniority preference between them remains the same and cannot be changed by a second random drawing.
10. Francis v. Lewis County Board of Education, Docket No. 2014-1080-CONS (September 16, 2015). Absent a policy of its own that imposes such a requirement, a county board is not required to give service employees compensatory time off in lieu of overtime pay.
11. Cook v. Lincoln County Board of Education, Docket No. 2015-0132-CONS (September 18, 2015). The failure to assign an equal share of extracurricular work to similarly situated service employees holding the same classification may constitute forbidden discrimination and favoritism if the differences are not related to the employees' job responsibilities and not agreed to by the affected employees.
12. Cline v. Braxton County Board of Education, Docket No. 2015-0904-BraED (September 23, 2015). A pattern of non-enforcement of certain rules may make it arbitrary and capricious to single out one employee for punishment without some indication that the





enforcement practices have changed. The pattern of non-enforcement may also mean that an employee's failure to comply with the rules is not sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination.

13. Crockett v. Wayne County Board of Education, Docket No. 2015-0317-WayED (September 30, 2015). A county board is not required by law to recognize personal leave time that a school employee accumulated during employment by a state university.
14. Crum v. Logan County Board of Education, Docket No. 2015-1197-CONS (October 19, 2015). "Willful neglect of duty" encompasses something more serious than "incompetence," which is another ground for teacher discipline. The term "willful" ordinarily imports a knowing and intentional act, as distinguished from a negligent act. The West Virginia Supreme Court of Appeals has declined to make a comprehensive definition of "willful neglect of duty," instead finding that "a continuing course of lesser infractions may well, when viewed in the aggregate, be sufficient". And we may envision a single act of malfeasance, whereby severe consequences are generated, that merits a dismissal.
15. Young v. Raleigh County Board of Education, Docket No. 2014-1620-RalED (October 22, 2015). A county board must offer competency testing only if no applicant for a service personnel position holds the classification title of the vacancy in question and no applicant has successfully completed the competency test for the classification.
16. Sayre v. Hancock County Board of Education, Docket No. 2014-0033-HanED (October 29, 2015). Bus operators must have first aid and CPR certification from an approved program in order to be certified to drive a school bus. A bus operator who fails to maintain certification is no longer qualified to be selected for a bus operator position. A county board may retain the employee until certification is regained but it may refuse to consider the individual's application for bus operator until that time. Also, an administrative law judge may in extreme instances allocate the cost of a hearing to a party found to be acting in bad faith.
17. Riffel v. Wayne County Board of Education, Docket No. 2015-1030-WayED (November 2, 2015). Before an employee's contract may be terminated in a reduction-in-force, the employee is entitled to a notice stating cause or causes. The notice requirement contemplates meaningful notice that affords an opportunity to prepare a defense and be heard on the merits. The reasons for the elimination of an employee's position set forth in any such notice must be the true reasons for the recommendation. It is arbitrary and capricious for the employer to instead rely on criteria that were not stated in the notice.
18. Brinkley-Simpkins v. Mercer County Board of Education, Docket No. 2015-0429-MerED (November 6, 2015). The contractual scheme of employment for school personnel does not allow for the hiring of independent contractors to perform the full-time regular duties of school service personnel positions. However, there is nothing in the school statutes requiring a county board to guarantee overtime work assignments to service personnel, nor



is there anything preventing a county board from contracting out such services. County boards do not have to offer short-term, specialized assignments to regular or substitute service employees where it can present a sound reason for not doing so.

19. Goodson v. Fayette County Board of Education, Docket No. 2014-1654-CONS (November 12, 2015). Neither the Grievance Board’s procedural rules nor the statute establishing the grievance procedure specifically prohibits amending a claim between levels of the grievance procedure. The question is whether the county board would be prejudiced by allowing the amendment to the statement of grievance. If the Level One statement of grievance adequately notifies the county board of the decision that a grievant is challenging, an amendment at Level Two or Level Three that merely provides additional Code sections alleged to have been violated does not prejudice the employer. Also, an amendment to a statute concerning school legal holidays did not change West Virginia Day as a holiday, but it did remove the requirement that employees be paid for the holiday. But, if pay for that holiday is included in an employee’s contract, or if removing the pay would violate the non-relegation clause for service employees, the county board may be required to compensate a service employee for the holiday.
20. Doebrich v. Wood County Board of Education, Docket No. 2015-1227-WooED (November 19, 2015). After a county board votes to eliminate, through a reduction-in-force, the position of a professional employee, the county board is not required to automatically make the employee an applicant for a posted vacancy to be filled in the same school year that the vote was taken.
21. Bumgardner v. Kanawha County Board of Education, Docket No. 2015-0927-KanED (November 19, 2015). Under the statute, a Level One decision is to “issue” within 15 days of the Level One conference or hearing. Neither the statute nor the Grievance Board’s procedural rules define “issued.” Also, within ten days of a default in meeting that deadline, a grievant may file with the county superintendent a written notice of intent to proceed directly to the next level or to enforce the default. If the county superintendent objects to the default, then the Superintendent may, within five days of the filing of the notice of intent, request a hearing before an administrative law judge for the purpose of stating a defense to the default.
22. McCool v. Marshall County Board of Education, Docket No. 2014-1441-MarED (November 20, 2015). The grievance procedure statute defines harassment as repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession. What constitutes harassment varies, based upon the factual situation in each individual grievance. Harassment has been found in cases in which a supervisor has constantly criticized an employee’s work and created unreasonable performance expectations, to a degree where the employee cannot perform the employee’s duties without considerable difficulty.



23. Snoderly v. Brooke County Board of Education, Docket No. 2014-0732-BroED (December 4, 2015). State Superintendent’s interpretations of school law are to be given weight unless clearly wrong or in conflict with case law precedent. Also, under the statute requiring that an additional \$40 per month be added to the minimum monthly pay of each service person “who holds an associate’s degree,” an employee who holds multiple associate’s degrees should be paid an additional \$40 per month, rather than \$40 per month for each of the associate’s degrees.
24. Duncan v. Mingo County Board of Education, Docket No. 2015-1625-MinED (December 7, 2015). Employees seeking to enforce the uniformity provisions must establish that their duties and assignments are like those of the employees to whom they are attempting to compare themselves. Grievants seeking uniformity cannot compare themselves to a predecessor who is retired and no longer employed. Also, in the absence of a legal requirement to do so, a county board is not required to follow the same informal personnel practices year after year. Finally, before the annual term of an employee’s contract can be extended, the extension must be recommended by the county superintendent and approved by the county board.
25. Wheeler v. Lincoln County Board of Education, Docket No. 2015-0695-LinED (December 17, 2015). A grievance contending that a service employee is misclassified may be filed at any time, but only once while the employee remains in the classification, and relief is limited to 15 days prior to the initiation of the grievance. Also, before the prosecution of a grievance may be barred on the basis of res judicata, three elements must be satisfied. There must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. The two actions must involve either the same parties or persons in privity with those same parties. The claim identified for resolution in the subsequent proceeding either must be identical to the claim determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.
26. Freda v. Lewis County Board of Education, Docket No. 2015-0597-LewED (December 22, 2015). The various statutes under chapter 18A of the West Virginia Code governing the contract and procedural rights of county board employees do not apply to employees of the regional education service agencies. Also, an employee may not use the grievance procedure to challenge actions that were not taken by his or her employer.
27. Bailey v. Mingo County Board of Education, Docket No. 2015-1551-CONS (January 8, 2016). County boards should be encouraged to correct their errors as soon as possible. Prior mistakes do not create an entitlement to continuing incorrect compensation.
28. Yoder v. Harrison County Board of Education, Docket No. 2016-0129-HarED (January 15, 2016). A review of past improvement plans and disciplinary action can establish that an employee was on notice of his inappropriate behavior, and that a continuing pattern of behavior is present which has proven not correctable. Also, an evaluation is properly conducted if it is performed in an open and honest manner, and is fair and professional.



The mere fact that an employee disagrees with an 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. 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 that the primary purpose of the policies has been confounded.

29. McClure v. Raleigh County Board of Education, Docket No. 2016-0324-RalED (January 11, 2016). Under the applicable statute, there are only two methods of terminating a service employee's contract: written notice stating cause, with majority vote of the county board, or the employee's written resignation. Where an employee does not resign in writing, but the county board deems the employee to have resigned by operation of a board policy, the employee's separation is involuntary and in the nature of disciplinary action, in which case the county board holds the burden of proving that discipline is in order. Finally, damages for medical expenses, mental anguish, stress, and pain and suffering are generally viewed as "tort-like" damages which are unavailable under the grievance procedure.
30. Kaplan v. Cabell County Board of Education, Docket No. 2009-1819-CONS (January 19, 2016). When it is not possible for any actual relief to be granted, any ruling on questions raised by a grievance would merely be an advisory opinion. The Grievance Board does not issue advisory opinions. When relief sought by a grievant is speculative or premature, or otherwise legally insufficient, the claim must be denied.
31. Smith v. Jefferson County Board of Education, Docket No. 2015-0730-JefED (February 3, 2016). The Grievance Board does not award tort-like or punitive damages. Also, simply because a service employee is required, even regularly, to undertake some responsibilities normally associated with a higher classification does not render the employee misclassified per se. Because of similarities in the nature of certain jobs, two or more definitions may encompass the same duties. Performance of such crossover duties does not necessarily mandate reclassification.
32. Spaid v. Preston County Board of Education, Docket No. 2015-1636-PreED (February 5, 2016). It is the responsibility of job applicants to ensure that their applications are adequately completed and submitted to the proper personnel in charge of reviewing the application.
33. Ragione v. Preston County Board of Education, Docket No. 2014-1327-PreED (February 12, 2016). 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. Also, the doctrine of estoppel should be applied cautiously, and only when equity clearly requires that it be done. In order to constitute equitable estoppel, there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must



have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to that party's prejudice.

34. Chandler v. Kanawha County Board of Education, Docket No. 2015-1018-CONS (February 23, 2016). The service personnel uniformity statute requires county boards to provide uniform benefits and compensation only to similarly situated employees, meaning those who have like classifications, ranks, assignments, duties and actual working days. Grievants seeking to enforce the uniformity provisions must establish that their duties and assignments are like those of the employees to whom they are attempting to compare themselves. The requirement that the compared employees be performing like assignments and duties is essentially the same requirement as in discrimination and favoritism cases, in which the grievant and the compared employee must be similarly situated. Employees who do not have the same classifications are not performing like assignments and duties for uniformity purposes and cannot show that they are similarly situated for discrimination and favoritism purposes.
35. Sebolt v. Logan County Board of Education, Docket No. 2016-0168-LogED (February 25, 2016). County boards must abide by the statutory requirement that they shall not employ for the first time any person who has not obtained a high school diploma or GED, or who is not enrolled in an approved adult education course by the date of the employment in preparation for obtaining a GED. Employment under the latter condition is contingent upon continued enrollment or successful completion of the GED program. The statute does not prohibit a county board from recommending recertification of school bus operators who do not possess a high school diploma or a GED, provided that, by the date of their employment by the county board, they were enrolled in an adult education class in preparation for obtaining a GED, continue to be enrolled in the GED program and are satisfactorily meeting one of the two contingencies permitted under the statute, as specified by the county board.
36. Hogan v. Kanawha County Board of Education, Docket No. 2015-1306-KanED (March 15, 2016). The summer service personnel statute, in addressing a reduction-in-force of summer employees, does not permit service employees who worked in jobs one summer to choose, on a seniority basis, which positions in the same classification they prefer to hold during the next summer.
37. Canterbury v. Raleigh County Board of Education, Docket No. 2016-0725-RalED (March 16, 2016). Considerable deference is afforded the employer's assessment of the seriousness of an employee's conduct and the prospects for rehabilitation. It may be reasonable to terminate an employee's contract based upon the concern that the employee's misconduct would otherwise be repeated.
38. Cole v. Wood County Board of Education, Docket No. 2015-1554-WooED (March 18, 2016). A teaching schedule adjustment within an assigned school, which does not include



duties or responsibilities outside of a teacher's presently utilized area of certification, discipline, department or grade level, is not a change in assignment amounting to a transfer.

39. Russell v. Kanawha County Board of Education, Docket No. 2016-0447-KanED (March 21, 2016). While immorality is frequently used to define sexual misconduct, immorality may also encompass other forms of conduct not in conformity with accepted principles of right and wrong behavior, such as theft. Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. Establishing this offense involves a fairly heavy burden in that the employer must not only prove that the acts it alleges did occur, but also that the reason for the employee's neglect of duty was more than simple negligence. Theft of state property is one of the most serious offenses an employee can commit; the value of the property is of little consequence.
40. Sprouse v. Lewis County Board of Education, Docket No. 2015-0207-CONS (April 1, 2016). A statute sets the minimum salary and class titles for 200-day school service personnel, based on the pay grade to which their class title is assigned and their years of service. Other than setting a three and one-half hour per day threshold, the statute does not address the number of hours a school service employee must work in order to be paid the minimum salary.
41. Long v. Wetzel County Board of Education, Docket No. 2015-0754-WetED (April 8, 2016). For purposes of determining whether a grievance complaint was timely filed, the discovery of a legal theory to support a grievance does not constitute discovery of an event giving rise to a grievance.
42. Ward v. Mingo County Board of Education, Docket No. 2015-1085-CONS (April 21, 2016). 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. A county board is not bound by the legally unauthorized acts of its officers. All persons must take note of the legal limitations upon the power and authority of school officials.
43. Stewart v. Doddridge County Board of Education, Docket No. 2016-0962-CONS (April 27, 2016). State board of education policy provides that children who attend a pre-K classroom and are not yet enrolled in kindergarten, and who are transported by a school bus, must sit in a segregated area of the vehicle with other pre-K children. A bus operator's repeated choice to not follow this rule, of which the bus operator was aware, constitutes insubordination.
44. Smith v. Ohio County Board of Education, Docket No. 2015-1624-OhiED (May 12, 2016). A Level One decision must be in writing, dated and set forth the reasons for the decision or outcome. If the grievance is not resolved, the decision must include the address and procedure to appeal to the next level. Also, the extra-duty statute requires only that the most senior service employee be given priority in making an assignment. That requirement





is met by a county board's policy of first checking to see if the most senior employee is available. The statute does not require unconditionally that the most senior employee be given the assignment. It is not an abuse of discretion for a county board to refuse to award an extra-duty assignment to a bus operator when legitimate questions exist as to the employee's logistical ability to perform the run.

45. Collins v. Calhoun County Board of Education, Docket No. 2015-1343-CalED (May 12, 2016). An employee of a multi-county vocational technical center initiates a grievance by filing a complaint with the director of the multi-county center, rather than with the superintendent of any of the participating county boards.
46. Scurlock v. Raleigh County Board of Education, Docket No. 2015-1760-CONS (May 16, 2016). It is permissible and reasonable for a county board to interpret "length of service time" for purposes of summer service employee reductions in force and reemployment to mean the total days served in a summer program or classification, rather than the number of summers worked.
47. McCloud v. Mingo County Board of Education, Docket No. 2016-1006-MinED (May 23, 2016). It is not the label given to the conduct that controls whether an employee is entitled to an opportunity to improve, but rather whether the conduct was related to the employee's performance and is correctable. Even when an employer labels an employee's conduct as willful neglect of duty or insubordination, if the underlying complaint regarding the employee's conduct relates to her employment, an initial inquiry must be made into whether the conduct is correctable. Excessive absenteeism is an issue for which school employees are entitled to evaluation and an opportunity to improve. Also, a review of past evaluations and disciplinary action can establish that an employee has been properly put on notice of performance deficiencies, in which case a continuing pattern of non-compliant behavior proves that the conduct is not correctable.
48. Wells v. Upshur County Board of Education, Docket No. 2010-0131-UpsED (May 24, 2016). A county board is prohibited from discharging, demoting or transferring an employee for reasons having to do with prior misconduct or incompetency that has not been called to the employee's attention through evaluation, and which is correctable. By statute, an unsatisfactory professional must be given notice and an opportunity to improve. If by the next performance evaluation the individual is still not performing satisfactorily, the supervisor may place the employee on another improvement plan or recommend dismissal. Also, it is not necessary for a professional to be on an improvement plan to be dismissed.
49. Bias v. Boone County Board of Education, Docket No. 2015-1235-BooED (May 25, 2016). The point at which a work environment becomes hostile or abusive does not depend on any mathematically precise test. Instead, the objective severity of harassment should be judged from the perspective of a reasonable person in the victim's position, considering all the circumstances. These circumstances may include, but are by no means limited to, the



frequency of the discriminatory conduct; its severity; whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. No single factor is required. Depending upon the facts, petty interoffice squabbling may not amount to a hostile or abusive work environment.

50. Lawton v. Hancock County Board of Education, Docket No. 2015-0611-HanED (May 27, 2016). An employee's filing of a grievance with the Grievance Board only, and not with the employer, may be found to substantially comply with the statutory requirements under circumstances where the county board is not harmed by the employee's error in not filing with the employer. Also, in spite of the statute that prohibits a county board from changing the daily work schedule of a service employee during the school year without the employee's written consent, a county board has freedom to make reasonable changes to a service employee's daily work schedule, within the parameters of his contract, when the changes cannot reasonably be effected until shortly after school starts. Whether the changes are reasonable involves a case-by-case, fact-specific inquiry. Minor alterations to a bus route which could not be anticipated prior to the beginning of the school year may be made after the school year begins, as when a child moves into an area, or to alleviate overloading. The schedule of an aide assigned to a school bus is defined by the daily schedule of her bus.
51. Barnett v. Cabell County Board of Education, Docket No. 2015-1762-CONS (May 31, 2016). In filling a vacancy in a position of employment, the county superintendent has the duty to nominate a qualified candidate to the county board. The board does not get to make the nomination. The board must vote on the nomination of the superintendent. If the board rejects a nomination, it may direct the superintendent to nominate someone else. In the end, a county board must select the most qualified candidate for the position, pursuant to the statutory criteria, and the selection must be reasonable, in the best interest of the schools, and not arbitrary and capricious. It would be arbitrary, capricious and improper for a county board to base the selection of an individual for a professional vacancy on the fact that the candidate's selection would be easier, would allow for a "seamless transition," or be the least likely to cause disruptions. To do so would be to disregard the candidate's the qualifications for the job.
52. Blackburn v. Mingo County Board of Education, Docket No. 2015-1148-CONS (June 1, 2016). County boards are encouraged to correct their errors as early as possible. An error made in regard to one employee does not entitle another employee to the benefits of the same mistake.
53. Bias v. Boone County Board of Education, Docket No. 2015-1236-BooED (June 2, 2016). One exception to the rule that a grievance must be filed within 15 days following the occurrence of the event upon which the grievance is based, or within 15 days of the date upon which the event became known to the employee, is the "continuing practice"





exception. An employee may contest a continuing practice within 15 days of the most recent event of the practice. A grievant may only contest a continuing practice once, and any remedy is prospective.

54. Sizemore v. Brooke County Board of Education, Docket No. 2015-1561-BroED (June 8, 2016). Once a service employee is properly placed in a particular summer position, seniority rights are established for the employee to return to the position during any succeeding year. If a county board reduces in force the number of service employees to be employed in a particular summer program or classification from the number employed in that position in previous years, the reductions in force and priority and re-employment to that summer position shall be based upon the length of service time in the particular summer program or classification.
55. Lake v. Cabell County Board of Education, Docket No. 2016-0377-CabED (June 28, 2016). Upon being employed by a county board, a teacher is entitled to credit for teaching experience for the time spent homeschooling her children as a certified teacher.

***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.***