



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

**RESA 7
ADMINISTRATORS CONFERENCE**

Harrison County Parks and Recreation / 4-H Center

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HIGHLIGHTS OF LEGISLATION ENACTED AT THE 2015 REGULAR SESSION AFFECTING PUBLIC EDUCATION IN WEST VIRGINIA

By the Education Law Group at Bowles Rice LLP

http://www.bowlesrice.com/email/education/VValert/BowlesRiceEducation_LegislativeUpdate15.html

Senate Bill 7

Requiring CPR and Care for Conscious Choking Instruction in Public Schools

In effect July 1, 2015

For some time, the State Board of Education has been under a duty to see that public schools teach the subject of health education. The curriculum must incorporate instruction on sexually transmitted diseases, substance abuse, cardiopulmonary resuscitation and first aid in any of the grades six through twelve, as considered appropriate by the county school board. Senate Bill 7 adds, to those requirements, instruction in care for conscious choking, plus recognition of symptoms of drug or alcohol overdose. *W. Va. Code § 18-2-9(b)*.

The bill also elaborates upon the required CPR instruction. Each student, prior to graduation, must have at least 30 minutes of instruction in the proper administration of CPR and the psychomotor skills necessary to perform it. This requires the use of “hands on” practice rather than cognitive-only training. The instruction must be based on programs established by the American Heart Association or American Red Cross, or another nationally recognized program that uses the most current national evidence-based CPR guidelines and incorporates psychomotor skills development. A licensed teacher need not be a certified CPR trainer in order to facilitate, provide, or oversee the instruction. Community members, such as emergency medical technicians, paramedics, police officers, firefighters, licensed nurses and representatives of the American Heart Association and American Red Cross may supply the instruction. Community members who teach CPR are encouraged to provide the necessary training and instructional resources at no cost to the schools. Any instruction that results in a student earning certification must be taught by an authorized CPR instructor. *W. Va. Code § 18-2-9(d)*.

Senate Bill 12

Relating to Payment of Separated Employee’s Outstanding Wages

In effect June 11, 2015

Senate Bill 12 affects how soon an employer must pay final wages to a separating employee. Whether an employee is discharged or resigns, the employer is required to pay the employee on or before the next regular payday for work that the employee performed prior to the separation of employment. Prior to this bill, employers were required to pay discharged employees by the next regular payday or within four business days, whichever occurred first. Likewise, under the prior version of the Act, if a resigning employee gave the employer at least one pay period’s written



notice of the employee's intention to quit, the employer was required to pay the employee, by the time of quitting, all wages earned. By establishing a uniform time period, Senate Bill 12 removes the different deadlines that previously applied to paying discharged employees and those who quit or resign their employment. *W. Va. Code § 21-5-4(b)*.

The legislation also reduces the amount of liquidated damages that an employee may recover when the employer does not pay final wages within the time limits required by the Act. An employer who does not pay an employee on time will now be liable to the employee for twice the wages due, instead of three times the wages due. *W. Va. Code § 21-5-4(e)*.

Senate Bill 238
Limiting Certain County Board of Education Liability Arising From Unorganized Recreation
In effect May 26, 2015

Under Senate Bill 238, county boards of education are not liable for loss or injury arising from the use of school property made available for unorganized recreation. However, they are liable for their acts or omissions that constitute gross negligence or willful and wanton conduct that is the proximate cause of injury or property damage. *W. Va. Code § 18-5-19*.

Senate Bill 243
Relating to School Nutrition Standards During State of Emergency or Preparedness
In effect March 13, 2015

In order to facilitate uninterrupted days of instruction during an official state of emergency or state of preparedness, Senate Bill 243 allows the Governor or Legislature to temporarily suspend nutrition standards for foods and beverages distributed to public school students during the school day. A suspension of the standards is allowed only if safe alternative foods and beverages are available for distribution, and only in the geographic area affected by the state of emergency or state of preparedness. *W. Va. Code § 15-5-6a*.

Senate Bill 286
Relating to Compulsory Immunizations of Students; Exemptions
In effect June 16, 2015

Senate Bill 286 makes clear that the compulsory immunization of school children applies to children entering a public, private or parochial school, or a state-regulated child care center, and that the required immunizations shall be against chickenpox, hepatitis-b, measles, meningitis, mumps, diphtheria, polio, rubella, tetanus and whooping cough. County health departments must provide immunizations when families attest that they cannot afford them. However, a child lacking a required immunization may be admitted to school or a state-regulated child care center with a certificate of exemption issued by the Commissioner of the Bureau for Public Health in the Department of Health and Human Resources. *W. Va. Code § 16-3-4(a),(b),(c)*.



Exemptions may no longer be granted by physicians in general. They may be granted only by the Commissioner or a physician appointed by the Commissioner to serve as Immunization Officer. A request for exemption must be accompanied by the certification of a licensed physician stating that the physical condition of the child is such that immunization is contraindicated or there exists a specific precaution to a particular vaccine. The denial of an exemption by the Commissioner or Immunization Officer may be appealed to the State Health Officer. A final determination by the State Health Officer may be appealed to circuit court. *W. Va. Code § 16-3-4(h)*.

Any school or state-regulated child care center having information concerning a person who seeks enrollment without the required immunizations must report the person's name to the Commissioner. *W. Va. Code § 16-3-4(d)*.

A physician convicted of the misdemeanor of making a false certificate of immunization may now be fined no less than \$25 and not more than \$100. *W. Va. Code § 16-3-4(i)*.

Senate Bill 287
Providing Posthumous High School Diplomas
In effect June 16, 2015

Known as "Todd's Law," this bill directs the State Board of Education to allow a high school diploma to be issued to a deceased student, at the request of the parent, guardian or custodian, if the student was enrolled in a West Virginia public school at the time of death, died after the completion of 11th grade, and was academically eligible or on track to complete the requirements for graduation at the time of death. *W. Va. Code § 18-2-32*.

Senate Bill 294
Eliminating Certain Unnecessary, Inactive or Redundant Councils, Committees and Boards
In effect June 1, 2015

The legislation eliminates certain unnecessary, inactive or redundant councils, committees and boards, including the Principals Standards Advisory Council established in former *W. Va. Code § 18A-3-2c(d)*. The Council was established in 1996 to assist the State Board of Education in developing a policy about the minimum qualities, proficiencies and skills that were required of principals after January 1, 1997.

Senate Bill 302
Relating to State Retirement Plans
In effect May 21, 2015

Former participants of the West Virginia Teachers Defined Contribution Retirement System who elected to transfer to the West Virginia Teacher Retirement System and whose benefits have



been terminated for less than honorable service shall not be refunded any transferred vested employer contributions. *W. Va. Code § 5-10A-6.*

Senate Bill 318
Relating to Payment of Wages by Employers
In effect June 12, 2015

The previous law requiring employers to pay employees at least once every two weeks is replaced by a requirement that employers pay employees at least twice every month, with no more than 19 days between paydays. *W. Va. Code § 21-5-3(a).*

Senate Bill 342
Clarifying Scope, Application and Requirements for Error Corrections by CPRB
In effect June 10, 2015

Senate Bill 342 modifies the provisions for the correction of errors under the various retirement systems, including the State Teachers Retirement System and the Teachers' Defined Contribution Retirement System, clarifying the scope, application and requirements for error correction by the Consolidated Public Retirement Board. The errors addressed include underpayments and overpayments to the retirement system by members, retirants and participating public employers, underpayments and overpayments from the retirement system to members, retirants, beneficiaries or other individuals; and errors as to the eligibility of individuals, employers or both. *W. Va. Code § 5-10-44; W. Va. Code § 18-7A-14c; W. Va. Code § 18-7B-21.*

Senate Bill 344
Relating to Duty to Mitigate Damages in Employment Claims
In effect June 8, 2015

Senate Bill 344 provides that in any employment law action against an employer, the plaintiff has the duty to mitigate past and future lost wages. Awards of unmitigated back pay (the wages an employee would have earned from the time of an adverse employment action through the time of trial) and front pay (wages an employee would have earned from the time of trial through a future date) are not available. Any award of back pay or front pay by a commission, court or jury must be reduced by the amount of interim earnings or the amount the plaintiff could earn with reasonable diligence. The employer has the burden to prove the lack of reasonable diligence. *W. Va. Code § 55-7E-1; W. Va. Code § 55-7E-3.*



Senate Bill 361
Eliminating Prevailing Hourly Wage Requirement for Construction of Public Improvements
In effect April 13, 2015

The "Prevailing Wage Bill" changes how West Virginia's prevailing wage rate is calculated and to which projects the rate applies. "Prevailing wages" must be paid to all workers who, on behalf of a public authority, are engaged in the construction of public improvement projects whose cost at the time the contract is awarded is greater than \$500,000 and is to be paid with public money (which excludes money obtained by private donation, contribution, fundraising or insurance proceeds). Projects costing \$500,000 or less in public money are now exempt from using the prevailing wage. The bill applies only to contracts for construction on public improvements let after the effective date. *W. Va. Code § 21-5A-1(7); W. Va. Code § 21-5A-3; W. Va. Code § 21-5A-6; W. Va. Code § 21-5A-10.*

The prevailing wage rates were previously calculated by the Department of Labor and were based primarily on union wages. Senate Bill 361 requires WorkForce West Virginia to calculate the prevailing wage, in coordination with economists at West Virginia University's Bureau of Business and Economic Research and Marshall University's Center for Business and Economic Research. These entities have until June 1 of this year to determine the methodology for annually calculating the prevailing wage, and they have until July 1 of this year to determine the prevailing wage that shall be in effect for the remainder of 2015. Each year, these entities shall determine the following year's prevailing hourly wage by September 30. The methodology for computing the hourly wage will be re-evaluated every three years. *W. Va. Code § 21-5A-5.*

Senate Bill 378
Relicensing Electricians Without Retesting Under Certain Circumstances
In effect February 20, 2015

Electricians previously licensed by the State Fire Marshal, but who did not renew their electrician's license, may now do so, without retesting, within three years of the date of the last renewal, provided that the license has not been revoked. The renewal fees are increased for licenses that have been lapsed for two or three renewal periods. *W. Va. Code § 29-3B-6.*

Senate Bill 409
Establishing Fair and Open Competition in Governmental Construction Act
In effect June 10, 2015

A "project labor agreement" is any pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project. Senate Bill 409, known as The Fair and Open Competition in Governmental Construction Act, prohibits the state and its agencies and political subdivisions from making a project labor agreement part of the competitive bid process on construction projects beginning July 1, 2015. *W. Va. Code § 5-22-3(b),(c).*



The Act prohibits public entities from requiring or inferring that a bidder, contractor or subcontractor must enter into or adhere to a project labor agreement. It prohibits rewarding or punishing a bidder, contractor or subcontractor for signing or adhering to, or not signing or adhering to, a project labor agreement. No provisions of a construction project's bid specification, bid requests, project agreements and other controlling documents may include any provision dealing with project labor agreements. *W. Va. Code § 5-22-3(d)*.

There are certain exclusions. A governmental entity is allowed to award a contract to a private owner, bidder, contractor or subcontractor who is a party to an agreement with a labor organization as long as being a party or adhering to such an agreement is not a condition for award of the contract, and if the government entity does not discriminate against a private owner, bidder, contractor or subcontractor based upon the status of being or refusing to become a party to such an agreement. The head of a governmental entity may exempt a particular project, contract or subcontract, following notice and a public hearing, if special circumstances require an exemption to avert an imminent threat to public health or safety. However, the threat of a labor dispute is not a special circumstance that justifies an exemption. *W. Va. Code § 5-22-3(f),(g)*.

Senate Bill 447
Allowing Issuance of Diploma by Public, Private or Home School Administrator
In effect June 12, 2015

A new section of the West Virginia Code empowers an individual who administers a program of secondary education at a public, private or home school to issue a diploma or other appropriate credential to a person who has completed the program of secondary education. When issued, the diploma or credential is legally sufficient to demonstrate that the person to whom it was issued meets the definition of having a high school diploma or its equivalent. No West Virginia state agency or institution of higher learning may reject or otherwise treat a person differently solely because of the source of the diploma or credential. However, a state agency or institution of higher learning is not prohibited by the statute from inquiring into the substance or content of the program in order to determine whether a person meets other specific requirements. *W. Va. Code § 18-8-12*.

Senate Bill 488
Creating Broadband Enhancement Council
In effect June 11, 2015

This legislation changes the name of West Virginia's Broadband Deployment Council to the Broadband Enhancement Council. The Council, like its predecessor, includes the State Superintendent of Schools or his or her designee, who is relieved of having to submit a written annual report describing the broadband infrastructure of the schools and related matters. But unlike its predecessor, the duties of the Council include exploring any and all ways to expand access to broadband services, including, but not limited to, middle mile, last mile and wireless applications, and gathering data regarding the various speeds provided to consumers in comparison to what is advertised. In contrast to the former Broadband Deployment Council, the



Broadband Enhancement Council is not empowered to bring broadband service to unserved areas, but rather is to advise the Legislature on how to do so, and how to improve service in underserved areas. *W. Va. Code § 31-15C-2(4)*; *W. Va. Code § 31-15C-3(b)(4)*; *W. Va. Code § 31-15C-4(a)*.

Senate Bill 529
Relating to PERS, SPRS and TRS Benefits and Costs
In effect March 18, 2015

Senate Bill 529 concerns benefits and costs for members of certain retirement systems. The full extent of the bill is beyond the scope of this summary. Among the bill’s features are these.

The bill authorizes certain members of the Teachers Retirement System who transferred from the Teachers’ Defined Contribution System to buy, with interest, their full service credit in the Teachers Retirement System. They are eligible to do so if on or before June 30, 2009, they transferred and provided the retirement board with a signed verification of cost for service credit purchased form, but were unable to complete the purchase, or if they did not request a verification of cost letter but attempted to and were denied the purchase of the credit on or before December 31, 2009, and on or before April 15, 2015, requested from the board a recalculation of the contribution for 2015. The recalculated amount must be paid into the State Teachers Retirement System by July 1, 2015, or within 60 days of the postmark date of the contribution recalculation, whichever is later. *W. Va. Code § 18-7D-6*.

Under Senate Bill 529, persons who first become members of the retirement system on or after July 1, 2015 (1) may take voluntary retirement at age 62, instead of age 60, and upon attaining ten or more years of actual, contributing service, rather than five or more years of service, (2) may not apply accrued annual or sick days to acquire additional credited service, (3) will have a “final average salary” that is based on the highest annual compensation received during any period of five consecutive years of contributing service, rather than three consecutive years of credited service, contained within their final 15 years of credited service, and (4) will have their teacher system final average salary computed without taking into account compensation for services rendered in a position covered by the public retirement system. *W. Va. Code § 5-13-2(h)*; *W. Va. Code § 5-10-2(8)*; *W. Va. Code § 5-10-15a*; *W. Va. Code § 5-10-20*.

The bill allows teachers and other public employees to purchase up to five years of military credit upon certain terms and conditions. *W. Va. Code § 18-7A-17a*.



House Bill 2005
Relating to Alternative Programs for the Education of Teachers
In effect June 12, 2015

At 31 pages, House Bill 2005 is perhaps the longest of the public education bills enacted by the Legislature earlier this year. Many of its provisions are beyond the scope of this summary. These are some of its significant features.

Existing law entitled a teacher from another state to a teaching certificate for a comparable grade level and subject area valid in West Virginia if he or she met a number of requirements, one of which was that the teacher graduated from an educator preparation program at a regionally accredited institution of higher education. The bill establishes, as an alternative, that the teacher graduated from “another educator preparation program.” *W. Va. Code § 18A-3-1(b)(2)(B)*.

The laws regulating alternative programs for the education of teachers are extensively rewritten. Alternative program partnerships are authorized between one or more schools or school districts and other enumerated entities. A partnership must adopt an agreement governing how the partnership will conduct its program and including, at a minimum, nine elements enumerated in the statute. Among the elements is the requirement that a partnership may consider enrolling a person in the alternative program only after a vacancy has been advertised for ten days and no qualified applicant applies. *W. Va. Code § 18A-3-1b(a),(b)(c)*.

Another element of the required agreement is that any school or school district that hires an alternative program teacher will, with one exception, renew the person’s contract from year to year as long as he or she makes satisfactory progress in the alternative program or until he or she completes the program. The exception is that if the school or school district reduces its overall number of teachers, the alternative program teacher is subject to the same force reduction rules and procedures as any other employee, “except those that relate to seniority,” and in no event will an alternative program teacher displace a professional educator (defined as “a teacher, supervisor, principal, superintendent, public school librarian or any other person regularly employed for instructional purposes in a public school in this state”). *W. Va. Code § 18A-3-1b(c)(9)*.

New sections of the West Virginia Code address the standards that alternative program instruction must meet, the permissible methods of instruction, the use of professional support teams, and the tuition that may be charged. The State Board of Education, which must approve or disapprove a partnership’s application to operate an alternative program, is required to adopt a policy governing the approval and operation of alternative education programs, to include, at a minimum, a number of standards, procedures and guidelines spelled out in the bill. *W. Va. Code § 18A-3-1c; W. Va. Code § 18A-3-1d; W. Va. Code § 18A-3-1e*.

Another new statute prohibits a person from participating in an alternative program unless he or she holds an alternative program teacher certificate issued by the State Superintendent for the alternative program position in which the individual will be teaching. Eligibility for the



certificate is based upon criteria spelled out in the statute, one of which is that the individual receive a formal offer of employment from a county superintendent in an area of critical need or shortage and by “a school or school district that is a member of an approved educational provider.” An alternative program teacher certificate is the same as a professional teaching certificate for the purpose of issuing a continuing contract. *W. Va. Code § 18A-3-1f*.

Alternative programs for highly qualified special education teachers are separate from other programs and apply only to teachers who have at least a bachelor’s degree in a program for the preparation of teachers from an accredited institution of higher education. These programs may be an alternative to the standard college and university programs for the education of special education teachers and also may address the content area preparation of certified special education teachers. *W. Va. Code § 18A-3-1g; W. Va. Code § 18A-3-1h*.

House Bill 2005 amends in a number of respects, the law under which the State Superintendent of Schools is empowered to issue certificates. A professional teaching certificate may now be issued to a person who has completed an alternative program approved by another state. Alternative program teacher certificates that were previously valid for one year and renewable for each of the next two consecutive years are now valid while the candidate is enrolled in the alternative program, up to a maximum of three years. “Citizen coach” certificates for persons to serve the public schools as athletic coaches or coaches of other extracurricular activities may now be issued even if a currently employed certified professional educator has applied for the position. *W. Va. Code § 18A-3-2a(a)(1)(A)(v); W. Va. Code § 18A-3-2a(b)(2); W. Va. Code § 18A-3-2a(e)(3)*.

House Bill 2025
**Prohibiting Certain Sex Offenders From Loitering Within One Thousand Feet of a School
or Child Care Facility**
In effect May 26, 2015

House Bill 2025 creates the new misdemeanor offense of criminal loitering by certain sex offenders who are on supervised release for ten years or more. The misdemeanor is committed when a covered person, with no legitimate purpose, and after being asked by an authorized person to leave, enters or remains on property within 1,000 feet of a facility that educates, entertains or cares for minor children. *W. Va. Code § 61-8-29(a),(b),(c)*.

Among the facilities protected by the new law are public and private pre-school, primary, intermediate, middle and high schools; playgrounds; athletic facilities used by minors; and school bus stops. The persons authorized by the new law to ask a covered sex offender to leave include law enforcement officers, security officers employed by a facility to protect persons or property, and county board of education employees. A sex offender’s legitimate purposes for coming closer than 1,000 feet to a protected facility include supervision, counseling or other activity in which the sex offender is directed to participate as a condition of supervised release. The sex offender's presence is also legitimate when expressly permitted by his or her supervising officer. *W. Va. Code § 61-8-29(d),(e)*.



House Bill 2099
Extending the Time of Meetings of Local Levying Bodies When Meetings are Delayed
In effect May 29, 2015

School boards are already required to meet as local levying bodies between March 7 and March 12 or, when a levy is on the primary ballot, before June 1. Recognizing that occasionally a school board cannot or does not meet these deadlines, the State Auditor is directed by House Bill 2099 to propose rules for the Legislature's approval. The rules will establish a process under which a school board can apply for permission to extend the meeting deadline to a date set by the State Auditor. *W. Va. Code § 11-8-9(c)*.

The State Auditor must also require school boards to file, no later than April 1, a report of their meetings as local levying bodies. *W. Va. Code § 11-8-9(c)*.

House Bill 2139
Relating to Employment of Retired Teachers as Substitutes in Areas of Critical Need and Shortage for Substitutes
In effect March 12, 2015

House Bill 2139 resurrects and modifies provisions of *W. Va. Code § 18A-2-3(c)* that expired on June 30, 2014. Those provisions allowed school boards under certain conditions to employ retired teachers as substitute teachers for an unlimited number of days in areas of critical need and shortage, without affecting their monthly retirement benefit. The reinvigorated provisions will now expire on June 30, 2017. *W. Va. Code § 18A-2-3(c)(9)*.

Modifications to the prior provisions include a requirement that, prior to employing a retired teacher as a critical needs substitute, a school board's superintendent must submit the justifying affidavit to the State Board of Education, but not also to the Consolidated Public Retirement Board. The State Board, upon verifying the retiree's eligibility to serve as a critical needs substitute, will now remit the affidavit to the Retirement Board. *W. Va. Code § 18A-2-3(c)(2)(G)*.

Additionally, under the modified process, if a retiree is to serve as a critical needs substitute in a position that is actually vacant, the retiree can do so only if his or her retirement took effect at least 20 days before the start of the employment term during which he or she is employed as a substitute. Even then, the county must continuously post the position vacancy electronically and in a way that the State Board of Education determines is easily accessible to prospective employees. *W. Va. Code § 18A-2-3(c)(6)*.



House Bill 2140
Building Governance and Leadership Capacity of County Board During Period of State Intervention

In effect June 11, 2015

West Virginia's process for improving education is amended with the aims of building the governance and leadership capacity of county boards of education during periods of state intervention, and to assure their sustained success following state intervention. To that end, the State Board of Education is authorized, during an intervention, to declare vacant the positions of professional personnel employed by the county board as deputy, associate or assistant superintendents in offices, departments or divisions at locations other than a school and who are directly answerable to the superintendent. The vacancies are to be filled by application. *W. Va. Code § 18-2E-5(m)(4)(C)(iii).*

A county board in which the State Board has intervened must establish, with State Board approval, goals and action plans designed to improve performance sufficiently to end the intervention within five years. The State Superintendent of Schools must oversee that process and provide assistance and feedback to the county board. The goals and plans are to include mandatory training and development activities for the school board and its administrators in effective governance and school improvement; collaboration between the county board and county superintendent to gather, analyze and interpret data and develop time-specific goals to correct deficiencies; and the allocation of resources for, among other things, school board development, training and coaching. *W. Va. Code § 18-2E-5(p).*

At least annually during an intervention, the Office of Education Performance Audits will now assess the county board's readiness to reassume control and sustain the necessary improvements. OEPA must also gauge the school board's progress in achieving the goals and taking the actions specified in the county's plan. If, after the fifth annual OEPA assessment, the State Board finds that the county board is not ready for a return of control, the State Board may, after conducting a public hearing, extend the intervention and require the county board to revise its plan. Once intervention ends and the county board resumes complete control, the process of governance education and development must continue for a period of up to three years. During that time, the State Board may again intervene, if necessary, but only following a public hearing. *W. Va. Code § 18-2E-5(p).*

House Bill 2140 also contemplates that electronic county and school improvement plans may cover a period of less than five years. Previously the plans had to last for five years. *W. Va. Code § 18-2E-5(b).*



House Bill 2200
Revising, Rearranging, Consolidating and Recodifying the Laws of the State of West Virginia Relating to Child Welfare
In effect February 16, 2015

This House Bill rearranges the West Virginia laws relating to child welfare, removing outdated language and modifying statutes to comply with a court decision concerning child welfare. As a result, some Code sections related to the obligation of school personnel to report abuse and neglect are assigned new section numbers and, in some instances, revised titles. *W. Va. Code § 49-6A-2*, “Persons mandated to report suspected abuse and neglect,” becomes *W. Va. Code § 49-2-803*, “Persons mandated to report suspected abuse and neglect; requirements.” *W. Va. Code § 49-6A-8*, “Failure to report; penalty,” becomes *W. Va. Code § 49-2-812* with the same title.

House Bill 2370
Increasing the Powers of Regional Councils for Governance of Regional Education Service Agencies
In effect June 10, 2015

An amendment to an existing law increases the powers of regional councils to govern West Virginia's regional education service agencies. House Bill 2370 prohibits the State Board of Education from appointing a RESA executive director who was not first nominated by the RESA's regional council. It also requires the State Board to consult with the regional councils in developing a job description and qualification criteria for the position of executive directors. Each regional council will hereafter determine one half of its executive director's annual performance evaluation. *W. Va. Code § 18-2-26(c)(1)*.

The bill makes clear that RESAs may cooperate with each other by sharing or combining services. It updates references in the RESA law to computer programs and systems, removing dated provisions about RESAs performing computer installation, maintenance and repair. *W. Va. Code § 18-2-26(d)*.

House Bill 2377
Authorizing State Board of Education to Approve Certain Alternatives With Respect to Instructional Time
In effect June 10, 2015

House Bill 2377 empowers the State Board of Education to approve on a case-by-case basis, certain alternatives proposed by county boards and by schools to “the letter of the law” on instructional time. The State Board may approve a proposed alternative only if, in the State Board's judgment, the alternative meets the “spirit and intent” of applicable statutes and has the sole purpose of improving student learning within a reasonable period. The State Board must also take into consideration a list of eight legislative findings about how instructional time optimizes student learning. *W. Va. Code § 18-2-5(c)*.



To be considered, a proposal must include the instructional time necessary for students to meet or exceed the State Board’s high quality standards for student performance; ensure sufficient time within the instructional term to promote the improvement of instruction and instructional practices; and incorporate a school calendar approved through the established approval process. A proposal must also contain the faculty senate’s determination that the alternative affords teachers sufficient planning time to develop engaging, differentiated instruction for all students in all classes, as well as collaborative time to undertake and sustain instructional improvement. *W. Va. Code § 18-2-5(c).*

House Bill 2377 repeals certain outdated provisions of *W. Va. Code § 18-2-5* concerning the entrance age for students, kindergarten, and the transition to developmental programming and instruction in grades K through 4.

House Bill 2381

Providing a Teacher Mentoring Increment for Classroom Teachers With National Board Certification who Teach and Mentor at Certain Schools

In effect July 1, 2015

This legislation grants a \$2,000 annual increment to National Board-certified teachers who are assigned to certain schools where, as part of their regular employment, they serve as mentors to other teachers. The schools are those identified by the State Department of Education as “persistently low performing” because they are among the lowest 20 percent of schools in three-year aggregate math and reading/language arts scores on the statewide summative assessment. The mentoring must involve working under the principal’s direction to improve the other teachers’ professional practice knowledge and skills through on-site embedded professional development and other appropriate building-level approaches. *W. Va. Code § 18A-4-2(a),(b),(c).*

A qualifying teacher whose National Board certification remains valid will receive the increment for five consecutive years if he or she remains in the same assignment at the same school, even if the school loses its designation as a persistently low performing school. During the same five-year period, the teacher may not receive the increment for mentoring teachers at a different school. School boards may use other funds to increase the bonus or to provide incentives for highly qualified teachers to teach at persistently low performing schools. *W. Va. Code § 18A-4-2(d),(e),(f).*

House Bill 2478

Relating to Public School Finance

In effect July 1, 2015

Under the public school support program’s foundation allowance for public education transportation cost, propane is now one of the fuels eligible for the 10 percent additional percentage allowance for school bus systems using alternative fuels. Additionally, the amount to be used for the replacement of buses for school years beginning July 1, 2015, and July 1, 2016, is



fixed at \$15 million and \$18 million, respectively. *W. Va. Code § 18-9A-7(a)(1)(F); W. Va. Code § 18-9A-7(a)(3).*

House Bill 2502

Possessing Deadly Weapons on School Buses or on the Premises of Education Facilities

In effect June 9, 2015

This bill amends an existing law that criminalizes possessing deadly weapons on school premises, on school buses, and at school sponsored functions. The amendment exempts currently employed city, county, state and federal law enforcement officers who possess deadly weapons, even when not acting in their official capacity. Retired city, county and state law enforcement officers are also exempted if they are now employed by a city, county or state law enforcement agency, but only if they are covered for liability purposes by their employer; are authorized by the county school board and principal to serve as security for the school; meet federal law requirements for retired law enforcement officers carrying firearms; and meet all requirements of their employer for handling and using a firearm. *W. Va. Code § 61-7-11a(b)(2).*

School principals who discover violations of the deadly weapons law are now required to report the violations as soon as possible (rather than within 72 hours) to the State Superintendent of Schools, as well as to the appropriate local office of the State Police, county sheriff or city police. *W. Va. Code § 61-7-11a(c).*

House Bill 2505

Relating to Retirement System Participation and Concurrent Employment Provisions

In effect June 7, 2015

House Bill 2505 provides that members of the Teachers' Retirement System who are employed in an additional job that requires membership in the West Virginia Deputy Sheriff Retirement System, the West Virginia Municipal Police Officers and Firefighters Retirement System or the West Virginia Emergency Medical Services Retirement System, must abide by the concurrent employment provisions of that system and participate in only one system administered by the Consolidated Public Retirement Fund. *W. Va. Code § 5-10-17(d); W. Va. Code § 18-7A-13(a).*

House Bill 2535

Relating Generally to Suicide Prevention Training, "Jamie's Law"

In effect June 8, 2015

Known as Jamie's Law, this legislation requires public middle and high school administrators, by September 1 of each school year, to disseminate and provide opportunities for all middle and high school students to discuss suicide prevention awareness information. The information to disseminate may be obtained from the Bureau for Behavioral Health and Health Facilities or from a suicide prevention training program approved by the State Board of Education. *W. Va. Code § 18-2-40.*



House Bill 2550
Increasing the Number of Unexcused Absences of a Student Before Action may be Taken
Against the Parent
In effect June 10, 2015

House Bill 2550 defines “excused absence” and “unexcused absence” for purposes of the truancy laws.

Excused absences are absences for personal illness or injury of the student or in the family; medical or dental appointments with physician or doctor excuse; chronic medical condition or disability impacting attendance; home or hospital instruction due to illness, injury or other extraordinary circumstance; calamity such as fire or flood; death in the family; approved curricular or extracurricular activities; judicial obligation or court appearance; military requirements for enlisted or enlisting students; personal or academic circumstances approved by the principal; and other situations determined by the county board of education. Absences of students with disabilities are governed by the Individuals with Disabilities Education Improvement Act and related state and federal rules. All other absences are “unexcused.” *W. Va. Code § 18-8-4(a)*.

Under the bill, a student and parent, guardian or custodian will receive written warning after three unexcused absences in a school year. After the fifth such absence they must report to the school for a conference. After the tenth unexcused absence the attendance director is to file a Magistrate Court complaint against the parent, guardian or custodian. *W. Va. Code § 18-8-4(b),(c)*.

House Bill 2598
Ensuring That Teachers of Students With Disabilities Receive Complete Information
About the School’s Plan for Accommodating the Child’s Disabilities
In effect June 12, 2015

If a student has a Section 504 plan, the school is required by House Bill 2598 to instruct each of the student's teachers about the plan's contents and requirements. If the plan is written, each teacher must receive a copy of the plan and of every update, and must sign a receipt acknowledging that they were given the copies. *W. Va. Code § 18-20-2(f)*.

House Bill 2632
Exempting the Procurement of Certain Instructional Materials for use in and in Support of
Public Schools From the Division of Purchasing Requirements
In effect March 11, 2015

The Purchasing Division of the West Virginia Department of Administration issues purchasing requirements that apply to all state government spending units except those that the Legislature exempts. Previously the Legislature exempted the purchase of textbooks by the State Board of Education from those requirements. House Bill 2632 now expands the State Board’s exemption



to cover the State Board's procurement of instructional materials, digital content resources, instructional technology, hardware, software, telecommunications and technical services for use in and in support of public schools. *W. Va. Code § 5A-3-1(d)*.

Additionally, the bill drops "21st Century" from the name of the State Board's state technology plan. It will now be known as the "West Virginia Strategic Technology Learning Plan." The legislation recognizes that the state plan may provide for technology system specialists, and it adds personalized learning to the student uses of school technology. The State Board is required to determine the "equitable allocation" of funds to county school systems for technology services to students; the State Board is permitted to use "per school-site equity" for technologies requiring a site license or other per-school application. State contract prices govern the purchase of technology tools that are made with appropriations for technologies and software resources. *W. Va. Code § 18-2E-7(b); W. Va. Code § 18-2E-7(d)(18)*.

House Bill 2632 removes expired transitional funding language from the statute governing the public school support program's foundation allowance to improve instructional programs. *W. Va. Code § 18-9A-10*.

House Bill 2636
Exempting Information Contained in a Concealed Weapon Permit Application From the Freedom of Information Act
In effect June 12, 2015

Commonly described as a bill that exempts information contained in concealed weapon permit applications from West Virginia's Freedom of Information Act, House Bill 2636 indeed exempts such information from FOIA disclosure, except when requested by a law enforcement agency or officer under certain circumstances. *W. Va. Code § 29B-1-4(a)(20)*. However, the legislation also makes other significant changes to the Act.

Previously, a "public record" which was subject to FOIA disclosure was defined as any writing prepared, owned and retained by a public body, and containing information relating to the conduct of the public's business. The bill revises the definition so that a public record will now be any writing containing information "prepared or received by a public body, the content or context of which, judged either by content or context," relates to the conduct of the public's business. *W. Va. Code § 29B-1-2(4)*.

While a public body may continue to establish fees reasonably calculated to reimburse it for the actual cost of making copies of records, the legislation prohibits public bodies from charging for the labor involved in searching for and retrieving records. *W. Va. Code § 29B-1-3(e)*.

Beginning January 1, 2016, a public body receiving a FOIA request must provide the Secretary of State with information about at least the nature of the request, the nature of the public body's response, the time frame that was necessary to comply in full with the request, and the amount of reimbursement charged to the party who made the request. However, a public body must not



provide the Secretary of State with the public records that were the subject of the FOIA request. *W. Va. Code § 29B-1-3a.*

The Secretary of State will maintain an electronic database, available to the public, of each FOIA request received and the outcome of the request. The website will include a form to be used by a public body to report the nature of and response to each FOIA request, whether the request was granted and, if not, the exemption asserted in denying the request. *W. Va. Code § 29B-1-3(f).*

Finally, House Bill 2636 adds to the Act a “presumption of public accessibility to all public records,” subject only to the listed exemptions. *W. Va. Code § 29B-1-4.*

House Bill 2645

Expanding the Availability of the Underwood-Smith Teacher Loan Assistance Program

In effect June 7, 2015

House Bill 2645 expands the availability of the Underwood-Smith Teacher Loan Assistance Program in two respects.

Previously, to be eligible for a loan assistance award, a teacher had to agree to teach, or be currently teaching, a subject area of critical need in a school or geographic area of the state identified as an area of critical need. House Bill 2645 allows awards to be made to teachers who agree to teach, or are currently teaching, a subject area of critical need, or to teachers who agree to teach, or are currently teaching, in a school or geographic area of the state identified as an area of critical need. *W. Va. Code § 18C-4A-1(b).*

Award recipients will now be eligible to receive loan assistance of up to \$3,000 annually, which is \$1,000 more than in the recent past. *W. Va. Code § 18C-4A-3(a).*

House Bill 2648

Allowing Authorized Entities to Maintain a Stock of Epinephrine Auto-Injectors to be Used for Emergency

In effect June 16, 2015

An authorized health care practitioner is authorized by House Bill 2648 to prescribe an epinephrine injector to an entity where allergens capable of causing a severe allergic reaction may be present. The entity or organization must designate employees or agents who are trained to be responsible for the storage and oversight of the injectors. *W. Va. Code § 16-47-1; W. Va. Code § 16-47-4.*

If a trained person believes in good faith that an individual is experiencing a severe allergic reaction on the premises of, or "in connection with," the entity, the trained person may provide an epinephrine auto-injector to that individual for immediate self-administration, or may administer the auto-injector to that individual, regardless of whether the individual has a



prescription for an auto-injector or has previously been diagnosed with an allergy. *W. Va. Code § 16-47-4.*

Administering an epinephrine auto-injector in accordance with House Bill 2648 is not the practice of medicine. A health care provider who prescribes auto-injectors, the entity that possesses and makes them available, and a party that provides training under the bill are not liable for civil damages resulting from the administration or self-administration of an epinephrine auto-injector, a failure to administer, or any other act or omission committed in good faith under the bill. An entity's employee who administers or provides an epinephrine auto-injection to a person as provided in the bill is immune from liability except in the case of gross negligence of willful misconduct. *W. Va. Code § 16-47-5.*

A nationally recognized organization experienced in training laypersons in emergency health treatment, or another party approved by the Department of Health and Human Resources, is to provide training in how to recognize the symptoms of allergic reactions to food, insect stings and other allergens, and in the proper administration of a subcutaneous injection of epinephrine auto-injector. *W. Va. Code § 16-47-3.*

The Department is authorized to develop policy and provide education and training about the bill. *W. Va. Code § 16-47-2.*

House Bill 2702

Redefining Service Personnel Class Titles of Early Childhood Classroom Assistant Teacher

In effect March 9, 2015

This bill renames the three service personnel class titles established in 2013 for Aides employed in public school kindergarten programs. The former class titles of “Early Childhood Assistant Teacher – Temporary Authorization,” “Early Childhood Assistant Teacher – Permanent Authorization” and “Early Childhood Assistant Teacher – Paraprofessional Certificate” are replaced, respectively, with the class titles of “Early Childhood Assistant Teacher I,” “Early Childhood Assistant Teacher II” and “Early Childhood Assistant Teacher III.” The definition and pay grade of each is as before, except that the minimum requirements to be classified as an Early Childhood Assistant Teacher II are to be determined by the State Board of Education and need no longer meet or exceed the requirements for a child development associate. A person holding the position of Aide in a kindergarten program on or after July 1, 2014, must hold a multiclassification that includes an Aide and/or Paraprofessional class title. *W. Va. Code § 18-5-18(b); W. Va. Code § 18A-4-8(i)(36),(37),(38); W. Va. Code § 18A-4-8(u).*

The State Superintendent of Schools must grant a permanent Early Childhood Assistant Teacher authorization to any Aide employed in a kindergarten program who is eligible for full retirement benefits before July 1, 2020. A person employed as an Aide in a kindergarten program who is eligible for full retirement benefits before the first day of the 2020-2021 instructional term may not be subject to a reduction in force or transferred to create a vacancy for the employment of a



less senior Early Childhood Classroom Assistant Teacher. *W. Va. Code § 18-5-18(b); W. Va. Code § 18A-4-8(t).*

Addressing a concern raised by the 2013 legislation, the bill makes clear that the three Early Classroom Assistant Teacher class titles are now included in the same classification category as Aides, Paraprofessionals, Autism Mentors and Braille or Sign Support Specialists. *W. Va. Code § 18A-4-8b(d)(2)(C).*

House Bill 2733
Removing Certain Combinations of Drugs Containing Hydrocodone From Schedule III of the Controlled Substances law
In effect June 10, 2015

The Uniform Controlled Substances Act is amended by removing certain drugs containing hydrocodone from the schedule III drug classification. Schedule III consists of substances with a potential for abuse less than the drugs or other substances in schedules I and II of the Act, have a currently accepted medical use in treatment in the United States, and when abused may lead to moderate or low physical dependence or high psychological dependence. The bill also extends until June 30, 2017, West Virginia's participation in the Multi-State Real-time Tracking System that is used by pharmacies and law enforcement to track sales of over-the-counter cold and allergy medications containing precursors to the illegal drug, methamphetamine. *W. Va. Code § 60A-2-208; W. Va. Code § 60A-10-16.*

House Bill 2755
Relating to Service and Professional Employee Positions at Jointly Established Schools
In effect March 9, 2015

A jointly established school is one that is located in one county (the "receiving county") but was established by the school boards of the receiving county and an adjoining county (the "sending county") to serve students from both. House Bill 2755 clarifies the rights of personnel in any jointly established school that includes elementary grade levels and is part of a pilot initiative authorized by the Legislature in 2013.

The bill makes clear that the employees of such a school are employees of the receiving county, but accrue seniority in both the receiving and sending county school districts while employed at the jointly established school. An employee who loses a job at the school due to a reduction in force or involuntary transfer may displace a less senior employee of the school district where he or she was employed immediately prior to employment at the jointly established school. But when employees of the jointly established school who came from the sending county voluntarily transfer or resign from a job at the school and are no longer employed in the receiving county, they lose their seniority and any other statutory rights in the receiving county. *W. Va. Code § 18-5-11a(c)(3)(A)(1).*



Another statute, *W. Va. Code § 18A-4-8i(c)*, requires the State Board of Education to create a certified list of the professional educators and service personnel whose employment by the sending county has been terminated because their jobs were eliminated as a direct result of the jointly established school, but who would have retained a position with the sending county if the jointly established school had not been created. House Bill 2755 appears to prohibit the receiving county, from February 1 of the school year immediately preceding the opening of a jointly established school until January 1 following the opening, from filling any vacancies created by the retirement or voluntary transfer of employees of the school until the jobs have been offered to qualified individuals from the State Board's certified list. *W. Va. Code § 18-5-11a(c)(3)(A)(2)*.

House Bill 2797

Changing the Term “Mentally Retarded” to “Intellectually Disabled”, and Changing the Term “Handicapped” to “Disabled”

In effect June 10, 2015

This House bill replaces in several school laws the term “mentally retarded” with the term “intellectually disabled,” and the word “handicapped” with “disabled,” including the statute that addresses preschool programs for what are now referred to as severely disabled children. *W. Va. Code § 18-20-1a*.

House Bill 2931

Adding Drugs to the Classification of Schedule I Drugs

In effect June 10, 2015

The Uniform Controlled Substances Act is amended by adding a number of drugs to the schedule I drug classification, which consists of substances with a high potential for abuse that have no accepted medical use in treatment in the United States or lack accepted safety for use in treatment under medical supervision. The substances added to schedule I include hallucinogenic substances (various tryptamines) and stimulants (various amphetamines). *W. Va. Code § 60A-2-204*.

House Bill 2939

Relating to Requirements for Mandatory Reporting of Sexual Offenses on School Premises Involving Students

In effect June 12, 2015

In addition to the mandatory reporter provisions that are already part of the law, House Bill 2939 requires mandatory reporting of sexual offenses on public or private school premises involving or between students. A teacher or other school employee who personally observes sexual contact, sexual intercourse or sexual intrusion of a child on school premises, school buses or other transportation used for a school purpose must immediately, but not later than 24 hours, report the circumstances or cause a report to be made to the State Police or other law enforcement agency having jurisdiction to investigate. A teacher or other school employee is under the same reporting duty upon receiving a disclosure of such activity from a witness whom



a reasonably prudent person would deem credible. However, teachers and other personnel may satisfy their duty by instead making the matter known immediately, but within 24 hours, to the principal, assistant principal or similar person in charge, in which case the principal, assistant principal or similar person must immediately, but within 24 hours, report the conduct to law enforcement. *W. Va. Code § 49-2-803(c),(e)*.

Teachers and other personnel do not have to report learning from a witness about or personally observing consensual sexual contact, intercourse or intrusion occurring between students unless the act involved any of the following and may, therefore, amount to a crime: (1) forcible compulsion; (2) the infliction of serious bodily injury on anyone; (3) employing a deadly weapon in the commission of the act; (4) sexual intercourse or intrusion with a student who is mentally defective or mentally incapacitated; (5) a student 16 years old or older engaging in sexual intercourse or sexual intrusion with a student under the age of 16 who is not his or her spouse and is four or more years younger; (6) a student 14 years old or older making sexual contact with a student who is younger than 12 years old; (7) sexual contact with a student who is physically helpless. *W. Va. Code § 49-2-803(c)*.

When the alleged conduct reported to law enforcement is between two students or between a student and a teacher or other school personnel, the law enforcement body receiving the report must immediately, but within 24 hours, notify the students' parents, guardians and custodians. *W. Va. Code § 49-2-803(e)*.

School boards and private school administrators must provide all employees with a written statement containing the requirements of these new provisions, and must obtain and preserve a signed acknowledgment from school employees that they have received and understand the reporting requirements. *W. Va. Code § 49-2-803(d)*.

A person, official or institution required to report a case involving a child known or suspected to be sexually assaulted or abused, or a student known or suspected to have been a victim of any non-consensual sexual contact, intercourse or intrusion, who knowing fails to do so or knowingly prevents another person acting reasonably from doing so, is guilty of a misdemeanor punishable by not more than six months in jail and/or a fine not more than \$10,000. *W. Va. Code § 49-2-812(b)*.

Senate Concurrent Resolution 10
Designating September Each Year as U.S. Constitution Month

The resolution designates the month of September every year as U. S. Constitution Month. It encourages the people of West Virginia to remember and study the extraordinary events of 1787, which culminated in the drafting of the U. S. Constitution.



**Senate Concurrent Resolution 31
Authorizing Meeting of Joint Select Committee on Tax Reform**

The Joint Select Committee on Tax Reform is authorized to study the West Virginia tax system and make recommendations for comprehensive tax reform, including drafts of any legislation to effectuate the recommendations.

**Senate Concurrent Resolution 59
Requesting Joint Committee on Government and Finance Study Expansion of Outcomes of
MU Luke Lee Listening, Learning and Language Lab**

Marshall University's Luke Lee Listening, Language and Learning Lab was the first West Virginia preschool program providing listening and spoken language outcomes to children with hearing loss, enabling them to communicate with hearing-aged peers. The Lab uses hearing technology to teach children to listen and speak. The Joint Committee on Government and Finance is asked to study how the Lab could be expanded throughout the state and to report its findings, conclusions and recommendations to the 2016 session of the Legislature.

**Senate Concurrent Resolution 68
Requesting Joint Committee on Government and Finance Study Public Library Funding**

The Joint Committee on Government and Finance is asked to establish a select committee on local public library improvement to study the long-term needs for maintenance and construction of local public libraries, including methods for providing adequate funding to meet those needs.

**House Concurrent Resolution 115
Requesting the Joint Committee on Government and Finance to Conduct a Study on State
Funding for School Bus Replacement**

House Concurrent Resolution No. 115 recognizes the need for objective information on the serviceable life of school buses in order to consider proposals for changing the 12-year/180,000 mile replacement cycle upon which the public school support plan bases the replacement allowance. It asks the Joint Committee on Government and Finance to conduct a study on state funding for bus replacement and report its findings and recommendations to the 2016 session of the Legislature.

**House Concurrent Resolution 149
Requesting the Joint Committee on Government and Finance to Study Potential
Improvements to Pensions for Retired Teachers and Public Employees who Have Been
Retired for Ten or More Years**

This resolution requests that the Joint Committee on Government and Finance study potential improvements to pensions for retired teachers and public employees who have been retired for 10 or more years. The study is to include potential one-time improvements, potential ongoing



improvements, and potential improvements for specific classes of retirees categorized by length of retirement in five year increments (individuals retired for 10-15 years, 15-20 years, and so forth).

House Concurrent Resolution 151
Requesting the Joint Committee on Health Authorize a Study on the Licensure of Athletic Trainers

The Joint Committee on Health is asked to evaluate the effectiveness of West Virginia's regulation of athletic trainers, particularly in the areas of proper training and education. The Committee is to report to the 2016 session of the Legislature its findings, conclusions and any recommended revisions to the existing law that requires athletic trainers to register with the Board of Physical Therapy.



RECENT DECISIONS OF THE WEST VIRGINIA SUPREME COURT OF APPEALS

West Virginia Supreme Court of Appeals

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

1. Board of Education of Webster County v. Hanna, No. 13-1086 (October 2, 2014) (memorandum decision). A school employee who exercises the option, offered by the prosecutor's office, of resigning her job with the school board in order to avoid prosecution for a work-related felony, may be found to have left work "voluntarily without good cause involving fault on the part of the employer" and, therefore, be disqualified from receiving unemployment compensation benefits. WorkForce West Virginia's determination that the resignation was voluntarily and without duress is a finding of fact to which a reviewing court is required to give deference.
2. Glaspell v. Taylor County Board of Education, No. 14-0175 (November 3, 2014) (memorandum decision). The "Maximum teacher-pupil ratio" statute relates solely to the teacher-pupil classroom ratio in kindergarten through 6th grade, not to a teacher-pupil ratio for the cafeteria or other non-classroom settings. Also, without a breach of duty giving rise to a claim of negligence, a county board is entitled to immunity under the Governmental Tort Claims and Reform Act.
3. Gring v. Harrison County Board of Education, No. 14-0248 (November 21, 2014) (memorandum decision). West Virginia Code § 18A-5-1(a) vests parental authority in public school teachers, but does not impose a parental duty upon them. A teacher has a duty to exercise reasonable care to protect students in the classroom from those injuries which can be reasonably anticipated.
4. Bowyer v. Fayette County Board of Education, No. 14-0261 (November 21, 2014) (memorandum decision). In filling a multi-classified aide/autism mentor vacancy, it is not unreasonable for a county board to examine the primary responsibilities of the job position and then look to an applicant's seniority as part of the selection process. Where the majority of the responsibilities of the aide/autism mentor position would be aide duties, it is not arbitrary and capricious for the county board to look to candidates with the most seniority in the aide classification. Moreover, as long as the applicant selected for an aide/autism mentor position qualifies for the position before the beginning of the assignment, her placement in that position is not clearly wrong.
5. Whetstone v. South Branch Career and Technical Center, No. 13-0751 (January 9, 2015). Unless his contract provides to the contrary, a director of a multi-county vocational school is exempt from the protections of State Board policy and state statute regarding



performance evaluations for county board employees, and the statute regarding the suspension and dismissal of county school personnel.

6. Stephens v. The Board of Education of the County of Wayne, No. 14-0131 (January 12, 2015) (memorandum decision). A licensed bus operator is expected to obey state and municipal traffic laws. It is not necessary that a bus operator be warned against violating such laws before the bus operator is disciplined for insubordination and willful neglect of duty.
7. Lewis County Board of Education v. Holden, No. 14-0045 (February 5, 2015). Incompetency is a ground for terminating a school employee under the school statutes. In gauging the competency of a bus operator, a county board is not bound by the single method provided in the West Virginia School Bus Transportation Policies and Procedures Manual, i.e., medical examination by a health care provider. The Manual contains no limiting language that would foreclose methods other than a medical examination for determining a driver's competency. Regardless of when a bus operator was initially certified to drive a school bus, it is implicit that he, as a school bus driver, be physically capable of completing fundamental tasks necessary to operate a bus safely and to meet the needs of his student passengers in the event of an emergency.
8. State ex rel. The West Virginia Secondary School Activities Commission v. Hon. David W. Hummel, Judge, No. 14-1045 (February 26, 2015). Decisions properly within the purview of the legislative grant of authority to the West Virginia Secondary Schools Activities Commission, such as the application of WVSSAC Rules in the review of rulings made by game officials, are not subject to judicial review. However, an administrative agency may not issue a regulation which is inconsistent with, or which alters or limits, its statutory authority. The SSAC's regulation forbidding it from reviewing the ejection of student athletes from games violates the Legislature's requirement that the SSAC provide a proper review procedure.
9. Lewis County Board of Education v. Bohan, No. 14-0521 (April 9, 2015) (memorandum decision). The statutory requirement that all service personnel substitutes be employed on a rotating basis according to their lengths of service time until each substitute has had "an opportunity" to perform similar assignments means that all substitutes must have the same opportunity to be called for a particular job, in order of seniority, and in a rotating fashion. The benefits and speed of a computerized call-out system may far outweigh the potential errors and, therefore, one substitute's opportunity to be called for work, with its inherent risks and benefits, may be the same as the opportunity of the others on the list, even in the case of an unfortunate mechanical or operator error.
10. Mountain State Sales and Electrical Service, Inc. v. Raleigh County Board of Education, No. 14-0601 (June 12, 2015) (memorandum decision). The Governmental Tort Claims and Insurance Reform Act provides immunity to county boards and their employees from liability for damages in a civil action for injury, death or loss to persons or property



allegedly caused by any act or omission in connection with a governmental or proprietary function. However, an employee is not entitled to such immunity if his or her acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner. The ultimate determination of whether the immunity bars a civil action is one of law for the court to determine. A county board's award of a construction contract to the lowest qualified bidder under the pertinent statute is the exercise of a governmental and proprietary function.



RECENT CIRCUIT COURT DECISION

1. American Federation of Teachers - West Virginia v. Monongalia County Board of Education, Circuit Court of Monongalia County Case No. 11-C-759 (June 9, 2015). Because interventionists are “classroom teachers,” the county board is not permitted to contract with its RESA for the services of interventionists. Instead, the county board must hire interventionists as its own employees under the posting and vacancy-filling rules of W. Va. Code § 18A-4-7a. It makes no difference that West Virginia Code §18-2-26(h) allows a county board to pay for services provided by a RESA, and that it allows a RESA to receive funding provided by a county board. Nor does it matter that the State Board’s RESA policy authorizes a RESA to partner with county boards in programs to accomplish the RESAs’ strategic plan. It is therefore of no consequence that the State Board of Education approved a strategic plan authorizing the RESA to employ interventionists for students in the RESA.



RECENT DECISIONS OF THE GRIEVANCE BOARD

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

1. West v. Marshall County Board of Education, Docket No. 2013-1674-MarED (May 19, 2014). A service employee seeking a multiclassification title must establish, by a preponderance of the evidence, that her duties encompass those of all class titles identified. Merely having to perform some responsibilities normally associated with another classification, even regularly, does not necessarily mean that an employee is misclassified. However, when a service employee regularly performs work in her own and another classification, multiclassification is required. Also, in a reclassification grievance, a successful grievant may be granted retroactive seniority in the sought classification only for the period beginning 15 days before the filing of the grievance.
2. Hilton v. Wood County Board of Education, Docket No. 2014-0140-WooED (May 16, 2014). Continued failure to perform assigned tasks after an employee has been shown how to perform them and given an opportunity to improve may constitute willful neglect of duty.
3. Bailey v. McDowell County Board of Education, Docket No. 2013-2111-McDED (June 5, 2014). Although reprimands are not specifically addressed in the statute that covers the suspension and termination of employee contracts for cause, lesser penalties can be imposed for the offenses listed in the statute. Also, due process requires an employer to provide an employee with the written charges and some opportunity to respond before the imposition of a suspension that deprives the employee of wages or salary.
4. Tolley v. Roane County Board of Education, Docket No. 2014-0223-RoaED (June 6, 2014). The non-relegation clause does not prohibit the correction of error in a service employee's wages or mandate the continuation of an erroneous salary. An error or mistake in computing a worker's wages does not give the worker an enforceable right to continue receiving erroneous wages.
5. Staats v. Jackson County Board of Education, Docket No. 2013-1637-JacED (June 13, 2014). A bus operator's time between transporting students to a location and picking them back up does not count as hours worked under the wage and hour laws if (1) the bus operator is on his or her own personal time, (2) the bus operator is free to leave or perform personal obligations, and not encumbered by duties or responsibilities to the school board, and (3) the bus operator's time to report back to resume his or her duties is a set time and predictable.



6. Spicer v. Monongalia County Board of Education, Docket No. 2013-1942-MonED (July 2, 2014). An employee who has not completed the requirements to obtain certification as a bus operator, and is not certified, is not qualified for a bus operator position. Also, because there is a lack of definition in the school statutes with regard to the seniority rights of multiclassified service personnel, multiclassification seniority for purposes of filling vacancies can permissibly be measured by looking to the greatest seniority in one of the relevant classification categories of the position in question.
7. Myers v. Monongalia County Board of Education, Docket No. 2013-1493-MonED (July 8, 2014). When a maintenance supervisor is on an extended paid leave and no other regular or substitute employee of the county board is classified as a maintenance supervisor, it is reasonable to offer to the maintenance department employees, in seniority order, the opportunity to perform the absentee's duties.
8. Graham v. Wetzel County Board of Education, Docket No. 2014-0901-WetED (July 7, 2014). Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. It is conduct constituting a knowing and intentional act, rather than a negligent act, and encompasses something more serious than incompetence. Insubordination involves willful failure or refusal to obey reasonable orders of a superior entitled to give such order. To establish insubordination, a county board must demonstrate that the employee's failure to comply with a directive was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination.
9. Smith v. Wood County Board of Education, Docket No. 2013-2255-CONS (Remedy) (July 24, 2014). A grievance may be dismissed in the discretion of the administrative law judge if the grievance complaint states no claim on which relief can be granted or seeks a remedy wholly unavailable to the grievant. A member of a county board may not be employed by the county board on which he or she serves, including employment as a teacher or service person. The Grievance Board is not authorized to grant attorney's fees at Level Three. Nor may the Grievance Board award tort-like damages, such as doctor's bills, medical testing bills and the costs of medication. Finally, claims for compensation for work-related illness fall under the workers' compensation statute. The Grievance Board has no authority to grant workers' compensation benefits or to make workers' compensation eligibility determinations.
10. Straley v. Putnam County Board of Education, Docket No. 2014-0314-PutED (July 28, 2014). The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. A single act that causes continuing damage does not convert an otherwise isolated act into a continuing practice.
11. Keatley v. Mingo County Board of Education, Docket No. 2014-0127-MinED (July 28, 2014). Coaching positions are professional extracurricular assignments. The standard of review for filling coaching positions is whether the county board abused its discretion in



the selection or acted in an arbitrary or capricious manner. The provisions for filling new positions in a consolidated or merged school when faculty senates vote to give preference to employees from the closing schools do not apply to professional extracurricular assignments. Unlike service personnel extracurricular assignments, if an extracurricular professional contract is terminated in one year and reestablished in any succeeding year, there is not a requirement that it be offered to the employee who held the assignment at the time of its termination.

12. Linville v. Lincoln County Board of Education, Docket No. 2013-2222-LinED (August 1, 2014). When a service employee establishes, by a preponderance of the evidence, that she is performing the duties of a higher classification than the one which she officially holds, she is entitled to reclassification. Also, a county board may utilize its own expanded job description for various service personnel positions, but the expanded descriptions must be consistent with, and not contrary to, the descriptions contained in the statute which defines the various service personnel class titles. Finally, the distinction between the secretary III and executive secretary classifications depends upon the duties and responsibilities of the individual to whom the secretary is assigned, not the secretary's own duties and responsibilities.
13. Hall v. Kanawha County Board of Education, Docket No. 2014-0282-CONS (August 7, 2014). Long-time sign language interpreters who are promoted to a new professional classification for interpreters and paid under the salary schedule for teachers are entitled to experience increment pay for their experience as sign language interpreters earned while they were classified as service personnel. It is not the degree or certification of the employee that is dispositive on the question of experience credit in the salary schedule for teachers but, rather, the duties performed.
14. Mullins v. Mason County Board of Education, Docket No. 2014-0357-MasED (August 20, 2014). It is not arbitrary and capricious for a county board to deny service personnel the opportunity to perform an extracurricular assignment when serious logistical problems exist, such as a schedule conflict that would require an employee to leave her regular work duties early in order to perform an extracurricular job.
15. Hays v. Roane County Board of Education, Docket No. 2014-0643-RoaED (August 28, 2014). Where county board employees perform substantially similar work under 261-day and 240-day contracts, and vacation days provided to 261-day employees reduce their annual number of workdays to a level at or near the 240-day employees, principles of uniformity demand that the similarly situated employees receive similar benefits. However, contracts featuring materially different amounts of work are not subject to the uniformity provision, and a 210-day contract is materially different from a 261-day contract.
16. Schooley v. Preston County Board of Education, Docket No. 2014-0518-CONS (September 3, 2014). An agreement by a county superintendent to increase the



compensation of an employee is an ultra vires act and does not obligate a county board. In addition, 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 to be used to force an agency to repeat such unauthorized acts.

17. Lancaster v. Ritchie County Board of Education, Docket No. 2104-0868-RitED (September 19, 2014). When an employee’s performance is unacceptable because he does not know the standard to be met, or what is required to meet the standard, and his behavior can be corrected, the behavior is unsatisfactory performance. The mere existence of an employee Code of Conduct is insufficient to automatically turn any inappropriate conduct into insubordinate behavior. When distinguishing between insubordination and unsatisfactory performance, not only does the employee need to know the standard to be met for the behavior to fall into the category of insubordination, the employee must also have an understanding of what is required to meet the standards. Not only must the employee refuse to obey a reasonable order, the defiance must be willful. If the employee does not understand what is required to meet the broad tenants of the employee Code of Conduct, his behavior, while perhaps juvenile, stupid, and inappropriate, cannot be characterized as willful disobedience.
18. Radabaugh v Monongalia County Board of Education, Docket No. 2013-1996-MonED (September 22, 2014). For purposes of the statute that entitles a summer service employee to the same assignment if it exists the following summer, the definition of “same assignment” is flexible. It is enough that there is consistency in the type of work being performed, even if the location and exact nature of the work is somewhat different. By way of example, bus operators’ positions remain the same even though the routes change from summer to summer, school lunch programs at different schools are part of one overall summer lunch program, and a summer transportation program employing aides remains the same program even though the routes change from summer to summer.
19. Berry v. Boone County Board of Education, Docket No. 2014-0450-BooED (September 29, 2014). When selecting candidates for professional positions other than classroom teachers, a county board must consider each applicable criterion listed in the statute governing the filling of professional vacancies. The statute permits a board to determine the weight to be applied to each factor, so long as the weighting does not result in an abuse of discretion. Accordingly, a board may determine that the last criterion, “other measures or indicators,” is the most important and determining factor.
20. Friend v. Nicholas County Board of Education, Docket No. 2014-0078-NicED (September 29, 2014). At their discretion, county boards may post an opening for a professional position other than classroom teacher more than once in order to attract more qualified applicants.
21. Lemasters v. Jackson County Board of Education, Docket No. 2014-0508-JacED (September 30, 2014). Where a teacher’s bus duties commence before the beginning of



her regularly scheduled work day and end after the conclusion of her regularly scheduled work day, and where the duties do not involve the instruction of students, the assignment involves extracurricular duties which may only be assigned by mutual agreement of the employee and the county superintendent.

22. Cross v. Randolph County Board of Education, Docket No. 2013-1509-RanED (October 2, 2014). Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered; explained or reached the decision in a manner contrary to the evidence before it; or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion.
23. Griffin v. Raleigh County Board of Education, Docket No. 2014-0432-RalED (October 7, 2014). Improvement plans are required for correctable conduct which involves professional incompetency, but improvement plans are not typically required for insubordination or willful neglect of duty, as these are intentional acts. An improvement plan cannot be expected to change an employee's recalcitrance and defiant attitude. Moreover, behaviors which involve intrinsic or established personality traits, such as poor judgment or poor sportsmanship, are usually not correctable with an improvement plan. Also, mitigation of the punishment imposed by an employer is extraordinary relief and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation.
24. Shreve v. Randolph County Board of Education, Docket No. 2014-1169-RanED (October 10, 2014). When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved.
25. Banks v. Mason County Board of Education, Docket No. 2014-0619-CONS (October 10, 2014). The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Discovery of a legal theory to support a grievance, does not constitute discovery of an "event" giving rise to a grievance. Nor does learning of the success of another employee's grievance.
26. Burns v. Lincoln County Board of Education, Docket No. 2013-1552-LinED (October 15, 2014). The failure of a county board to follow the evaluation procedure in State Board Policy 5300 prohibits the board from discharging, demoting or transferring an employee for reasons having to do with prior misconduct or incompetency that has not been called to the attention of the employee through evaluation, and which is correctable. Policy 5300 envisions that where a teacher exhibits problematic behavior, the



improvement plan is the appropriate tool if the conduct can be corrected. Only when these legitimate efforts fail is termination justified.

27. Washington v. Logan County Board of Education, Docket No. 2014-0407-LogED (October 15, 2014). Consistently following an arbitrary and capricious practice does not make it acceptable. A foolish consistency is the hobgoblin of little minds.
28. Thomas v. Logan County Board of Education, Docket No. 2014-0439-LogED (October 23, 2014). School principals are charged by statute with responsibility for making assignments necessary for the planning, management, operation and evaluation of the total educational program of the school to which they are assigned. However, these actions must be in accordance with the rules and regulations of the county board, and may not be arbitrary or capricious.
29. McComas v. Mercer County Board of Education, Docket No. 2014-1489-MerED (October 24, 2014). Intentional and irresponsible conduct on repeated occasions by someone entrusted with the care and safety of school children involves behavior that is not correctable within the meaning of State Board Policy 5310. Also, hearsay evidence is admissible in the grievance procedure, but there is no requirement that it be afforded any particular weight. Generally, written statements, even affidavits, may be discounted or disregarded unless the offering party can provide a valid reason for not presenting the testimony of the persons making them.
30. Stewart v. Lincoln County Board of Education, Docket No. 2014-0620-LinED (October 30, 2014). In order to prevail in a misclassification grievance, a service employee must establish that his job duties and responsibilities more closely fit the sought classification rather than the existing classification. If a school service employee establishes by a preponderance of the evidence that he is performing the duties of a higher classification than that under which he is officially categorized, the employee is entitled to reclassification. However, simply because an employee is required to undertake some responsibilities normally associated with a higher classification, even regularly, does not render the employee misclassified per se.
31. Skaggs v. Richie County Board of Education, Docket No. 2014-0516-RitED (October 31, 2014). A county board is precluded by statute from making changes to the daily work schedule of service personnel during the school year without the employee's written consent. However, the statute has been interpreted to allow a county board freedom to make reasonable changes to a service employee's daily work schedule, within the parameters of his contract, some of which cannot reasonably be effected until shortly after school starts. Whether the changes to the employee's schedule are reasonable involves a case-by-case, fact-specific inquiry. Minor alterations to a bus route, which cannot 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."



32. Harlow v. Upshur County Board of Education, Docket No. 2014-0734-CONS (November 7, 2014). When school is cancelled because of a snow day and an employee is required to work that day, the employee is not entitled to any additional compensation for working on a make-up day. A day lost due to snow will necessarily be scheduled to be made up on a day which is already included as a paid day within the employment term. This does not amount to extending the calendar for the employee or entitle the employee to any additional compensation.
33. Lemasters v. Jackson County Board of Education, Docket No. 2013-1969-CONS (November 10, 2014). “Discrimination” means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees. Teachers who are assigned full-time to a school and who are treated differently in the assignment of duties than some itinerant teachers, are not similarly situated to the itinerant teachers who only spend a percentage of time in the same school.
34. Nottingham v. Kanawha County Board of Education, Docket No. 2014-0382-KanED (November 25, 2014). A passing score on the competency test is not the end of the review of candidate qualifications for a service position. It is not necessarily an abuse of discretion to demand additional qualifications beyond the passing of the competency test. Nor is it error for a county board to pass over a regular employee and choose a non-employee more acquainted with the administrative and managerial skills necessary for a supervisory service personnel position. However, a county board’s selection process may be arbitrary and capricious if it does not give adequate consideration to seniority, evaluation of past service or objective measures of qualifications.
35. O’Dell v. Fayette County Board of Education, Docket No. 2014-0854-CONS (December 10, 2014). The Grievance Board will not grant illusory relief that entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party.
36. Davis-Wilson v. Hardy County Board of Education, Docket No. 2014-1507-HrdED (December 12, 2014). A county board has broad discretion when determining whether or not to rehire a probationary employee. To prove her case, a grievant must establish the board’s decision to not renew her contract was arbitrary and capricious.
37. Lewis v. Kanawha County Board of Education, Docket No. 2014-1590-CONS (January 2, 2015). An administrative law judge has discretion to dismiss a grievance if the grievant makes no claim on which relief can be granted or seeks a remedy wholly unavailable to the grievant.
38. Burton v. Mercer County Board of Education, Docket No. 2014-1682-MerED (January 7, 2015). Even when an employee’s conduct is clearly wrong, a county board is not necessarily justified in dismissing her from employment if she is a long-term employee



with an otherwise good record of performance. Nevertheless, termination of the employee may be justified if she does not admit her wrongdoing, and if her actions violate a policy that could result in the loss of federal funding.

39. Conrad v. Grant County Board of Education, Docket No. 2013-2085-GraED (January 9, 2015). The non-renewal of an employee's probationary contract is neither a contract termination nor a disciplinary matter. Thus, an employee who brings a grievance to contest the nonrenewal has the burden of proof by a preponderance of the evidence.
40. Smith v. Randolph County Board of Education, Docket No. 2014-0385-CONS (January 14, 2015). County boards are required to provide uniform benefits and compensation to similarly situated employees, meaning employees who have like classifications, ranks, assignments, duties and actual working days. Grievants seeking to enforce the uniformity provision must establish that their duties and assignments are like those of the employees to whom they compare themselves.
41. Thomas v. Marion County Board of Education, Docket No. 2014-0499-MrnED (January 20, 2015). In the remedy phase of a default grievance, the county board, if it is to prevail, has the burden of proving, by a preponderance of the evidence, that the remedies requested by the grievant are contrary to law or contrary to proper and available remedies.
42. Wright v. McDowell County Board of Education, Docket No. 2014-1503-McDED. (January 22, 2015). A grievance must be filed within fifteen days of the occurrence of the event upon which the grievance is based, or within fifteen days of the day on which the event became known to the grievant, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance. Ordinarily the running of the relevant time period is considered to start when the employee is unequivocally notified of the decision being challenged.
43. Chapman v. Fayette County Board of Education, Docket No. 2014-0855-FayED (January 23, 2015.) It is a mere technical deficiency for a grievant to fail to include on the Level Three appeal form a statement of grievance and relief requested. Only at Level One does the grievance statute specifically require a statement of grievance and requested relief. Also, the service employee non-relegation clause does not prohibit correction of errors in wages. Nor does it mandate the continuation of erroneous salary. An error or mistake in computing a worker's wages does not give the worker an enforceable right to continue receiving erroneous wages.
44. Harris v. Wood County Board of Education, Docket No. 2014-1496-WooED (February 5, 2015). While it is true that a service employee's misclassification is a continuing violation, there are limits to a grievant's attempt to gain relief. A service employee can contest a misclassification at any time, but only once.



45. Robinette v. Boone County Board of Education, Docket No. 2014-1437-BooED (February 10, 2015). Drug testing will not be found to violate an employee’s right to privacy where it is conducted by a county board based upon a reasonable good faith objective suspicion of an employee’s drug usage or while an employee’s job responsibility involves public safety or the safety of others.
46. Robinette v. Boone County Board of Education, Docket No. 2014-1437-BooED (February 10, 2015). Service employees who do not have the same classifications, are not performing like assignments and duties for uniformity purposes, and cannot show they are similarly situated for purposes of discrimination and favoritism. Crockett v. Wayne County Board of Education, Docket No. 2014-1698-CONS (February 19, 2015).
47. McDonald v. Wood County Board of Education, Docket No. 2014-1623-WooED (February 27, 2015). The summer service employee statute requires that decisions about the reduction-in-force of summer service personnel and the reemployment of reduced service employees be determined by “the length of service time in the particular summer program or classification.” It is permissible and reasonable for a county board to interpret that phrase to mean the total days served in the summer programs, rather than the number of summers worked.
48. Hooton v. Preston County Board of Education, Docket No. 2014-1202-PreED (March 3, 2015). Ultra vires acts of a governmental 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.
49. Goff v. Calhoun County Board of Education, Docket No. 2015-0049-CONS (March 10, 2015). The school statutes allow a county board to reduce local salary supplements in three situations: defeat of a special levy; loss in assessed values; or events over which it has no control, and then only after receiving the approval of the State Board of Education. A fiscal emergency may arise because adequate provision was not made in a budget, even though the purpose for which the funds are needed was foreseeable when the budget was adopted. In such a case, before an emergency can be found, it must be shown that the amount placed in the budget was reasonable in light of all the attended circumstances, including prior budgetary experience. Also, county boards and county superintendents are required by law to comply with the instructions of the State Board of Education and State Superintendent with respect to revising proposed budgets. The State Board of Education and State Superintendent are authorized to enforce compliance with their orders in the court system, and may withhold state aid for non-compliance.
50. Thomas v. Logan County Board of Education, Docket No. 2015-0280-LogED (March 13, 2015). Timeliness is an affirmative defense. The burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting that a grievance was not timely filed. Once the county board has demonstrated that a grievance has not



been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely matter.

51. Fields v. Mingo County Board of Education, Docket No. 2014-1023-MinED (March 18, 2015). In a situation where two service employees have an identical seniority date, the statute requires that the tie be broken through a random selection system established and approved by the county board. The random selection shall occur within 30 days of the employees establishing an identical seniority date. As long as the affected employees hold identical seniority within the same classification category, the initial random selection conducted by the county board shall be permanent for the duration of the employee's employment within the same classification category.
52. Durham v. Hancock County Board of Education, Docket No. 2014-0762-CONS (April 1, 2015). The statutory definition of autism mentor is clear and unambiguous. All that is required for an employee to qualify for the autism mentor class title is that the employee "works with autistic students" and meets the standards and experience established by the State Board of Education. It is invalid for even the State Board of Education to limit the autism mentor class title to aides in jobs that were specifically posted for autism mentors.
53. Raines v. Kanawha County Board of Education, Docket No. 2014-1011-KanED (April 7, 2015). The extra-duty statute makes no provision for the allocation of overtime assignments based upon a service employee's worksite or job location. Unless an alternative procedure for making such assignments has been duly approved by the county board and affected employees, a county board must use seniority within a particular category of employment to determine the order in which employees will be offered the work. Additionally, a county board is not required to consider each day of a multi-day extra-duty assignment as a separate assignment.
54. Layne v. Kanawha County Board of Education, Docket No. 2014-1763-CONS (April 10, 2015). Drug testing of school employees pursuant to county board policy will not be found to violate public policy grounded in the potential intrusion of a person's right to privacy where the testing is conducted by the employer based upon a reasonable good faith objective suspicion of the employee's drug usage or while the employee's job responsibilities involve public safety or the safety of others. Also, an employee has the right to representation at any meeting at which there will be a discussion of the employee's conduct and which may lead to some disciplinary action. However, the employee must affirmatively request the representation; the employer is under no obligation to advise the employee of the right to representation. Finally, the Legislature intended that probationary employees be treated differently than non-probationary employees. When a probationary contract is not renewed, the county board is not required to convene a pre-termination hearing. While a county board may not refuse to rehire a probationary employee for just any reason, or no reason, the reason need not rise to the level of a "for cause" requirement.



55. Stephens v. Wayne County Board of Education, Docket No. 2014-1662-CONS (April 17, 2015). A grievant who fails to appear in person at his or her Level Three hearing and does not provide testimony addressing the grievant's specific duties as related to the grievance may be found by an administrative law judge to have failed to offer evidence sufficient to prove the grievant's claim.
56. McGraw v. Department of Education, Docket No. 2015-0666-DOE (April 24, 2015). An at-will employee serves at the will and pleasure of the employer and can be discharged at any time, with or without cause. However, this rule is tempered by the principle that where the employer's motivation for the discharge is to contravene some substantial public policy principle, the employer may be liable to the employee for damages occasioned by the discharge. Thus, an at-will employee's grievance challenging the employee's termination may be dismissed without hearing when the employee fails to allege a contravention of substantial public policy. To identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, the courts look to established precepts in the constitution, statutes, legislatively approved regulations, and judicial opinions.
57. Buckley v. Kanawha County Board of Education, Docket No. 2015-0963-KanED (May 18, 2015). Theft of state property is one of the most serious offenses an employee can commit. The value of the property is of little consequence.
58. Miller v. Kanawha County Board of Education, Docket No. 2015-0214-KanED (May 29, 2015). The suspension of an employee pending investigation of an allegation of misconduct is not disciplinary in nature and a grievant bears the burden of proving that such suspension was improper. If the topic of a meeting with an employee is conduct of the employee that could lead to discipline, the employee has a statutory right to have a representative present if the employee makes such a request. However, the statute does not state that the employer is required to advise the employee that he or she may have a representative present.

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.