

LEGAL UPDATE

Presented by

Sue W. Yount

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Bricker & Eckler
ATTORNEYS AT LAW

Columbus · Cleveland · Cincinnati-Dayton
www.bricker.com

100 South Third Street
Columbus, Ohio 43215
(614) 227-2300

I. State Retirement Systems Update

A. STRS – No change to service credit rule

The State Teachers' Retirement Board announced earlier this year that it would consider whether to eliminate the 120-day rule requirement to earn a full year of service. This proposed change would have required members to work 180 days to earn a full year of service. *Note: In the April 2010 Board News, STRS announced that the existing service credit rule will stay in effect.*

B. "Strengthening Pension Plan and Health Care Funding: The STRS Challenge" (Sept. 2009)

The STRS and Ohio's four other public pension systems submitted plans to the Ohio Retirement Study Council (ORSC) for either maintaining or returning to a 30-year funding period. The proposed changes will require legislative action by the Ohio General Assembly and the Governor, and the ORSC will work with the systems to draft legislation, which will then go through the normal legislative process. **Note: Legislation has not yet been introduced, and STRS reports that it is unlikely that a bill will be introduced before November 2010.**

The plan submitted by the State Teachers Retirement Board (that was approved by the Board on Sept. 1, 2009) includes the following changes:

- Increase in contributions.
 - Increase member contributions by 0.5% per year beginning July 1, 2011, to a total of 2.5% on July 1, 2015.
 - Increase employer contributions by 0.5% per year beginning July 1, 2016, to a total of 2.5% on July 1, 2020.
 - Ultimately, members would contribute 12.5%; employers would contribute 16.5%.
- Increase in Final Average Salary (FAS) years.
 - Base FAS on five highest years of earnings, beginning Aug. 1, 2015 (versus the current three years).
- Retirement eligibility change.
 - Beginning Aug. 1, 2015, increase years of service required for retirement.
 - Members can retire at any age with 35 years of service; at age 60 with 30 years of service; or at age 65 with five years of service.
 - May retire earlier with an actuarially reduced benefit at age 55 with 30 years or at age 60 with five years.
 - Those who meet age and service eligibility for service retirement as of July 1, 2015 under the current rule retain their eligibility.

- Benefit formula change.
 - New formula would be 2.2% per year for the first 30 years of service; 2.5% per year thereafter, beginning Aug. 1, 2015.
 - 35-year enhanced benefit eliminated.
 - Those with 30 years of service; who are age 55 with 25 years of service; or who are age 60 with five years of service as of July 1, 2015, would receive **the greater of** the benefit as of July 1, 2015 under the current formula or the benefit upon retirement under the new formula.
- Cost-of-Living Adjustment (COLA).
 - Beginning July 1, 2011, current retirees would receive an annual 2% COLA; members retiring on July 1, 2011 or later would receive a 1.5% COLA each year. (The COLA is currently 3 %.)

C. The School Employees Retirement System (SERS) (Sept. 2009)

The SERS Board submitted the following proposed changes to the ORSC:

- Effective for members retiring on or after August 1, 2015:
 - A member must be age 67 with 10 years of service, or age 57 with 30 years of service, to retire with no actuarial reduction to one's retirement allowance.
 - A member may retire early at age 62 with 10 years of service or age 60 with 25 years of service.
 - If a member retires early, base early retirement reductions on actuarial reductions from the lesser of age 67 or possible attainment of 30 years of service.
- The SERS Board will periodically examine its 30-year funding responsibility and recommend benefit or contribution changes as needed. If the recommended retirement eligibility changes fail to keep SERS within the 30-year funding window, the Board will consider other changes such as reducing cost of living adjustments and contribution increases for members and employers.

D. SERS Rules

1. New/amended rules.

OAC 3309-1-02 (definition of compensation) was amended effective April 2, 2010 to include as compensation back wages awarded when an employee is reinstated pursuant to a final order or settlement award without interruption or loss of time, and payments on behalf of the contributor to an eligible retirement plan as defined in section 402(c)(8) of the Internal Revenue Code.

New rule 3309-1-14 (purchasing board approved leave of absence service credit), effective April 2, 2010, provides that a member must purchase leave of absence credit no more than two years after returning to

contributing service following the employer-approved leave, and must provide to SERS an employer certification.

New rule 3309-1-18 (effective July 1, 2010) sets forth the procedural requirements for the payment of employee and employer contributions to SERS.

2. **Proposed rules.**

An emergency amendment to OAC 3309-1-35 (health care) goes into effect July 1, 2010. It makes dependent coverage available for adult children up to age 26 (to comply with federal health care reform).

An amendment to 3309-1-35 effective June 1, 2010 changes premium subsidy requirements, so that an age and service retirant who retires on or after August 1, 2008 must have earned twenty years of service credit to be eligible for a premium subsidy.

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

A. **Am. Sub. Senate Bill 181** (effective September 13, 2010; certain sections effective June 13, 2010)

Among the provisions of this bill is an amendment to school district and building performance ratings. Districts or buildings that are rated excellent or effective cannot have their rating lowered unless they fail to make AYP for two or more of the same student subgroups for three or more consecutive years, and an excellent rating can be lowered only one level, instead of two. For continuous improvement districts and buildings, the act repeals a provision prohibiting the Department of Education from lowering a rating from the prior year based solely on one subgroup not making AYP.

B. **Sub. Senate Bill 2010 – Healthy Choices for Healthy Children Act** (effective Sept. 17, 2010, certain provisions effective July 1, 2011)

This legislation includes the following provisions:

- Establishes nutritional standards for certain foods and beverages sold in schools (beginning July 1, 2011). Food and beverages sold for fundraisers or other events outside the regular school day and at interscholastic events are exempt.
- Requires schools to adopt standards governing beverage sales (in addition to food sales as currently required), and to designate staff to prepare an annual report regarding compliance with such standards.
- Prohibits placing vending machines in classrooms (with certain exceptions).
- Requires schools to establish body mass index (BMI) and weight status category screening programs. Parents may decline the screening, and schools may receive a waiver by submitting an affidavit to the Superintendent of Public Instruction.

- Establishes a pilot program requiring 30 minutes of daily physical activity for students.
- Teachers hired to teach physical education (on or after July 1, 2013) must be licensed in physical education.
- Provides that the required one-half unit in health education include instruction in nutrition and the benefits of nutritious foods and physical activity for overall health.
- Allows breakfast provided as part of the federal school breakfast program to be offered in classrooms.
- Requires ODE to issue an annual report on school district compliance with BMI screening requirements, and directs the State Board of Education to develop measures for district and building report cards covering success in meeting physical education standards, compliance with federal requirements for local wellness policies, compliance with BMI screening requirements, and participation in the physical activity pilot program.
- Establishes the Healthy Choices for Healthy Children Council.

C. **Sub. House Bill 19 – The “Tina Croucher Act” (Dating Relationships) (effective March 29, 2010)**

1. Requires public schools to incorporate dating violence into their policies prohibiting harassment, intimidation, or bullying (by not later than six months after the bill’s effective date).
2. Directs the State Board of Education to update its model policy to prohibit harassment, intimidation, or bullying to include violence within a dating relationship (by not later than six months after the bill’s effective date).
3. Requires school districts to include dating violence prevention education in the health curriculum for grades 7 to 12.
4. Public schools must incorporate training in the prevention of dating violence into the child abuse prevention training required under R.C. 3319.073 for middle and high school employees.
5. Clarifies the conditions under which a community school must close for poor academic performance.
6. Requires the Department of Education to amend rule 3301-83-23 (that took effect Aug. 27, 2009, and specifies offenses that disqualify a person for employment as a school bus or school van driver and establishes rehabilitation standards). **The Capacity Committee of the State Board of Education is currently considering changes to this rule.**
7. Provides that until the amendments to rule 3301-83-23 are effective, bus drivers will be subject to the disqualifying offenses and rehabilitation standards that apply to non-licensed school personnel. (Under current law, disqualifying offenses for bus drivers are the same as those applied to teachers and other licensed school personnel.)

D. **Sub. House Bill 10 – Protection Orders (effective June 17, 2010)**

Also known as the Shynerra Grant Law, this law enables juvenile court judges to issue protection orders against those under 18 years of age when a person alleges that the minor committed a covered offense (felonious assault, aggravated assault, assault, aggravated menacing, menacing by stalking, menacing, or aggravated trespass, a sexually oriented offense, or a violation of a municipal ordinance that is substantially equivalent to any of those offenses) against the person.

E. **Sub. House Bill 48 – Leave for Spouses and Parents of a Member of the Uniformed Services (effective July 2, 2010)**

When a member of the uniformed services is called to active duty, or is injured, wounded, or hospitalized while serving on active duty, an employer must provide a spouse or parent of the uniformed services member up to ten days of leave per calendar year.

This provision applies to employees employed for at least 12 consecutive months and for at least 1,250 hours in the preceding 12 months who do not have any other leave available (except sick leave or disability leave). If the leave is being taken because of a call to active duty, employees must provide notice to their employers 14 days in advance. Notice of leave due to an injury, wound, or hospitalization must be provided 2 days in advance, although no notice is required if the injury is of a critical or life-threatening nature.

An employer is not required to pay an employee during the leave, but must continue to provide benefits. An employer may require certification from the appropriate military authority.

The leave provisions of the bill prevail over any conflicting provisions of a collective bargaining agreement if the agreement contains benefits that are less than those provided under the bill. (For bargaining agreements in effect before the legislation's effective date, the bill's provisions apply immediately upon the expiration of such agreement.) An employer can provide leave benefits that are greater than those established by the bill, and must comply with bargaining agreements that provide greater leave benefits.

Election Calendar Changes

H.B. 48 also changes filing deadlines for candidates, questions, and issues to the 90th day before the day of the election (rather than the 75th day). Other associated election deadlines are increased by ten days.

III. **Special Education**

A. **Reimbursement for Private School Costs**

1. **On Remand: Reimbursement denied for private school placement unrelated to disability – *Forest Grove School District v. T.A.*, No. 04-331, 2009 U.S. Dist. LEXIS 115356 (U.S. Dist. Ct. Oregon, Dec. 8, 2009)**

After unilaterally enrolling their child in a private school, the parents sought tuition reimbursement from the school district. Following a

determination by the U.S. Supreme Court that reimbursement for private school placement is authorized even if a student has never received special education services through the public school (see above), the district court issued a decision on the merits of the parents' reimbursement claim.

The district court denied reimbursement based on evidence that the parents enrolled their child "not because of any disability recognized by the IDEA but because of his drug abuse and behavioral problems." The court noted the parents did not list ADHD and trouble with schoolwork on the private school application. The school district's responsibility is to address the learning-related symptoms of a disability, not the underlying medical disability.

2. **Unreasonable parent denied tuition** – *Maynard v. District of Columbia*, 2010 U.S. Dist. LEXIS 33191 (U.S. Dist. Ct., D.C., April 5, 2010)

Where a parent gave the district a ten day notice over summer break that she would enroll her child in a private school, then showed up at the district on the first day of school upset that the child did not have a schedule set up for the public school and left prior to obtaining assistance from the district, the court upheld a finding of unreasonableness and denied tuition reimbursement.

3. **Parents must cooperate** – *Seladoki v. Bellaire Local Sch. Dist. Bd. of Educ.*, 2009 U.S. Dist. LEXIS 94860 (U.S. Dist. Ct., S.D. Ohio, September 2009)

Where the parents "failed to remain engaged" in the IEP process after the initial meeting, the court noted that tuition reimbursement was only available if the parents had cooperated with the district.

- B. **Ban on prone restraints** – Executive Order 2009-13S, signed by Governor Strickland on August 3, 2009

Executive Order 2009-13S requires state agencies, including the Ohio Department of Education, to adopt the "Policy on the Use of Prone Restraint, Transitional Hold, and Other Types of Physical Restraint." This policy prohibits the use of prone restraint, defined as all items or measures used to limit or control the movement or normal functioning of any portion, or all, of an individual's body while the individual is in a face-down position for an extended period of time.

The use of transitional hold (defined as a brief physical positioning of an individual face-down for the purpose of quickly and effectively gaining physical control) is permitted only when certain conditions are met and as determined by departmental policy.

Other types of physical restraint are to be used only when there is risk of escape or harm to the individual or others, or by personnel within the specific guidelines of a secured facility. Physical restraint may only be used by trained staff and under the approval, guidance, and restrictions as outlined within each department's policies.

Finally, the Order establishes the Ohio Policy Committee on Restraint and Seclusion charged with creating a single state policy on the use of restraint and seclusion.

C. Updates to Guidance Documents, Model Policies, and Forms

1. Whose IDEA Is This? (June 14, 2010)

The Ohio Department of Education Office for Exceptional Children has released an updated version of *Whose IDEA Is This?* dated June 14, 2010. The updated version is to be used starting July 1, 2010. It is available online at www.edresourcesohio.org.

2. Memo Defining Other Health Impairment – Major and Minor (Feb. 10, 2010)

The ODE Office for Exceptional Children released a memo defining and listing conditions that would be reported in EMIS as other health impaired – major or minor. This memo is available at <http://edresourcesohio.org/files/OHI%20Memo%202-10-2010.pdf>.

3. Question and Answers

a. IEPs, Evaluations, and Reevaluations Revised Q&A (revised June 2010)

The U.S. Department of Education, Office of Special Education and Rehabilitative Services (OSERS) has issued a revised Q&A document with information regarding the IDEA requirements relating to individualized education programs (IEPs), evaluations, and reevaluations.

Available online at <http://www.ed.gov/policy/speced/guid/idea/iep-ga-2010.pdf>.

b. In June of 2009, ODE and the federal Office for Special Education programs issued a question and answer document regarding the ETR, IEP, services plan, EMIS, nonpublic schools, custody, medication, and surrogate parents. This document is available on the Ed Resources website.

c. In June of 2009, the U.S. Department of Education issued additional guidance concerning the new regulations in the form of “Questions and Answers” documents covering five topical areas: discipline, disproportionality, procedural safeguards, technical assistance and enforcement, and secondary transition. A Question and Answer document regarding special education transportation was issued in November 2009. These documents are available at <http://idea.ed.gov/>.

4. **New Online Tool – Going Places with a Standards-Based IEP (GPS-IEP)** (March 2010)

The ODE Office for Exceptional Children announced a new online resource designed to assist school personnel in developing standards-based IEPs. The tool, based on *A Seven-Step Process to Creating a Standards-based IEP* (developed by Project Forum), guides users through each of the seven steps and uses a sample IEP to display how each step applies to completing relevant IEP sections. This GPS-IEP tool is available at <http://www.edresourcesohio.org/index.php?slug=gps-iep>.

IV. School Funding Issues

A. **Special education funding – *Doe v. State of Ohio*, No. 2:91-CV-464, Consent Order** (U.S. Dist. Ct., S.D. Ohio, Oct. 21, 2009)

This class-action case is on behalf of all students eligible for services under the Individuals with Disabilities Education Act. The suit alleges that Ohio's special education system does not provide eligible students with a free appropriate public education and is discriminatory against these children.

On October 21, 2009, Judge Holschuh issued an order approving the partial settlement agreement reached by the parties. The consent order resolves claims concerning ODE's implementation of IDEA, but does not address the funding of special education and related services. The funding portion of the case will continue to trial. (The Ohio Legal Rights Service filed an amended class-action suit on June 1, 2010, asking the court to declare Ohio's system of funding and providing services to students with disabilities unconstitutional.)

The settlement agreement addresses: (1) the way ODE monitors compliance with the IDEA; (2) requests for waivers of state standards for the delivery of special education services; (3) investigation of state-level complaints filed by parents; and (4) corrective action to be taken when a school district does not meet state or federal standards.

B. **County has no authority to recoup cost of printing or mailing tax bills – Ohio Atty. Gen. Op. No. 2010-005** (Feb. 17, 2010)

The Ohio Attorney General issued an opinion finding that a county has no authority to recoup from taxing authorities within the county any portion of the cost of printing or mailing tax bills.

V. Student Issues

A. **Student Discipline**

1. **Discipline for off-campus online speech violated student's free speech rights – *Layshock v. Hermitage School District*, 593 F.3d 249; 2010 U.S. App. LEXIS 2384 (3d Cir. Pa., Feb. 4, 2010)**

A student created a parody profile of his principal on myspace.com from his grandmother's home computer. School administrators heard

about the profile and eventually suspended the student for ten days, assigned him to an alternative education program, and banned him from attending school events, including his graduation ceremony.

The lower court found the disruption caused by the student's actions was minimal so that the school district was unable to establish a sufficient nexus between the off-campus speech and a substantial disruption of the school environment. The school district did not challenge this finding on appeal, and the appellate court "found no authority that would support punishment for creating such a profile unless it results in foreseeable and substantial disruption of school."

The appellate court held that allowing the district to punish the student for conduct engaged in at home on a personal computer would set such a precedent and violate the student's First Amendment guarantee of free expression.

2. **Discipline for off-campus internet speech justified** – *J.S. v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 2010 U.S. App. LEXIS 2388 (3d Cir. Pa., Feb. 4, 2010)

A separate Third Circuit three-judge panel issued a decision on another case on the same day of the *Layshock* opinion described above that seems to contradict the *Layshock* decision.

In this case, the panel found the district did not violate a student's free speech rights when it disciplined her for a parody online profile of the school's principal that the student created at home. The profile did not name the principal, but included his photograph, and insinuated that the principal was a pedophile and sex addict.

The court found that, although the actual disruption the profile caused at school was not substantial, "the profile presented a reasonable possibility of a future disruption" and "the potential impact of the profile's language alone is enough to satisfy the Tinker substantial disruption test."

The court distinguished its opinion from that of the *Layshock* panel, finding the school district in *Layshock* did not argue on appeal that there was a nexus between the student's speech and a substantial disruption of the school environment.

Note: On April 9, 2010, the full Third Circuit U.S. Court of Appeals granted a petition for rehearing en banc for both the *Layshock* and *Blue Mountain* cases. Arguments in both cases were heard on June 3, 2010.

- B. **Cell phone expectation of privacy** – *State v. Smith*, 2009-Ohio-6426, 124 Ohio St. 3d 163 (Dec. 15, 2009)

In this case, concerning a warrantless police search of a cell phone, the Ohio Supreme Court ruled that a person has a high expectation of privacy in a cell

phone's contents that goes beyond the privacy interest in an address book or pager, and an arresting officer may not search the phone's contents without a warrant. Although this decision stems from a criminal matter, and school searches are not subject to the same standards, it provides insight as to the standard the Ohio Supreme Court applies to cell phone searches. This case has been appealed to the U.S. Supreme Court (May 11, 2010).

C. **May students distribute religious gifts at school?** – *Doug Morgan, et al. v. Lynn Swanson, et al.*, 2010 U.S. App. LEXIS 13450, (5th Cir. Tex., June 30, 2010)

Does the free-speech clause of the First Amendment protect student-to-student distribution of religious, noncurricular materials in public elementary schools? The 5th U.S. Circuit Court of Appeals held that school officials who prevented students from distributing religious-themed gifts to their classmates were not entitled to qualified immunity, because the law protecting elementary students from religious-viewpoint discrimination was clearly established.

In 2008, the 6th Circuit ruled in *Curry v. Hensiner* (513 F.3d 570) that a student's free speech rights were not violated when the student was prohibited from distributing candy canes with a religious message attached during a curricular activity, as school-sponsored speech is subject to greater control by school authorities. The case before the 5th Circuit concerns the distribution of non-curricular materials, and the court found the students' speech was restricted "solely because of its religious character, not for a pedagogical reason or because of a concern that the public might misperceive the speech as bearing the imprimatur of the school."

D. **Parent not entitled to alternative transportation eligibility timing** – *Graham v. Painesville City Schools*, 2009-Ohio-6899 (Ct. App. 10th Dist. Franklin County, Dec. 29, 2009)

The parent of non-public school children filed a mandamus action against the Ohio Department of Education ("ODE") and Painesville Schools after transportation of his children to their non-public school was denied based on a direct travel time of over 30 minutes. (R.C. 3327.01 states that a board of education is not required to transport children to their non-public school or community school if such transportation requires more than 30 minutes of direct travel time.) The parent had requested an official eligibility timing pursuant to ODE's handbook titled "Transportation Services For Chartered Non-public and Community Schools."

The court concluded that while the Handbook encourages school districts to discuss the route with the parents in advance and that the route should be agreed upon, the guidelines did not require such practices or agreement--and parents do not have veto power over the district's selection of the route. The court also concluded that the route chosen was reasonable; it was the shortest route chosen by a computer program; construction in the area did not present unusual delays; and nothing in the record suggested that the parent's route was quicker. (The court also noted that the guidelines do not require alternative timings to resolve a dispute). In short, the decision was not arbitrary or subjective.

- E. **Tuition for students with out-of-state parents** – *Grosso v. Boardman Local School District*, 2009-Ohio-5080, 2009 Ohio App. LEXIS 4277 (Ct. App. 7th Dist. Mahoning County, Sept. 25, 2009)

A juvenile court granted legal custody to the aunt and uncle (the Grossos) of a child whose parents resided in Nevada. The school district refused to enroll the student unless the Grossos paid tuition, asserting that Ohio R.C. 3313.64 does not apply to pupils whose parents do not reside in Ohio. The court disagreed, finding that nothing in R.C. 3313.64 sections (B) or (C) indicates that they only apply to students whose parents reside in Ohio. The school district was ordered to admit the student and charge tuition to the school district in Nevada where the student's parents reside. **The Ohio Supreme Court declined to hear an appeal (Feb. 10, 2010).**

- F. **Student's request for grade change properly denied** – *Hingel v. Board of Education of the Austintown Local School District*, No. 08 MA 258, 2009-Ohio-6396 (Ct. App. 7th Dist. Mahoning County, Nov. 23, 2009)

A student alleged that her teachers' grading policies did not follow the model grading system mandated by school board policy, and she sought a writ of mandamus to compel the school board to change her grade in two courses. The court found that absent evidence that the board abused its discretion, it would be inappropriate for a court to compel the school board to change the student's grades. The board's policy allowed teachers the discretion to deviate from the grading guidelines, the board followed its policy in reviewing the grades, and there was no evidence that the grades given were unfair or arbitrary to the point that administrative approval would be a gross abuse of discretion.

- G. **New immunization requirements** – Ohio Department of Health Director's Journal Entry (signed December 9, 2009, effective August 15, 2010)

The Ohio Department of Health has issued new immunization requirements for the 2010-11 school year as follows:

- A Tdap or Td vaccine is now required prior to entry into the seventh grade;
- For pupils entering kindergarten, the final dose of the polio vaccine must have been given on or after the 4th birthday; and
- A second dose of varicella (chickenpox) is required for kindergarten entry.

Additional information, including an Immunization Summary chart, is available at the Ohio Department of Health website, www.odh.ohio.gov.

VI. School Board Policy/Issues

- A. **Law school may deny recognition to student group that violates nondiscrimination policy** – *Christian Legal Society v. Martinez*, No. 08-1371, 2010 U.S. LEXIS 5367 (June 28, 2010)

A public law school denied official recognition to a Christian student group because the group did not comply with the school's nondiscrimination policy and the requirement that groups allow any student to participate, regardless of her status or beliefs. The Christian Legal Society's bylaws require members to sign a statement of faith and exclude anyone who engages in "unrepentant homosexual conduct." The Supreme Court held the school's "all-comers" policy is a reasonable, viewpoint-neutral condition on official recognition, and does not violate First Amendment limitations.

B. School board's limitations on public comments at school board meetings upheld – *Lowery v. Jefferson County Bd. of Educ.*, 586 F.3d 427, 2009 U.S. App. LEXIS 24769 (6th Cir. Nov. 12, 2009)

A federal appeals court has upheld a board of education's decision to deny an angry parent a second opportunity to attack the board during the "public participation" segment of its meeting. The case arose after two boys were dismissed from the high school football team for challenging the coach's authority. The court rejected the parents' claims that denying them a second appearance before the board on the same subject violated their free speech rights under the First Amendment to the United States Constitution.

The board had a rule in place prohibiting public comments which were "frivolous, repetitive, [or] harassing." The court found the board's policy was content-neutral, narrowly tailored to serve a significant governmental interest, and left open ample alternative channels for communication.

Other key findings: a 5-minute limitation per speaker is permissible; requiring a pre-meeting sign-up is permissible; allowing the board president to decide what is "repetitive" or "disruptive" is permissible; and any rules limiting public speakers must be "content-neutral."

C. Prevailing wage requirement – *Enertech Electrical v. Ashtabula Area City School District Bd. of Educ.*, No. 2009-CV-1032 (Ct. of Common Pleas, Ashtabula Cty., Sept. 30, 2009)

The board of education issued a "special condition" for a school construction project which required project bidders to pay prevailing wage rates. Non-union bidders challenged this condition. The court found that while R.C. 4115.04(B)(3) exempts school boards from the Prevailing Wage Law requirements, it does not prohibit them from requiring prevailing wages as a special condition within a school project bid specification. The Ohio Court of Appeals for the 11th District affirmed (2010-Ohio-2815; 2010 Ohio App. LEXIS 2347 (June 18, 2010)).

D. Territory transfer may be denied based on loss of revenue – *Spitznagel v. State Board of Education*, 2010-Ohio-2715, 2010 Ohio LEXIS 1396 (Dec. 15, 2009)

The Ohio Supreme Court held that the state board of education properly considered evidence of a loss of revenue when determining that a territory transfer would cause some financial or educational detriment to the transferring school district. The lower court's ruling allowing consideration of revenue loss as a

factor weighing against a transfer, without specifically quantifying the detriment to fiscal or educational operations, was upheld. Whether and how much the revenue loss should weigh against the transfer is dependent upon the facts and evidence in each case.

- E. **Sale of unused property to community school** – *State of Ohio ex rel. Hope Academy v. Sanders*, 2010-Ohio-14; 2010 Ohio App. LEXIS 6 (Ct. App. 8th Dist. Cuyahoga County, Jan. 7, 2010)

The community school claimed that the school board was required, under R.C. 3313.41(G)(2) (effective March 20, 2007), to offer for sale to the community school eight parcels of school board property that had allegedly not been used for over one year. Certain buildings had been closed in 2005, and the board passed a resolution in June 2007 providing for the use of the parcels. The community school claimed that because the buildings had not been used since 2005, the June 2007 resolution was too late. The court disagreed, concluding the statute was prospective in nature so that any lack of use occurring prior to its effective date could not be considered.

The court also denied the community school's claim that storage of "obsolete and dilapidated furniture" does not constitute "storage" under the statute. Neither was the school board's resolution defective for lack of specificity.

VII. Records Issues

- A. **Home addresses and phone numbers of teachers not subject to disclosure** – *Ohio Education Association v. Ohio State Dept. of Education*, Franklin C.P. No. 09CVH-17023 (March 31, 2010)

The Franklin County Court of Common Pleas granted the Ohio Education Association's (OEA) request for a permanent injunction prohibiting the Ohio Department of Education (ODE) from releasing or publishing the home addresses, home telephone numbers, and personal email addresses of individuals licensed by ODE. The court found that "disclosure would cause irreparable harm since the information could never be returned to its current level of privacy once the information is released." The court also ruled that personal contact information of ODE licensees is generally not a "record" under the Public Records Act.

OEA sought the injunction following a public records request by the Ohio Republican Party for contact information of all educators in ODE's state licensure database.

- B. **Mandamus action moot, but claim for attorney fees not moot** – *State ex. rel. Cincinnati Enquirer v. Ronan*, 2009-Ohio-5947, 2009 Ohio LEXIS 3200 (Ohio S. Ct., Nov. 18, 2009)

The Cincinnati Enquirer made a public records request to the Cincinnati Public Schools for documents submitted by prospective candidates for the superintendent's position. The request was refused because the school district had not checked the post office box to which such documents had been directed. The District, however, promised that it would make all public records

in the post office box available after the date on which it was going to retrieve the documents.

The newspaper filed a mandamus action, but because the school district had produced the requested records after the suit was filed, the Supreme Court found the lower court's dismissal of the complaint was proper. However, the Supreme Court remanded the case to the court of appeals for a determination on the newspaper's request for attorney fees, holding that even though the underlying mandamus case was moot due to the production of the public records, this did not moot the attorney fees claim.

- C. **Attorney investigative report not automatically protected from disclosure by attorney-client privilege** – *State ex rel. Meyers v. Fostoria Bd. of Education*, 2009-Ohio-5622, 2009 Ohio App. LEXIS 4728 (Ct. App. 6th Dist. Wood County, Oct. 22, 2009)

The high school principal criticized two school district administrative employees during an open forum of a school board meeting. The school board then hired an attorney to conduct an independent investigation. After reviewing the attorney's report, the school board dismissed the principal's accusations as unsubstantiated. The principal then requested a copy of the report, which the school board denied on the basis that the report was subject to the attorney-client privilege.

The court denied the school board's motion to dismiss the principal's mandamus petition, noting that the Ohio Supreme Court held in *Toledo Blade* [citation below] that "[b]efore the attorney-client privilege applies to communications relating to investigative services, the client for whom the investigation was conducted must show that other legal advice or assistance was sought and that the investigation conducted was integral to that assistance." In this matter, there was no evidence that the report was more than a factual investigation, or that the board's attorney was called upon to render legal advice or services. The board was ordered to file its answer to the principal's complaint.

- D. **Sufficient evidence of paternity established father's right school records** – *State ex rel. Brown v. Lemmerman*, 2010-Ohio-137, 124 Ohio St. 3d 296, (Ohio S. Ct., Jan. 26, 2010)

The school district refused to provide the school records of three children to an imprisoned man claiming to be the students' father, because the school's records conflicted as to whether he was the father of the children. The Ohio Supreme Court granted the requestor's writ of mandamus to compel production of the records. The court found that trial court entries naming him as the father of the children provided sufficient evidence of his paternity. While the district may not have erred when denying the initial request given the uncertainty in paternity, once the father submitted additional documentation establishing him as the father, the district had a clear legal duty to provide the requested records.

- E. **Student complaints alleged against a teacher are not FERPA education records** – *Briggs v. Board of Trustees Columbus State Community College*, 2009 U.S. Dist Lexis 92950 (U.S. Dist. Ct., S.D. Ohio, July 8, 2009)

A student asserted claims of sexual harassment against her instructor. She then filed a motion to compel discovery of sexual harassment complaints against the professor maintained by the school that had been filed by other students. The defendant argued that the complaints filed against him by other students were “education records” and therefore were protected from disclosure by FERPA.

The court held that records relating to school employees and only indirectly to students are not “education records” within the meaning of FERPA. The court further stated that the limitations on disclosure established by FERPA do not apply to sexual harassment complaints alleged by a student against an instructor.

- F. **FERPA Guidance – Disclosure of Student Information Related to Emergencies and Disasters** (June 2010)

The Family Policy Compliance Office has released a guidance document to answer questions about sharing personally identifiable information from students’ education records with outside parties when responding to natural or man-made disasters. This guidance document can be found at <http://www2.ed.gov/policy/gen/guid/fpco/index.html>.

VIII. Employment Issues

A. Teachers’ Contracts

1. **Teacher not eligible for continuing contract** – *State ex rel. Richard Browne v. Sandusky City Sch. Dist. Bd. of Edn.*, 2009-Ohio-6672 (Ct. App. 6th Dist. Erie County, December 18, 2009)

A teacher completed 21 hours of continuing education credit after graduating from college but prior to receiving his initial teaching certificate. After receiving his certificate, he completed another ten hours and applied for a continuing contract. For teachers without a master’s degree at the time of initial licensure, like the teacher in this case, R.C. 3319.08 requires them to earn “thirty semester hours of coursework in the area of licensure or in an area related to the teaching field since the initial issuance of such certificate or license....” The Board, finding that he had not completed thirty hours since his initial certificate, denied his request for a continuing contract.

The teacher filed suit, relying on an Ohio Attorney General opinion from 2007 opining that the statute required only that the thirty hours be completed after initial licensure, not both commenced and completed after initial licensure. The appellate court, however, disagreed, and noted that to follow the Attorney General opinion would create inequitable results and would not be consistent with the purpose of awarding tenure to teachers who have reached a certain level of professional accomplishment.

Thus, the teacher was not eligible for a continuing contract under the statute.

B. Discipline

1. **Terminated bus driver provided due process** – *Desparois v. Perrysburg Ex. Vill. School Dist.*, 2009 U.S. Dist. LEXIS 98644 (U.S. Dist. Ct., N.D. of Ohio, Oct. 16, 2009)

Following his termination, a school bus driver claimed the school district violated his procedural due process rights by failing to give him sufficient time to gather facts and evidence, and by not providing him an opportunity to be heard at a school board meeting. The school business manager had issued the driver a notice to appear at a pre-disciplinary hearing, but did not give any additional information about the hearing. The allegations and evidence against the driver were explained at the hearing, and the driver and his union representative were given an opportunity to respond.

The district court found that this was all the pre-termination process to which the driver was entitled. Further, even if the pre-termination hearing had been inadequate, due process mandates can be met through adequate post-termination proceedings. In this case, the driver's termination proceeded to arbitration. (The arbitrator upheld the termination.) This "trial-type proceeding" provided the constitutional due process to which the driver was entitled.

2. **Teacher's termination reversed** – *Johnson v. Edgewood City School Dist. Bd. of Edn.*, 2009-Ohio-3827, 2009 Ohio App. LEXIS 3223 (Ct. App. 12th Dist. Butler County, Aug. 3, 2009)

A teacher was terminated for "immorality or other good and just cause" pursuant to R.C. 3319.16 after students complained they were embarrassed by a senior sociology class project where students made predictions about fellow classmates' future lives which were then read aloud in class by the teacher. An appointed referee recommended the teacher be reprimanded rather than terminated, but the board of education rejected this recommendation.

The lower court found the teacher's termination was not supported by the weight of the evidence, as the teacher had a strong employment record, was praised by the board as being an "outstanding teacher" just prior to his termination, had assigned this class project for 12 years without incident, was not provided with unambiguous instructions regarding the project, and had no malicious intent to harass the students. The court of appeals upheld the trial court's reversal of the board's decision to terminate, finding the lower court followed the guidelines of R.C. 3319.16 and Ohio case law in determining that the termination was against the greater weight of the evidence.

- C. **Statements made as a public employee are not protected speech** – *Fox v. Traverse City Area Public Schools Bd. of Educ.*, No. 09-1688, 2010 U.S. App. LEXIS 9976 (6th Cir. May 17, 2010)

A special education teacher claimed her contract was non-renewed in retaliation for voicing her concerns that her teaching caseload exceeded limits allowed by law. The court found no violation of the teacher's First Amendment free speech rights. Her statements were made as a public employee, not as a citizen, were directed solely to her supervisor rather than to the general public, and were made pursuant to her official duties.

- D. **Filing of grievance is not protected speech** – *Weintraub v. Board of Educ.*, No. 07-2376, 593 F.3d 196 (2nd Cir. Jan 27, 2010)

When a teacher filed a union grievance protesting the principal's failure to discipline a student, his speech was pursuant to his official job duties and therefore was not protected by the First Amendment. Interpreting the U.S. Supreme Court's holding in *Garcetti v. Ceballos* that "[w]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline," the Second Circuit found the "grievance was 'pursuant to' his official duties because it was 'part-and-parcel of his concerns' about his ability to 'properly execute his duties' ... as a public school teacher – namely, to maintain classroom discipline."

- E. **Athletic coordinator's removal was not in retaliation for filing lawsuit** – *Vereecke v. Huron Valley Sch. Dist.*, No. 08-2051, 2010 U.S. App. LEXIS 12492 (6th Cir. June 18, 2010)

A teacher claimed that his removal from the athletic coordinator position and other adverse employment actions were in retaliation for his filing of a lawsuit against the district on behalf of his daughter. The court rejected the teacher's argument that the temporal proximity between his lawsuit and the disciplinary actions permit the inference that his speech was a motivating factor in the adverse employment action. The decision to remove him from his athletic coordinator position occurred nearly eight months after his lawsuit was served on the defendants, and there were valid, non-retaliatory reasons for the discipline imposed on him.

- F. **Text message search did not violate employee's Fourth Amendment rights** – *City of Ontario v. Quon*, No. 08-1322, 2010 U.S. LEXIS 4972 (U.S. June 17, 2010)

A police officer complained that the city violated his Fourth Amendment right to be free from unreasonable searches and seizures when the police chief searched text messages the officer sent on a pager supplied by the city. The officer was disciplined when it was discovered that many of his messages were not work-related, and some contained sexually explicit content.

The U.S. Supreme Court ruled that the search was reasonable "because it was motivated by a legitimate work-related purpose, and because it was not excessive

in scope.” The city had undertaken the audit of text messages to determine whether their current contractual character limit was too low after exceeding the limit several months in a row. The city limited the search to two months, and messages the officer sent while off duty were redacted. The Court did not resolve the parties' disagreement over Quon's privacy expectation.

- G. **Creation of new position not required under the ADA – *Johnson v. Cleveland City School Dist.*, No. 08-4532, 2009 U.S. App. LEXIS 19136 (6th Cir. Aug. 25, 2009)**

After an employee developed a degenerative condition that affects the nervous system, an academic interventionist position was created to accommodate her disability. When she transferred to a new school, the district required her to return to the classroom, which the employee claimed would violate the accommodations necessary for her condition. The court found the creation of an academic interventionist position was not a reasonable accommodation, as the Americans with Disabilities Act (“ADA”) does not require an employer to create a new position as an accommodation. Also, there was no indication that her disability required other accommodations she had requested.

- H. **No ADA violation where employee unable to perform essential functions – *Hubbard v. Detroit Public Schools*, 2010 U.S. App. LEXIS 7631 (6th Cir. April 13, 2010)**

A school social worker with fecal incontinence appealed a jury verdict in favor of the school district on her claims that the district's failure to accommodate her disability violated the ADA. The appeals court upheld the verdict, finding the district “put on some evidence showing that Hubbard could not have performed her job even with accommodation” that supported the jury verdict. The essential functions of the school social worker position, including meeting with students where they were and observing students in a classroom, could not be performed mostly in an office where her requested accommodation of having access to a restroom within 20 seconds could be met.

- I. **School mechanic's termination may have been retaliation – *Fraker v. Marysville*, 2010 U.S. Dist. LEXIS 20637 (U.S. Dist. Ct., S.D. of Ohio, March 8, 2010)**

A school mechanic who was suspended (and later terminated) three weeks after giving testimony in a co-worker's race discrimination case against the district claimed his termination was retaliatory in violation of Title VII of the Civil Rights Act. The court denied the district's motion for summary judgment, finding the mechanic established a prima facie case of retaliation by showing: (1) he engaged in activity protected by Title VII; (2) school officials knew about this fact; (3) the district took adverse action against him; and (4) the protected activity and the adverse action were causally connected.

The mechanic produced sufficient evidence to create a genuine issue of material fact as to whether school officials knew of the mechanic's testimony when they suspended him and recommended his termination to the board of education.

Moreover, the temporal proximity between his protected activity and the adverse employment actions created a genuine issue of material fact as to whether a causal connection existed.

J. **Ohio Supreme Court to decide constitutionality of R.C. 3319.391** – *Doe v. Ronan*, Ohio Supreme Court No. 1:09cv243 (Jan. 27, 2010)

The Ohio Supreme Court will consider whether R.C. 3319.391 and related regulations violate the retroactivity and contract clauses of the Ohio Constitution. A former Cincinnati Public Schools employee filed suit in federal court after he was terminated. A background check conducted after the disputed statute went into effect revealed a conviction that barred his continued employment. The federal court case has been stayed pending the Ohio Supreme Court's ruling. **Oral arguments were heard on June 8, 2010.**

IX. **Political Subdivision Tort Liability**

A. **Bullying – student suicide** – *Mohat v. Mentor Public School District*, Case No. 1:2009cv00688, U.S. District Court, Northern District of Ohio (filed March 26, 2009)

The parents of a Mentor High School student filed a lawsuit against the district, alleging school administrators' indifference to the persistent bullying their son endured led to his suicide almost two years ago. They claim their son was verbally abused, pushed, shoved, and hit in school hallways and classrooms. The suit also alleges that three other students committed suicide because of bullying and harassment. (This case has been stayed pending the Ohio Supreme Court's ruling on a question of law. See *Mohat v. Mentor Public School District*, 1:09 CV 688, 2010 U.S. Dist. LEXIS 11614 (N.D. Ohio, Jan. 29, 2010).)

B. **Provision of school lunches is a governmental function entitled to immunity** – *Taylor v. Boardman Township Local Sch. Dist. Bd. of Education*, No. 08 MA 209, 2009-Ohio-6528 (Ct. App. 7th Dist. Mahoning County, Dec. 1, 2009)

A parent claimed the school district was liable for negligence and a breach of the implied warranty of merchantability after her daughter ate food prepared by the school district which was contaminated with ants. The court found summary judgment for the school district was proper, as the provision of school lunches is a governmental function entitled to immunity. The provision of meals to schoolchildren is an integral part of the provision of an educational program, is subject to heavy regulation, and is a function not customarily engaged in by nongovernmental entities.

C. **School officials conducting student strip search not entitled to immunity** – *Knisley v. Pike County Joint Vocational School Dist.*, No. 08-3082, 2010 U.S. App. LEXIS 9860 (6th Cir. May 14, 2010)

The U.S. Supreme Court asked the 6th Circuit to reconsider its prior 2008 ruling in this case in light of the Supreme Court's decision in *Safford v. Redding*, 129 S. Ct. 2893 (2009). In *Redding*, the Supreme Court invalidated a strip search of a female student by school officials looking for ibuprofen tablets, but held that school officials were entitled to immunity because neither the Supreme Court nor

the 9th Circuit had established case law on point, and the appellate courts had not reached a consensus.

The 6th Circuit, however, reaffirmed its prior ruling that school officials, who conducted a strip search of students in a nursing class after several students reported cash and credit cards were missing, were not entitled to immunity. There is established law in the 6th Circuit (*Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598 (6th Cir. 2005)) finding such searches unconstitutional, and *Redding* affirms the court's holding in *Beard*. The court noted that "a search undertaken to find money serves a less weighty governmental interest than a search undertaken for items that pose a threat to the health or safety of students, such as drugs or weapons" and the school officials lacked individualized suspicion.

- D. **No immunity for student injury caused by faulty electrical service panel** – *Johnson v. Ashtabula County JVS*, 2010-Ohio-3054, 2010 Ohio App. LEXIS 2547 (Ct. App. 11th Dist. Ashtabula County, June 30, 2010)

A welding student received extensive second-degree burns when an electrical service panel exploded. The parents sued, alleging the service panel was negligently constructed and maintained. The appeals court found the JVS was not entitled to immunity because maintaining the service panel does not require "policy-making, planning, or enforcement," and the routine maintenance of the service panel is not a discretionary act. Therefore, the liability defenses under R.C. 2744.03(A)(3) or (5) do not apply.

- F. **Teachers not immune from suit alleging lack of teacher oversight** – *E.F. v. Oberlin City School Dist.*, 2010-Ohio-1370, 2010 Ohio App. LEXIS 1156 (Ct. App. 9th Dist. Lorain County, March 31, 2010)

School employees were not immune from allegations that the multiple sexual assaults on a student with Down Syndrome by classmates resulted from an extreme lack of teacher oversight. Monitoring student behavior is part of the official duties of teachers and therefore is not "manifestly outside the scope of the employee's employment or official responsibilities."

- F. **District not liable for sexual battery by tutor** – *Troutman v. Jonathan Alder Local School Dist. Bd. of Edn.*, 2010-Ohio-855, 2010 Ohio App. LEXIS 713 (Ct. App. 12th Dist. Madison County, March 8, 2010)

The tutor of a special needs student began tutoring the student at her private residence after the local library became unavailable. The student claimed that he and the tutor engaged in sexual activity two times after the tutoring began at the tutor's home. (The tutor pleaded guilty to sexual battery and served a six-month prison sentence.) The court ruled the district was immune from the student's claims against the district. Providing tutoring during school hours is a governmental function entitled to immunity. The exception to immunity for injury caused by the negligence of employees "that occurs within or on the grounds of ... buildings that are used in connection with the performance of a governmental function" does not apply because the sexual assault took place off school premises, and the tutor was not authorized to tutor the student in her home.

Further, the injuries were not the result of a physical defect within the buildings or grounds.

- F. **School district must defend teachers against principal's defamation claim** – *Spitulski v. O'Mara*, 2010-Ohio-186, 2010 Ohio App. LEXIS 147 (Ct. App. 6th Dist. Lucas County, Jan. 22, 2010)

A former principal filed a lawsuit against teachers at his former high school, claiming the teachers defamed him by accusing him of unprofessional conduct, blaming him for the high teacher turnover and decline in academic performance, and telling students that he had been treated at a psychiatric unit and had stolen money. The teachers asked the school district to defend them in the suit, but the school district declined.

The appellate court determined that R.C. 2744.07 required the school district to defend its employees for damages based on acts of the employees in connection with a governmental or proprietary function if the employees were acting in good faith and not manifestly outside the scope of their official responsibilities. Here, the teachers were all sued because they had worked with the principal at the high school, and this relationship was within the scope of their employment. Further, if the teachers were innocent of the charges (and the principal had presented “not a scintilla” of evidence that they were guilty), they had acted in good faith. Thus, the court held that the teachers were entitled to have the school district defend them under R.C. 2744.07.

X. Ohio Regulations & Miscellaneous Update

- A. **Pesticide Use in Schools** – Ohio Department of Agriculture – Rule Number 901:5-11-15 (effective Aug. 10, 2009)

The Ohio Department of Agriculture has issued a new rule that sets out requirements for pest control in and around schools. The new rule sets limits on when a pesticide may be applied at a school and requires that information concerning the application be provided to a school's designated contact person. Schools are required to adopt a policy that enables parents, students, faculty, and staff to request and receive notification before a pesticide is applied, and to designate a school employee to serve as a contact person for pesticide applications.

Note: Additional amendments were made to this rule to clarify to what buildings and at what times the rule applies. The changes also clarify when notifications are to be issued. **The revised rule is effective April 26, 2010.**

- B. **Nepotism Restrictions** – Ohio Ethics Commission Advisory Opinion No. 2010-03 (May 25, 2010)

This opinion, issued “as a reminder to all public officials and employees in the state,” gathers information from the Commission's many previous opinions on nepotism, and provides examples of the restrictions in the law (Chapter 102, R.C. 2921.42, and R.C. 2921.43).

This opinion concludes that public officials and employees cannot:

- a) hire or use their positions to secure employment for their family members;
- b) recommend or nominate their family members for public jobs with their own, or any other, public agencies; or
- c) give to their family members, or solicit or use their positions to secure for their family members, raises, promotions, job advancements, overtime pay or assignments, favorable performance evaluations, or any other things of value related to their employment.

The opinion also includes definitions of the terms “public official,” “public contract,” “authorizing,” and “member of the family,” and explains that the restrictions do not amount to a “no-relatives” policy provided officials comply with the law. If an official is required by law to participate in hiring, then the family member could not be employed (i.e. R.C. 3319.07(A) requires a school superintendent to nominate a teacher for hire).

C. Application of Ethics Law to Community School Officials – Ohio Ethics Commission Advisory Opinion No. 2010-01 (April 22, 2010)

The Ohio Ethics Commission issued Opinion No. 2010-01, which overrides Opinion No. 2003-01, to account for the amendment to R.C. 3314.03(A)(11)(e) (eff. June 30, 2006). Formerly, the Commission opined that a member of a community school’s governing board could be employed by or enter into a contract with the community school without violating Ohio ethics laws. Because of revisions to R.C. 3314.03, this exception no longer applies, and Chapter 102 restrictions fully apply to governing board members, officers, and employees of community schools (with the exception that teachers with no administrative or supervisory functions are not subject to post-employment and conflicts of interest restrictions).

XI. Federal Law and Regulations Update

A. Title IX Dear Colleague Letter – U.S. Department of Education Office for Civil Rights (April 20, 2010)

This Dear Colleague letter (“Intercollegiate Athletics Policy Clarification: The Three-Part Test – Part Three”) provides clarification on compliance with Part Three of the three-part test, which is one of the methods used by OCR to assess compliance with Title IX requirements that institutions provide equal athletic opportunities for members of both sexes. Prior guidance issued in March 2005, including the “User’s Guide to Student Interest Surveys under Title IX” has been withdrawn.

In contrast to the withdrawn 2005 guidance, this letter makes clear that while a survey is one tool institutions can use in their Part Three assessment, reliance on a survey alone is not sufficient to demonstrate compliance, regardless of the response rate, and a lack of response to surveys is not evidence of lack of interest or ability.

(To establish compliance with Title IX requirements to provide equal athletic opportunities for both sexes, institutions must satisfy a three-prong test: 1) whether the number of male and female athletes is substantially proportionate to their respective enrollments or 2) there is a history and continuing practice of expanding participation opportunities or 3) the institution is fully and effectively accommodating the interests and abilities of the underrepresented sex.)

Note: Although this letter and the 1979 “Intercollegiate Athletics Policy Interpretation” are designed for intercollegiate athletics, the general principles will often apply to interscholastic, club, and intramural athletic programs.

- B. **E-Readers Accessibility** – Joint Dear Colleague Letter issued by the U.S. Department of Education Office for Civil Rights and the U.S. Department of Justice (June 29, 2010)

This “Dear Colleague” letter to Colleges and Universities addresses the use of electronic book readers in classroom settings. The agencies explain that is a violation of the ADA and Section 504 of the Rehabilitation Act to use electronic book readers in a classroom setting if those devices are not accessible to individuals who are blind or have low vision. (While many e-readers have text-to-speech functions, navigation menus are not accessible to blind/low vision students.)

- C. **Title II and III of the ADA Regulations amended** - (signed July 23, 2010, effective 6 months following publication)

On July 23, 2010, Attorney General Eric Holder signed final regulations amending 28 CFR Parts 35 and 36 (Nondiscrimination on the Basis of Disability by State and Local Government Services; Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities).

Among the changes is a new definition of service animal. A service animal means “any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.” One of the examples of “work or tasks” included in the regulations is “helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors.” However, the “provision of emotional support, well-being, comfort, or companionship” is not “work or tasks” under the definition.

A service animal can be excluded if it is out of control or is not housebroken. If it is not readily apparent, a public entity may ask if the animal is required because of a disability and what work or task the animal has been trained to perform, but shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal.

Note: On July 26, 2010, the Department of Justice issued a notice of proposed rulemaking to establish specific requirements for state and local governments and public accommodations to make their websites accessible to those with disabilities. The Department is seeking public comment on what standards for website

accessibility it should adopt. Comments must be submitted by January 24, 2011. (See Federal Register Vol. 75, No. 142.)

- D. **COBRA Subsidy** – The American Recovery and Reinvestment Act of 2009 (“ARRA”) (signed February 17, 2009); extended by the Department of Defense Appropriations Act for Fiscal Year 2010 (signed Dec. 19, 2009); by the Temporary Extension Act of 2010 (signed March 2, 2010); and by the Continuing Extension Act of 2010 (signed April 15, 2010)

This provision in the ARRA required employers to pay 65% of COBRA insurance premiums for a period of up to 15 months to “assistance eligible individuals” following an involuntary termination of employment. The COBRA premium subsidy applied to involuntary terminations that occurred from September 1, 2008 through May 31, 2010. **Recent legislation (the Unemployment Compensation Extension Act of 2010, signed by the President on July 22, 2010) did NOT extend the COBRA premium reduction.**

Guidance documents, fact sheets, model notices, and information concerning review of subsidy denials are available from the Department of Labor website: www.dol.gov/COBRA.

- E. **Family and Medical Leave Act (“FMLA”) Expansion** – signed and effective Oct. 28, 2009

President Obama signed into law the National Defense Authorization Act for Fiscal Year 2010 (H.R. 2647, Public Law No. 111-84). This new law includes an expansion of the FMLA exigency and caregiver leave provisions enacted in January 2008.

The 2008 amendments provide up to 12 weeks of leave for “any qualifying exigency” arising from the fact that a spouse, son, daughter, or parent is on active duty or has been called to duty in the National Guard or Reserves. H.R. 2647 expands exigency leave benefits to include family members of active duty service members.

The 2008 amendments also extended FMLA leave from 12 to 26 weeks for a spouse, son, daughter, parent, or next of kin to care for an ill or disabled service member. H.R. 2647 expands this provision to allow 26 weeks of leave to care for a family member that is a veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.

Note: Ohio Sub. H.B. 48 (effective July 2, 2010) provides two weeks of leave for the spouse or parent of a member of the uniformed services who is called to active duty or who is injured, wounded, or hospitalized while serving on active duty.

F. **FMLA definition of “son or daughter” – FMLA Administrator’s Interpretation No. 2010-3 (June 22, 2010)**

The U.S. Department of Labor Wage and Hour Division released this interpretation to provide additional clarification on the definition of “son or daughter” as applied to FMLA-protected leave when there is no legal or biological parent-child relationship. FMLA regulations provide that employees with no legal or biological relationship to a child may stand in loco parentis to the child and be entitled to FMLA leave for the birth or placement of a child, to care for a newborn or newly placed child, or to care for a child with a serious health condition.

The Administrator’s Interpretation clarifies that the regulations do not require an employee to establish that he or she provides both day-to-day support and financial support to stand in loco parentis to a child. For example, where an employee does not provide financial support for an unmarried partner’s child, but does provide day-to-day care, the employee could be entitled to FMLA leave. Or, an employee who will share equally in raising an adopted child with a same sex partner, but who does not have a legal relationship with the child, could be entitled to leave to bond with the child following placement, or for other allowable reasons. The Interpretation also points out that under the FMLA there is no restriction on the number of parents a child may have. Whether an employee stands in loco parentis to a child will depend on the particular facts of the case.

(Military FMLA leave for a son or daughter is determined by separate definitions, and is not addressed by this Administrator’s Interpretation.)

G. **Genetic Information Nondiscrimination Act – H.R. 493, Pub. L. 110-233 (effective November 21, 2009)**

On May 21, 2008, President Bush signed the Genetic Information Nondiscrimination Act (“GINA”). This law restricts the ability of employers, employment agencies, labor organizations, and health insurers to collect and use genetic information. Employers may not discriminate based on genetic information in hiring, firing, and other terms of employment, and will be subject to the investigatory and enforcement power of the Equal Employment Opportunity Commission. Interim final rules implementing GINA were published October 7, 2009 (see Federal Register Vol. 74, No. 193).

On October 30, 2009, the EEOC issued a new poster and supplement with information on GINA’s employment-related provisions. To comply with notice requirements, employers can post the November 2009 version of the “EEO is the Law” poster, or a supplement poster. The posters are available at the U.S. Department of Labor poster page: www.dol.gov/osbp/sbrefa/poster/matrix.htm.

H. **The Patient Protection and Affordable Care Act of 2010 and the Health Care and Education Reconciliation Act of 2010 (signed March 23, 2010 and March 30, 2010)**

Included in this legislation is a new requirement that employers provide reasonable break time for nursing mothers to express milk, as necessary, during the first 12

months following the birth of a child. A private break area (not a bathroom) must be provided for this purpose.

Other significant provisions include: dependent coverage to age 26 (effective Sept. 23, 2010, note that Ohio law requires certain dependents to be covered until age 28 effective for plan years beginning on or after July 1, 2010); form W-2 reporting of the total cost of employer-provided group health coverage (effective for tax years beginning after Dec. 31, 2010); exclusion of non-prescribed drugs for reimbursement from HSAs, FSAs, HRAs, or MSAs (effective Jan. 1, 2011); FSA contributions limited to \$2,500 (effective Jan. 1, 2013); mandatory coverage requirements for employers with 50 or more FTE employees (effective Jan. 1, 2014); excise tax on Cadillac plans is delayed until 2018.

Visit www.bricker.com/reform for more extensive information on health care reform.

***Note:** Collectively bargained plans that were ratified before March 23, 2010 are exempt from certain provisions of the Act until the date on which the last of the collectively bargained agreements relating to the plan terminates. "Grandfathered" health plans (plans in existence as of March 23, 2010) are also exempt from certain provisions. Please consult legal counsel for additional information.

I. Identity Theft Red Flags Rule Delayed (May 28, 2010)

The FTC has again delayed enforcement of the "Red Flags" Rule through December 31, 2010. (The Red Flags Rule requires covered entities to develop and implement written identity theft prevention programs.) Congress requested the delay while it considers legislation that would exclude certain businesses from the Act (the Fair Credit Reporting Act). A bill was passed by the House in October 2009 (H.R.3763), and identical legislation was introduced in the Senate on May 25, 2010 (S.3416).

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