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News For Clients

Annual Survey of Wisconsin Law

In April, the State Bar of Wisconsin published the 2005 edition of the *Annual Survey of Wisconsin Law*, which examines the significant judicial and legislative developments of the past year. Lathrop & Clark LLP attorneys **Joanne Harmon Curry** and **Richard F. Verstegen** co-authored the chapter that surveys the past year's developments in school law. Joanne Harmon Curry wrote the Case Law section and the Noteworthy Federal Statutory

Changes section. Rick Verstegen wrote the Statutory Developments section. Because the *Survey* focuses on a wide range of issues that impact the public sector, it serves as a valuable resource for school administrators and board members. Enclosed is a copy of that chapter for your review.

If you have any questions regarding any matter addressed in the *Survey*, please feel free to call us.

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School Law

by Joanne Harmon Curry and Richard F. Verstegen



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This chapter reviews the significant Wisconsin judicial and legislative developments in school law during 2004. A noteworthy decision of the Seventh Circuit Court of Appeals is discussed, as are significant changes to the federal special education law, although extended discussion of them is beyond the scope of this article. Some relevant cases affecting schools may be covered in the chapters on constitutional law, municipal law, insurance law, labor and employment law, and tort law.

CASE LAW

Labor Relations

In October 1998, Madison Teachers Inc. (MTI), the teachers’ union for the Madison Metropolitan School District’s (MMSD) teachers, filed a grievance with MMSD on behalf of three special education teachers, alleging violations of certain overload and planning time provisions of the 1997–99 collective bargaining agreement.¹ MMSD and MTI, which were then negotiating a successor to the 1997–99 collective bargaining agreement, discussed the grievance and others on the same subject. MMSD and MTI then developed a memorandum of under-

standing (MOU), in which they agreed to establish a joint committee to study middle and high school special education overload and planning time issues.

In MTI’s view, the MOU was not intended to resolve the special education teachers’ grievance and, even if that had been the intent, a resolution did not occur because the MOU deadlines were not met. MTI therefore wanted to proceed to arbitration of the grievance. In MMSD’s view, the MOU was an agreement to resolve the grievance, such that when the joint committee issued its report and the recommendations were implemented, there was nothing to arbitrate.

MMSD and MTI selected an arbitrator and submitted the following issues to arbitration: (1) Is this matter arbitrable? (2) If the matter is arbitrable, did MMSD violate the collective bargaining agreement when it did not compensate the grievants for working an overload? (3) If MMSD violated the agreement, what is the appropriate remedy? The arbitrator determined that the MOU covered the grievance. He also determined that the terms of the MOU had been satisfied, that the grievants and other MTI members had benefited from the terms of the MOU, and that MTI had acquiesced in any departures from the deadlines. The arbitrator concluded that the grievance had been resolved through a settlement between the parties, and that he lacked

jurisdiction to address the grievances further.

MTI appealed the arbitrator’s decision to the circuit court. MTI asked the court to vacate the arbitration award, claiming that the arbitrator had “exceeded [his] powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made” under state law.² The circuit court concluded that the parties had not reached an agreement on the recommendations by the deadline provided in the MOU, and that they did not agree to waive the deadline. The court stated that the arbitrator’s determination was based on a “perverse misconstruction of the facts,” resulting in an incorrect application of the law and an incorrect conclusion that the grievance was not arbitrable.³ The circuit court agreed with MTI that the arbitrator had exceeded his authority and therefore the court reversed the arbitration award, entered an order vacating the arbitrator’s opinion, and ordered the grievance to be assigned to a new arbitrator, to be agreed on by the parties, for a determination of the merits. MMSD appealed the circuit court’s decision.

¹ *Madison Teachers Inc. v. Madison Metro. Sch. Dist.*, 2004 WI App 54, 271 Wis. 2d 697, 678 N.W.2d 311.

² *Id.* ¶ 8; see also Wis. Stat. § 788.10(1)(d).

³ *Madison Teachers Inc.*, 2004 WI App 54, ¶ 8, 271 Wis. 2d 697.

The court of appeals reversed the circuit court. It reasoned that, contrary to MTI's argument, the arbitrator was not limited to considering the construction of the MOU and the procedures it laid out, but could also consider evidence on the joint committee's activities and the respective views of MMSD and MTI concerning the relation of that activity to the grievance. The court said that the arbitrator could, when deciding whether to enforce the time limits and apply the doctrine of waiver with regard to adherence to the MOU deadlines, consider the parties' conduct. Further, the court rejected MTI's assertion that, because the arbitrator lacked evidence to conclude that the MOU modifications were not significant, he exceeded the scope of his authority. The court reasoned that the parties had reached agreement and resolved the dispute in a timely manner.

The court concluded that the arbitrator did not act outside his authority when he decided that the grievance was not arbitrable because it had already been resolved. The court explained that its role is supervisory—to ensure that the parties receive what they bargained for when they agreed to resolve certain disputes through final and binding arbitration. The court explained that courts may not overturn an arbitrator's decision for mere errors of fact or law, but may do so only if perverse misconstruction or positive misconduct is plainly established, if there is a manifest disregard of the law, or if the award itself is illegal or violates strong public policy. Here, the court found no basis for overturning the arbitrator's award.

Administrator Contracts

In *Kabes v. School District*,⁴ Sharon Kabes and Roger Buchholz (the plaintiffs) each entered into two-year employment contracts with the River Falls School Board. Kabes contracted to serve as River Falls High School principal, and Buchholz contracted to serve as the high

school's assistant principal.⁵ Kabes received several two-year contract extensions for her position as principal. Buchholz, who was hired after Kabes, also received a two-year contract extension as assistant principal. Before the end of the term of the plaintiffs' contracts, the school board unilaterally reassigned Kabes to be principal of an elementary school and reassigned Buchholz to be assistant principal at a middle school. Their salaries remained the same, however. The plaintiffs sued the school district and school board (collectively, the district) for breach of contract, requesting reinstatement to their positions at the high school.

The circuit court granted summary judgment in favor of the plaintiffs, concluding that the district had breached their employment contracts by reassigning them to different schools. The court reasoned that the contracts designated specific positions of employment and that reassignment without the plaintiffs' agreement was a breach of contract. The district appealed the circuit court decision to the court of appeals.⁶

The district offered two alternative theories to support its argument that the reassignment of the plaintiffs did not breach their employment contracts. First, it relied on section 118.24(3) of the Wisconsin Statutes,⁷ which states, "The principal shall perform such administrative and instructional leadership responsibilities as are assigned by the district admin-

istrator under the rules and regulations of the school board." Under this statutory authority, the district argued, the plaintiffs' reassignments constituted administrative responsibilities that they were required to perform. The district argued that this statutory provision confers power that cannot be abrogated by an employment contract, is immutable, and preempts any conflicting contractual terms.

The appellate court, however, disagreed and adopted the plaintiffs' position that the contracts were valid and took primacy. The plaintiffs relied on section 118.24(6), which specifically requires mutual assent to modify an employment contract. The court agreed, as a matter of first impression, that section 118.24(6) provides explicit legislative protection of a principal's employment contract that trumps the other statutory grant of power.

In harmonizing the two statutory provisions, the court reasoned that the purpose of section 118.24(3) is to ensure that the principal acts at the behest of a school district. However, the court explained, the purpose of section 118.24(1) and (6) is to secure and protect administrators' positions, "most likely to guarantee some stability in the public school's administration."⁸ The court explained that principals are required to perform administrative responsibilities as long as performance of the responsibilities does not modify the terms of an employment contract. A school district retains power over principals "with the only caveat being that they must honor what they have contractually agreed to before."⁹ The court concluded that the plaintiffs' contracts were for the positions of principal and assistant principal at the River Falls High School. Therefore, the reassignments breached their employment contracts.

In the alternative, the district argued that it did not breach the employment contracts because it retained the power to reassign the plaintiffs by virtue of an

⁴ 2004 WI App 55, 270 Wis. 2d 502, 677 N.W.2d 667 (review denied).

⁵ Section 118.24(1) of the Wisconsin Statutes provides that a school board may employ school principals and other specified administrative employees and that employment contracts for such employees may not exceed two years but may provide for one or more extensions of one year each.

⁶ In its decision, the court of appeals noted that the case arguably was moot, but the court stated that it would nevertheless address the issue, because "the issue presented is of great public importance and is likely to arise again." *Kabes*, 2004 WI App 55, ¶ 3 n.1, 270 Wis. 2d 502.

⁷ Textual references to the Wisconsin Statutes are hereinafter indicated as "chapter xxx" or "section xxx.xx," without the designation "of the Wisconsin Statutes."

⁸ *Kabes*, 2004 WI App 55, ¶ 12, 270 Wis. 2d 502.

⁹ *Id.* ¶ 13.

agreement with school administrators governing personnel practices for district managers. The court rejected this argument because one version of the agreement had expired and a second version had not been signed by either plaintiff. Additionally, neither plaintiffs' employment contract incorporated the terms of the agreement. Therefore, the court held that the plaintiffs' reassignment could not be justified based on this agreement, and the appellate court affirmed the circuit court's judgment in favor of the plaintiffs.

School Referendums

In November 2000, the LaFarge School District held a referendum on the question of whether the district should issue \$2.25 million in general obligation bonds for the purpose of making various school improvements.¹⁰ The ballots required each voter to make a cross (i.e., an "X") either in a "yes" box (to indicate support for issuance of the bonds) or in a "no" box (to indicate opposition to issuance of the bonds). The initial ballot tabulation resulted in a count of 392 votes in favor of the school funding and 392 votes against the school funding. Pursuant to section 5.01(4)(d), the tie vote resulted in the defeat of the referendum.

An elector who had voted in favor of the bond issuance requested a recount pursuant to section 9.01. During the recount, the School District Board of Canvassers (the board), the entity responsible for reporting the referendum election returns, disqualified three "yes" votes and three "no" votes, which resulted in another tie vote (389 in favor, 389 opposed). An elector, Patricia Roth, appealed the board's decision to disqualify one of the "yes" votes to the circuit court. The challenged "yes" vote had been disqualified because the initials of only one poll worker were on the ballot. Two sets of initials are required by section 7.50(2).

Another elector, Gail Muller, who was opposed to passage of the referendum,

made a motion to intervene in Roth's case. Muller had been present at the recount and disputed the board's assessment that the mark on a particular "no" vote ballot had been erased. The "no" vote was disqualified because, despite the fact that a slash mark (i.e., "/") appeared next to the word "no" on the ballot, the board concluded that the mark appeared to have been erased. As a result, the board set aside the ballot, concluding that it could not determine the elector's intent with reasonable certainty, the standard required by section 7.50(2)(c). Although Roth initially was successful in challenging Muller's right to intervene in her case, the court of appeals overturned the lower court ruling and permitted Muller's challenge to the disqualification of the "no" vote.

The circuit court determined that the disputed "yes" vote should have been counted, despite the fact that a procedural requirement was not followed. Because of this determination, the circuit court determined that the referendum passed. Additionally, on remand to consider Muller's challenge to the disqualification of the "no" vote, the circuit court held that the board had not misinterpreted section 7.50(2)(c) when it determined that the "no" vote should be disqualified because it could not ascertain voter intent from an erased mark.

Muller appealed the circuit court's conclusion that the "no" vote was properly disqualified. The court of appeals concluded that the circuit court and the board erroneously interpreted and applied section 7.50(2)(c). The court of appeals said that the law was ambiguous with regard to whether both the presence of a mark and an intent to vote was required or whether any mark indicates an intent to vote. The court reasoned that legislative intent favors an interpretation of finding an intent to vote when there is a mark in the appropriate space. It concluded, therefore, that, since there was a mark in the space designated for a "no" vote, the "no" vote should be counted. This decision resulted in a tie vote on the referendum (and, therefore, failure of the referendum). Roth appealed this decision to the supreme court.

The supreme court affirmed the court of appeals. The main issue was the application of section 7.50(2)(c), which states that a vote should be counted "[i]f an elector marks a ballot with a cross ('X'), or any other marks, as 'I, A, V, O, /, v, +,' within the square to the right of the candidate's name, or any place within the space where the name appears, indicating an intent to vote for that candidate."¹¹ In this case, there was a slash mark in the "no" box on the disputed ballot. Based on this mark, the elector argued that the ballot should be counted as a "no" vote. The elector also challenged the board's discretionary decision that the visible mark was an erasure, noting that nothing in section 7.50(2)(c) permitted the board to declare that a visible mark is an erasure. Further, the elector argued that the statute does not include any qualifying language, such as "unless [the] mark is light or looks erased."¹²

The court concluded that the board erred in its application of section 7.50(2)(c). The court explained that under this statutory provision, and in consideration of the court's jurisprudence favoring a voter's chance to have his or her vote counted, a vote must be counted if a mark similar to the eight examples listed in the statute is present in a "qualifying place" on the ballot. Here, because a qualifying mark was made in a qualifying place, the "no" vote counted. The court found that there was no indication that the voter attempted to erase or remove his or her vote from consideration. Further, the court stated that there were no other marks on the ballot that would require the board to compare the contested mark to another mark. As a result, the November 2000 referendum resulted in a tie vote, and the referendum question of additional funding for school improvements was defeated.

Noteworthy Seventh Circuit Court of Appeals Decision

The case of *Beischel v. Stone Bank School District*¹³ concerned the nonre-

¹⁰ *Roth v. LaFarge Sch. Dist. Bd. of Canvassers*, 2004 WI 6, 268 Wis. 2d 335, 677 N.W.2d 599.

¹¹ *Id.* ¶ 18.

¹² *Id.*

¹³ 362 F.3d 430 (7th Cir. 2004).

newal of the two-year contract of a district administrator and principal, Karen Beischel. The board of education was unhappy with Beischel's performance and therefore decided to not renew her employment contract when it expired. It issued a formal notice of nonrenewal to Beischel and informed her of her right to request a hearing, which she then did. The board conducted a hearing and then voted to not renew Beischel's contract.

Beischel filed suit in federal district court, alleging that the school board members deprived her of her liberty interests and property interests without due process of law. Among other things, Beischel claimed that the board was not an impartial decisionmaker because it simultaneously acted as complainant, prosecutor, witness, and judge. When the federal district court ruled against the school board on some of Beischel's claims, the board appealed to the Seventh Circuit Court of Appeals.

The court of appeals first considered whether Beischel had a property interest in her continued employment, such that the decision to not renew her contract would require due process protections. The court reasoned that section 118.24 does not establish any limits as to the bases on which a nonrenewal decision can rest, such as termination only "for cause." Therefore, the court concluded that Beischel did not have a legitimate expectation that her employment would continue beyond the two-year term of her contract (absent contractual provisions to the contrary) and, hence, did not have a property interest in employment beyond the term of the contract.

Second, the court considered Beischel's claim that her procedural due process rights were violated. It disagreed with her that due process required the board to utilize an outside decisionmaker to hear her nonrenewal case. Relying on prior jurisprudence and interpretation of section 118.24, the court explained that the board properly followed the state statutory requirements in terminating Beischel's employment. In considering whether to renew her contract, the board provided Beischel with an opportunity to present her case for renewal and, then, it

decided not to renew her contract following the hearing.

The court also rejected Beischel's claim that individual board members were biased against her and that the alleged bias resulted in a violation of her right to an impartial hearing. Several board members had admitted to feeling personally attacked by Beischel. However, the court reasoned that the board members' generalized statements were insufficient to overcome the presumption that board members carry out their duties with honesty and integrity. The court explained:

It is surely a strange posture Beischel finds herself in—arguing, in effect, that school board members cannot judge her fairly because she has been sufficiently abusive to them as to make them biased. It could hardly be desirable to encourage employees to use personal abuse as a tactical choice in an attempt to disqualify a board and get in its place an alternative decisionmaker.¹⁴

STATUTORY DEVELOPMENTS¹⁵

The Wisconsin Legislature enacted numerous school-related laws during 2004. This section of the chapter highlights several significant legislative developments.

School District Finance and Facilities

Requirements for Local Governments in Providing Technological Services. 2003 Wisconsin Act 278 established requirements applicable to municipalities that offer cable television, telecommunications, or Internet access services. In particular, the new law requires that, before a local government may authorize the construction, ownership, or operation of facilities for any of these services, the local government must conduct a cost-benefit analysis of the proposed service and make the analysis available for pub-

lic inspection.¹⁶ The local government must also hold a public hearing on the proposed authorization.¹⁷ Exceptions to these general requirements are provided in the new law.¹⁸ The Act also provides that a municipality that owns and operates a cable television service may not require anyone who does not subscribe to the service to pay any cost of the service, except for certain items such as public, educational, and governmental access channels.¹⁹

Leasing of School Property. 2003 Wisconsin Act 254 eliminated the term limit for a lease of school property. School boards may lease school sites, buildings, and equipment not needed for school purposes to any person for any lawful use at a reasonable rental if the lease is approved at a school board meeting.²⁰ Act 254 eliminates the 15-year limit on the length of a lease of school property.²¹ This new law applies to lease agreements entered into, modified, or extended on or after April 17, 2004.²²

Retainage on Public Construction Contracts. 2003 Wisconsin Act 157 changes the amount of retainage required for public construction contracts. *Retainage* is an amount of money due under a contract that is withheld by the governmental entity until the satisfactory completion of the project, in order to ensure that work is properly completed under the contract. Under prior law, the local governmental unit was required to retain 10% of the estimate of the value of the work done until 50% of the work was completed.²³ Act 157 changes the amount of retainage from 10% to not more than 5% of the estimate until 50%

¹⁶ Wis. Stat. § 66.0422(2).

¹⁷ *Id.*

¹⁸ Wis. Stat. § 66.0422(3), (3d), (3m).

¹⁹ Wis. Stat. § 66.0419(3m).

²⁰ Wis. Stat. § 120.13(25).

²¹ *Id.*

²² 2003 Wis. Act 254, § 2.

²³ Wis. Stat. §§ 16.855(19), 66.0901(9)(b) (2001–02).

¹⁴ *Id.* at 438–39.

¹⁵ Hereinafter and unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2003–04 Wisconsin Statutes.

of the work is completed.²⁴ This new requirement applies to contracts entered into on or after March 31, 2004.²⁵

Date for Mailing Property Tax Bills. 2003 Wisconsin Act 95 requires each taxing jurisdiction, including school districts, located within a taxation district to submit all information related to the taxing jurisdiction's property tax levy to the clerk of the taxation district no later than December 1.²⁶ The Act requires property tax bills to be mailed by the third Monday in December.²⁷ The law provides that failure to meet the deadline under this provision is not a violation of the criminal misconduct in public office statute.²⁸ This Act first applies to property tax assessments as of January 1, 2003.²⁹

Revision of Tax Incremental Finance Laws. 2003 Wisconsin Act 126 makes various changes in the tax incremental financing program, including changes to the composition of the tax incremental district joint review board. The Act requires that the school district representative to a joint review board be the district's school board president or the president's designee.³⁰ If the school board president appoints a designee, he or she must give preference to the school district's finance director or to another person with knowledge of local government finances.³¹ Act 126 also provides that, if a union high school district and an elementary district each have authority to impose property taxes within the tax incremental district, the representative for each of these districts will then have one-half vote on a joint review board.³²

Town Tax Incremental Financing Districts. 2003 Wisconsin Act 231

grants towns limited authority to create tax incremental financing districts. A town that seeks to create such a district must create a joint review board to review a town tax incremental district proposal.³³ The joint review board must include a representative of a school district that has the power to levy taxes on property within the tax incremental district.³⁴ The Act requires that the school district's representative to the joint review board be the school board president or the president's designee.³⁵ If the school board president selects a designee, the president must give preference to the school district's finance director or to another person with knowledge of local governmental finances.³⁶ If a union high school district and an elementary district each have authority to impose taxes within the tax incremental district, the districts will have shared school board representation on the joint review board and each district will have one-half of one vote.³⁷ The law applies to tax incremental districts that are created on or after October 1, 2004.³⁸

School District Employees

Employees' HIV Test Authority. 2003 Wisconsin Act 271 expanded the list of persons who, under certain circumstances, may subject the blood of an individual to a test for the presence of human immunodeficiency virus (HIV).³⁹ The list now includes social workers and employees of the following entities, while the employees are performing employment duties involving another individual: school districts, cooperative educational service agencies, charter schools, private schools, the Wisconsin Educational Services Program for the Deaf and Hard of Hearing, and the Wisconsin Center for the Blind and Visually

Impaired.⁴⁰ Pursuant to Act 271, if a person in any of these positions has a contact with an individual and the contact carries a potential for HIV transmission, the person may subject that individual's blood to a test for the presence of HIV and may receive disclosure of the test results.⁴¹

Requirements for Persons Transporting Pupils. 2003 Wisconsin Act 280 established a number of new requirements for school bus operators. As in the past, a person may operate a school bus only if the person applies for and receives authorization from the Wisconsin Department of Transportation (DOT) in the form of a school bus endorsement to the person's valid operator's license.⁴² Act 280 requires the DOT to conduct a background investigation of the applicant before issuing or renewing an endorsement and prohibits the DOT from issuing or renewing an endorsement if the applicant has been convicted of or adjudicated delinquent for any specified disqualifying crime or offense within a prior minimum specified time period.⁴³ The disqualifying crimes and offenses apply without consideration of whether the circumstances of the conviction substantially relate to operating a school bus.⁴⁴ The new law also prohibits the DOT from issuing or renewing an endorsement if the individual's application indicates that the individual is listed on the Department of Health and Family Services (DHFS) client abuse registry for neglecting or abusing a client or misappropriating a client's property.⁴⁵ The DOT may, by administrative rule, specify other disqualifying crimes and increase minimum periods of disqualification for the specified crimes.⁴⁶

²⁴ Wis. Stat. §§ 16.855(19), 66.0901(9)(b).

²⁵ 2003 Wis. Act 157, § 3.

²⁶ Wis. Stat. § 74.09(5).

²⁷ *Id.*

²⁸ *Id.*

²⁹ 2003 Wis. Act 95, § 2.

³⁰ Wis. Stat. § 66.1105(4m)(ae)1.

³¹ *Id.*

³² Wis. Stat. § 66.1105(4m)(a), (am).

³³ Wis. Stat. § 60.85(4)(a)1.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Wis. Stat. § 60.85(4)(a)2.

³⁸ 2003 Wis. Act 231, § 4.

³⁹ Wis. Stat. § 252.15(1)(ab), (2)(a)7.a.

⁴⁰ Wis. Stat. § 252.15(1)(ab), (2)(a)7.a.

⁴¹ Wis. Stat. § 252.15(1)(ab), (1)(em), (2)(a)7.a.

⁴² Wis. Stat. § 343.12(1)(a).

⁴³ Wis. Stat. § 343.12(2)(dm), (6), (7).

⁴⁴ Wis. Stat. § 343.12(2)(dm), (6), (7).

⁴⁵ Wis. Stat. § 343.12(2)(em).

⁴⁶ Wis. Stat. § 343.12(8)(a), (c)1.

Act 280 also sets forth the method for conducting criminal background checks of persons applying for issuance or renewal of an endorsement.⁴⁷ The DOT must conduct a criminal history search and must make a good faith effort to obtain out-of-state criminal history information if the person resided outside Wisconsin within the two years preceding the search.⁴⁸ The DOT may also obtain fingerprints and submit these fingerprints to the Federal Bureau of Investigation (FBI) for the purpose of checking FBI arrest and conviction records.⁴⁹ Act 280 also requires the DOT to cancel a person's endorsement if the DOT receives a record of conviction or adjudication of delinquency for a crime or offense that would disqualify a person from holding an endorsement.⁵⁰ Every four years, the DOT must also review the criminal history background of each person to whom an endorsement is issued and, if appropriate, cancel the endorsement.⁵¹

Act 280 also sets forth new requirements relating to persons who operate vehicles that are alternatives to school buses. Specifically, the law requires that a person (the employer) who employs or contracts with an individual (except an individual who holds a valid school bus endorsement) to operate an alternative vehicle must, every four years, request a criminal history search from the Wisconsin Department of Justice on the individual, request the individual's motor vehicle operating record, and obtain a completed background information form from the individual.⁵² The employer may also obtain fingerprints from the individual and submit them to the FBI so that the employer can verify the individual's

identity and obtain records of his or her criminal arrests and convictions.⁵³

The new law also restricts employers from allowing individuals to operate alternative vehicles under certain circumstances. These circumstances include if the employer knows or should have known that the individual has been convicted of providing false information on a background information form, has been convicted or adjudicated delinquent of a crime or offense that would disqualify the individual from issuance or nonrenewal of a school bus endorsement, or is listed on the DHFS client abuse registry.⁵⁴ Under the new law, an individual who is employed or contracted to operate an alternative vehicle also has a duty to provide to the employer information concerning certain adverse occurrences, including involvement in a traffic accident, conviction for an offense that would make the individual ineligible to operate an alternative vehicle, and suspension or revocation of the individual's operator's license.⁵⁵

Finally, Act 280 requires the release of the name of an operator of a school bus or alternative school vehicle on the request of the parent of a pupil who is being transported by that operator.⁵⁶ Act 280 also requires the Department of Public Instruction (DPI) to study the use of video cameras on school buses and strategies to improve the training of school bus and alternative school vehicle operators.⁵⁷

WRS Annuity Adjustments. 2003 Wisconsin Act 153 changed the law with respect to post-retirement annuity adjustments under the Wisconsin Retirement System (WRS). In the past, surpluses in the WRS fixed annuity reserve were distributed only if the surplus amounts were sufficient to generate an increase in

annuity payments of at least 2%.⁵⁸ Under the revised law, on recommendation of the actuary, surpluses in the fixed annuity reserve fund will be distributed in any year that a surplus results in at least a .5% increase in fixed annuities.⁵⁹ In contrast, on recommendation of the actuary, annuity reserve surplus distributions may be revoked in any year that a deficit occurs in the fixed annuity reserve fund and this deficit results in at least a .5% decrease in fixed annuities in force.⁶⁰ The Department of Employee Trust Funds may, by administrative rule, establish a different percentage threshold.⁶¹

Dissolution of Racine County Children with Disabilities Education Board. A county board may establish a special education program for county school districts.⁶² This program is then run by the county children with disabilities education board.⁶³ 2003 Wisconsin Act 180 provides that if the program operated by the Racine County Children with Disabilities Education Board is dissolved, all assets and liabilities will be distributed as provided under current law, except that Racine County will be responsible for paying the costs associated with the post-retirement health benefits and the unfunded prior service liability incurred under the WRS for former employees of the board.⁶⁴ The Act also provides that the tax for the costs associated with the dissolution of the program will continue to be confined to the area of Racine County that participated in the program before its dissolution.⁶⁵

Pupils and Curriculum

Confidentiality of Pupil Records and Exchange of Information. 2003 Wisconsin Act 292 established new provisions concerning the confidentiality of pupil

⁴⁷ Wis. Stat. § 343.12(6)(a).

⁴⁸ *Id.*

⁴⁹ Wis. Stat. § 343.12(6)(b).

⁵⁰ Wis. Stat. § 343.20(1)(d)2.

⁵¹ Wis. Stat. § 343.12(6)(d).

⁵² Wis. Stat. § 121.555(3)(a) (eff. Sept. 1, 2005).

⁵³ Wis. Stat. § 121.555(3)(b) (eff. Sept. 1, 2005).

⁵⁴ Wis. Stat. § 121.555(3)(c) (eff. Sept. 1, 2005).

⁵⁵ Wis. Stat. § 121.555(4)(a) (eff. Sept. 1, 2005).

⁵⁶ Wis. Stat. § 121.52(5) (eff. Sept. 1, 2005).

⁵⁷ 2003 Wis. Act 280, § 30(4)(a).

⁵⁸ Wis. Stat. § 40.27(2) (2001–02).

⁵⁹ Wis. Stat. § 40.27(2).

⁶⁰ Wis. Stat. § 40.27(2)(c).

⁶¹ Wis. Stat. § 40.27(2), (2)(c).

⁶² Wis. Stat. § 115.817(2)(a).

⁶³ Wis. Stat. § 115.817(1), (5).

⁶⁴ Wis. Stat. § 115.817(7)(b), (9)(m).

⁶⁵ Wis. Stat. § 115.817(9)(a).

records and the exchange of information among schools, the juvenile justice system, and law enforcement agencies.

The new law defines *law enforcement unit records* as records that are created and maintained by a school district's *law enforcement unit*.⁶⁶ A law enforcement unit is defined as any individual, office, department, division, or other component of a school district authorized or designated by the school board to enforce any law or ordinance, or refer to appropriate authorities a matter for enforcement, against any person other than the school district, or to maintain the physical security and safety of a public school.⁶⁷ For confidentiality purposes, such records are not to be treated as pupil records but should be treated as law enforcement officers' records of juveniles.⁶⁸

Act 292 also created additional instances in which certain law enforcement and social welfare agencies may provide records to schools and to each other. Such information sharing may occur if the agency⁶⁹ and the school board, private school, law enforcement agency, or social welfare agency enter into an agreement providing for the routine disclosure of designated juvenile record information to the school board, private school, social welfare agency, or other law enforcement agency.⁷⁰ In addition, a law enforcement agency may now provide, to a school district or private school administrator or the administrator's designee, any information in its records relating to an act for which a juvenile enrolled in the school district or private school was taken into custody based on a law enforcement officer's reasonable belief that the juvenile was committing or had committed a violation of any state or federal criminal law.⁷¹ If a law enforcement agency de-

nies access to such records, the school district may now file a petition directly with the court seeking access to the records.⁷² The court must, without notice or hearing, inspect the record and determine if the record should be released.⁷³ If the court determines that disclosure is warranted, the court must order disclosure.⁷⁴

The new law also designates certain circumstances in which a school board may now disclose pupil records to appropriate law enforcement or social service agencies. A school board may now disclose pupil records to such agencies in connection with an emergency if knowledge of the information is necessary to protect an individual's health or safety.⁷⁵ In addition, a school board may disclose pupil records to a law enforcement agency, district attorney, city attorney, corporation counsel, social welfare agency, juvenile intake worker, court, private school, or another school board for the purpose of providing services to the pupil before adjudication if the disclosure is pursuant to an interagency agreement and the person to whom the records are disclosed certifies that the records will not be further disclosed.⁷⁶

Disclosure of Minors' Library Records. 2003 Wisconsin Act 207 requires public libraries to disclose the library records of a child under 16 years old to the child's parent or guardian on request of the parent or guardian.⁷⁷ This new law applies to libraries that are supported in whole or in part by public funds and applies to all library records relating to the child's use of the library's documents or other materials, resources, or services.⁷⁸

School Board Contracts for Yearbook Photographs. 2003 Wisconsin Act 132 provides that if a school board contracts

with a person to provide photographs of 12th-grade pupils for a school yearbook, the contract may not prohibit a pupil from supplying his or her own photograph for the yearbook, subject to the school board's reasonable specifications.⁷⁹

Milwaukee Parental Choice Program Requirements. 2003 Wisconsin Act 155 established new requirements relating to the Milwaukee Parental Choice Program (MPCP). MPCP schools are subject to uniform financial accounting standards established by the DPI and must annually submit to the DPI an independent financial audit of the school.⁸⁰ Act 155 requires that the audit be conducted by a certified public accountant and include a statement by the auditor that the audit report is free of material misstatements and fairly presents pupil cost.⁸¹

The new law also provides that by August 1 before the school term in which a school first participates in the MPCP, the school must submit to the DPI a copy of the school's current certificate of occupancy issued by the city, evidence of financial viability, and proof that the school administrator has participated in a DPI-approved fiscal management training program.⁸² The state superintendent may issue an order barring a private school from participating in the MPCP in the current school year if the superintendent determines that the private school has misrepresented the information required above; failed to provide notice of intent to participate in the MPCP; failed to file the audit, auditor's statement, and evidence of sound fiscal practices; or failed to refund any overpayment by the appropriate date.⁸³ The state superintendent also may immediately terminate a private school's participation in the program if the superintendent determines

⁶⁶ Wis. Stat. § 118.125(1)(bs).

⁶⁷ Wis. Stat. § 118.125(1)(bL).

⁶⁸ Wis. Stat. § 118.125(7).

⁶⁹ *Agency* is defined as the Department of Corrections, a county department of human or social services, or a licensed child welfare agency. Wis. Stat. § 938.78(1).

⁷⁰ Wis. Stat. § 938.78(2)(b)1m.

⁷¹ Wis. Stat. § 938.396(1m)(ar).

⁷² Wis. Stat. § 938.396(5)(bm), (c)3.

⁷³ Wis. Stat. § 938.396(5)(bm).

⁷⁴ *Id.*

⁷⁵ Wis. Stat. § 118.125(2)(p).

⁷⁶ Wis. Stat. § 118.125(2)(n).

⁷⁷ Wis. Stat. § 43.30(1m), (4).

⁷⁸ Wis. Stat. § 43.30(1m), (4).

⁷⁹ Wis. Stat. § 118.12(5).

⁸⁰ Wis. Stat. § 119.23(7)(am).

⁸¹ *Id.*

⁸² Wis. Stat. § 119.23(7)(d).

⁸³ Wis. Stat. § 119.23(10)(a)1.-3. The DPI has been directed to promulgate an administrative rule laying out the deadline for refunding overpayments. See Wis. Stat. § 119.23(10)(a)3.

that conditions at the private school present an imminent threat to students' health or safety.⁸⁴ Whenever the state superintendent issues an order barring participation in the program, he or she must immediately notify the parent or guardian of each pupil attending the private school under the program.⁸⁵ The state superintendent may withhold payment from a parent or guardian if the private school attended by the parent's or guardian's child violates this law.⁸⁶

The Act also provides that the state superintendent may issue an order barring a school from participating in the MPCP in the current school year if the superintendent determines that the school failed to meet at least one of the currently required academic standards by the appropriate deadline.⁸⁷ The Act also repeals the requirement that the DPI monitor the performance of pupils attending an MPCP school.⁸⁸ The DPI must issue rules to implement and administer this program.⁸⁹

Woodlands Charter School. 2003 Wisconsin Act 156 allows otherwise ineligible pupils to attend Woodlands School after its conversion to a charter school. Woodlands School, located in Milwaukee, is a private school that participated in the MPCP but was converted to a charter school beginning with the 2004–05 school year. Although prior law would not have permitted certain pupils attending Woodlands School in the 2003–04 school year to attend the school after its conversion, Act 156 permits a pupil who attended in the 2003–04 school year to attend in the 2004–05 school year.⁹⁰ In addition, the Act provides that if a pupil attended Woodlands School in the 2003–04 school year, a member of the pupil's family who resides

in the same household as the pupil may attend Woodlands School.⁹¹

Observance Day for "The Great Hunger" in Ireland. 2003 Wisconsin Act 305 established March 17 as a special observance day in schools for "The Great Hunger" in Ireland from 1845 to 1850.⁹²

Limitations on Youth Options Program. 2003 Wisconsin Act 131 made several significant changes to the law relating to youth option programs and procedures. The Act provides that a school board may establish a written policy limiting to 18-per-student the number of post-secondary semester credits for which the school board will pay.⁹³ In turn, the Act repealed provisions barring pupils from taking more than 15 credit hours per semester at an institution of higher education and from participating in the youth options program for more than two semesters once the pupil gains 12th grade status.⁹⁴ The Act also repealed the provision that required payment for one-half of comparable courses for a pupil who is attending technical college for 10 or more credits in that semester.⁹⁵

Another significant change under Act 131 is that if a pupil receives a failing grade in or fails to complete a course for which the school board has made payment under the youth options program, the pupil's parent or guardian (or the pupil, if he or she is an adult) must reimburse the school board on the board's request.⁹⁶ If a school board has requested reimbursement and has not been reimbursed, the pupil is ineligible to participate in the youth options program.⁹⁷

A final change under Act 131 requires a technical college to admit an eligible pupil under the youth options program if there is space available in the course after admission of individuals who are not

attending the technical college under the youth options program.⁹⁸ Thus, pupils under the youth options program would not take priority for admission over others applying to attend a technical college. The Act first applies to attendance at an institution of higher education or a technical college in the 2004–05 school year.⁹⁹

School District Governance

Recruitment, Training, and Compensation of Election Officials. 2003 Wisconsin Act 98 requires the State Elections Board to make recommendations about election official compensation, the establishment of a program for election official recruitment and training, and the certification of election officials for whom certification is not currently required by law.¹⁰⁰

Regulatory Reform. 2003 Wisconsin Act 118 made some noteworthy changes to the law governing administrative agencies. An agency's rule analysis must now include the following: an explanation of the agency's authority to promulgate the rule; a summary of a preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule; a comparison of similar rules in adjacent states; and a summary of the factual data and analytical methodologies used by the agency in support of the rule.¹⁰¹ In addition, with respect to hearings held before administrative agencies, the Act requires a hearing examiner to award costs and reasonable attorney fees that are directly attributable to responding to a frivolous petition, claim, or defense involved with an administrative action.¹⁰²

⁸⁴ Wis. Stat. § 119.23(10)(b).

⁸⁵ Wis. Stat. § 119.23(10)(c).

⁸⁶ Wis. Stat. § 119.23(10)(d).

⁸⁷ Wis. Stat. § 119.23(10)(a)4.

⁸⁸ 2003 Wis. Act 155, § 3.

⁸⁹ Wis. Stat. § 119.23(11).

⁹⁰ Wis. Stat. § 118.40(2r)(c)3.

⁹¹ *Id.*

⁹² Wis. Stat. § 118.02(5m).

⁹³ Wis. Stat. § 118.55(7t)(a).

⁹⁴ 2003 Wis. Act 131, §§ 2, 9.

⁹⁵ 2003 Wis. Act 131, § 8.

⁹⁶ Wis. Stat. § 118.55(7t)(c).

⁹⁷ *Id.*

⁹⁸ Wis. Stat. § 118.55(7r)(b).

⁹⁹ 2003 Wis. Act 131, § 12.

¹⁰⁰ 2003 Wis. Act 98, § 1. These recommendations were required to be submitted to the legislature no later than March 18, 2004. *Id.*

¹⁰¹ Wis. Stat. §§ 227.135(1)(f), .14(2)(a).

¹⁰² Wis. Stat. § 227.483.

Noteworthy Federal Statutory Changes

On December 3, 2004, the Individuals with Disabilities Education Improvement Act of 2004¹⁰³ (the Act) was signed into law; it takes effect July 1, 2005.¹⁰⁴ In reauthorizing the Individuals with Disabilities Education Act (IDEA), the U.S. Congress made numerous changes to the federal special education law, including changes intended to align such law with the goals of the No Child Left Behind Act (NCLB). The changes selected for discussion here are some of those that will have a significant impact on the delivery of special education services to students with disabilities in Wisconsin.

Highly Qualified Personnel. With limited exceptions, special education personnel will need to meet the qualification of a highly qualified teacher as defined by the NCLB.¹⁰⁵ In addition to obtaining and keeping full state certification as a special education teacher, teachers must demonstrate competence in the core academic subject areas that they teach. New special education teachers who teach multiple subjects are required to obtain certification in at least one core subject area (mathematics, language arts, or science), in the same manner that is required of regular education teachers. Special education teachers who are not new to the profession must demonstrate competence in all the core academic subjects they teach in the same manner allowed for regular education teachers under the NCLB, including through successful evaluation using a single, high objective uniform state standard covering multiple subjects. A highly qualified teacher is not one who has had special education certification waived on an

emergency, temporary, or provisional basis. Special education teachers not new to the profession must meet the requirements of a highly qualified teacher by the end of the 2005–06 school year.

Special education teachers who teach core academic subjects only to students with disabilities who are identified to be assessed using alternate achievement standards may meet the highly qualified teacher requirement by demonstrating subject matter knowledge appropriate to the level of instruction being provided. The state will determine the knowledge required to effectively teach to those standards. It is not clear whether special education teachers who provide only consultative services to a highly qualified regular education teacher, as opposed to direct instruction to students, will be required to obtain the regular education certification. Congress, however, has expressly precluded a parent's or student's individual right of action against a school district with regard to the district's failure to employ highly qualified special education teachers.

Student Discipline. School districts are given increased authority to discipline students with disabilities.¹⁰⁶ If school authorities determine that a student's violation of a code of conduct is not a manifestation of his or her disability, the relevant disciplinary procedures applicable to students without disabilities may be applied to the student in the same manner and for the same duration in which the procedures would be applied to students without disabilities. A determination of whether a student's conduct is a manifestation of his or her disability is now restricted to a determination of whether the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability, or was a direct result of the school district's failure to implement the student's individualized education programs (IEP). If school authorities determine that the student's misconduct is not a manifestation of his or her disability, they may now, without consent of the student's parent, order a change in the student's placement to an alternative setting for more than

10 days to the same extent that such alternatives are applied to students without disabilities.

In addition, the Act has expanded the unilateral authority of school personnel to remove a student with disabilities to an interim alternative educational setting, for a placement of not more than 45 school days, without regard to whether the behavior is determined to be a manifestation of the student's disability. Prior law provided that such removal was permitted on occurrence of either of the following types of student misconduct: (1) when a student carries a dangerous weapon to school; or (2) when a student knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance while at school. Both of these categories have been revised to permit removal when the prohibited behavior occurs at a school function or on school premises. A student with a disability who has inflicted serious bodily injury¹⁰⁷ on another person while at school, on school premises, or at a school function may now also be unilaterally removed from the student's current placement by school personnel for up to 45 school days.

As under the previous law, educational services to students with disabilities who are removed from their current placements must be continued to enable the students to make progress in the general curriculum and toward meeting the goals set out in their IEPs. However, the Act now provides that a student will remain in the interim alternative educational disciplinary setting ordered by school personnel pending the outcome of a parent's request for a due process hearing challenging the administration's decision to change the student's placement.

Eligibility for Special Education. School district personnel are required to obtain a parent's consent before conducting an initial evaluation of a student and

¹⁰³ Pub. L. No. 108-446, 118 Stat. 2647.

¹⁰⁴ Because the law has not yet been codified, citations to the law are to Public Law Number 108-446. Additionally, the U.S. Department of Education is scheduled to issue revised federal regulations, although their release date is unknown. The authors note that it is not possible to provide comprehensive coverage of all the changes to the IDEA and therefore they offer the reader information regarding selected changes.

¹⁰⁵ Pub. L. No. 108-446, § 602(10).

¹⁰⁶ *Id.* § 615(k).

¹⁰⁷ *Serious bodily injury* is defined as bodily injury that involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. 18 U.S.C. § 1365(h)(3).

before providing special education and related services to an eligible student.¹⁰⁸ Now, however, if a parent of an eligible student refuses to consent to the provision of services, the school district will not be required to provide special education and related services and the school district will not be considered in violation of the law.

The law expands the special rule for eligibility determination by prohibiting a determination that a student is a student with disabilities when the determining factor for eligibility is a lack of appropriate instruction in reading, including in the essential components of reading instruction as defined in the NCLB.¹⁰⁹

Individualized Education Programs (IEP). The revised IDEA now defines the substance of the student's IEP as instruction in the *core academic subjects*, defined in the NCLB as English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography.¹¹⁰ A statement of the student's present level of performance must now include a statement of the student's academic achievement, as well as functional performance, with measurable goals to determine the student's progress in the general curriculum. The selection and delivery of special education and related services and supplementary aids and services will need to be based on peer-reviewed research to the extent practicable.

The revised IDEA changes the required educational emphasis for students with disabilities who are between 16 and 21 years old. Transition services for this age group must now be "results-oriented," with measurable post-secondary goals based on age-appropriate transition assessments related to training, education, employment, and, when appropriate, independent living skills. Transition services include courses of study that are needed to assist the student in reaching the designated IEP goals.

Requirements concerning attendance of IEP team members at IEP team meetings have been changed.¹¹¹ If the parent of the student with a disability and the school district agree, an IEP team member may be excused from attendance at an IEP meeting if the member's attendance is not necessary because the member's curriculum or service area is not being modified or discussed in the meeting. An IEP team member with relevant information may be excused by agreement of the parent and school district if the member submits to the IEP team written input into the development of the IEP. In either case, a parent's agreement to excuse the IEP team member must be in writing.

Procedural Safeguards. Several changes were made with regard to due process hearing complaint requirements and procedures.¹¹² First, the party filing a due process complaint must now provide to the other party a copy of the complaint at the time it is filed. Second, a due process complaint notice filed by either party will be deemed to be sufficient unless the party receiving the notice notifies the hearing officer and the other party in writing within 15 days that the receiving party believes the notice fails to meet the notice requirements, which mandate a sufficient description of the nature of the problem and the underlying facts. The hearing officer must determine, within five days of receiving notice of the insufficiency, whether the complaint notification meets the sufficiency requirements. The timeline for a due process hearing begins when the party files an amended notice, if the party is required to do so. Issues that are not raised in the due process notice will not be allowed to be raised at the due process hearing unless both parties agree otherwise.

Third, the school district must provide the parent with a written notice (or answer) regarding the subject matter contained in the parent's due process complaint within 10 days of receiving a complaint. Additionally, the law now re-

quires a school district to conduct a resolution meeting with the parents and relevant members of the student's IEP team within 15 days of receiving notice of the parents' complaint. An attorney representing the school district is prohibited from attending such a meeting unless the parent is accompanied by an attorney. If the parties agree at the meeting to resolve the complaint, the parties must execute a legally binding written agreement. The agreement must be signed by both the parent and a representative of the school district who has the authority to bind such agency and is enforceable in state or federal court. However, either party may void the legally binding agreement within three business days of the agreement's execution.

Attorney Fees. A school district that prevails at a due process hearing may now seek payment of its attorney fees by a parent who filed a complaint or subsequent cause of action that is determined to be frivolous, unreasonable, or without foundation; by the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or by the parent or the parent's attorney if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.¹¹³

Overidentification. The law now requires states to adopt policies and procedures designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as students with disabilities.¹¹⁴

¹⁰⁸ Pub. L. No. 108-446, § 614(a)(1).

¹⁰⁹ *Id.* § 614(b)(5).

¹¹⁰ *Id.* § 614(d).

¹¹¹ *Id.* § 614(d).

¹¹² *Id.* § 615.

¹¹³ *Id.* § 615(i)(3).

¹¹⁴ *Id.* § 612(a)(24).